Volume 1 of 3, Part B

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

a. Pre-Trial Motions

i. Motions regarding the dismissal of the Articles of Impeachment

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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In The Senate of The United States
Sitting as a Court of Impeachment

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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 DISMISS ARTICLE I OF THE HOUSE
OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

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Dated: July 21, 2010

TABLE OF CONTENTS

TABLE OF CONTENTS i

INTRODUCTION AND SUMMARY 1

ARGUMENT 5

I. The Supreme Court in *Skilling* Rejected the House's "Honest Services" Theory.. 6

II. The Alleged Appearance of Impropriety, By Itself, Is Not an Impeachable Offense. 10

A. Article I Distorts the Facts of the *Lifemark* Case 11

B. Impeachment Is an Inappropriate Sanction for the Appearance of Impropriety. 14

CONCLUSION 22

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, and respectfully requests that the Senate dismiss Article I of the Articles of Impeachment lodged against him by the House of Representatives on the ground that it fails to state any cognizable ground for impeachment. In support, Judge Porteous states as follows.

INTRODUCTION AND SUMMARY

Article I charges that Judge Porteous deprived the public and litigants of "honest services" by failing to recuse himself from presiding as a District Court Judge in the case of *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, Inc.*, No. 93-cv-1794 (E.D. La.) (the "*Lifemark* case"), failing to disclose enough information about his relationship with a lawyer representing one of the parties to that litigation, and later accepting a monetary gift from that lawyer. Article I should be dismissed because it is based on a legal theory that the Supreme Court recently ruled is unconstitutionally vague because it provides no consistent or foreseeable standard of behavior for the accused. At most, the allegations in Article I describe conduct creating the appearance of impropriety, not any actual impropriety. Appearance of impropriety is a poorly-defined standard, applied inconsistently and sometimes even arbitrarily in judicial discipline proceedings, which has never, until now, been urged as impeachable conduct in and of itself. Article I should, therefore, be dismissed in its entirety.

Article I alleges that Judge Porteous, "while a federal judge,"[1] deprived the public and the litigants in the *Lifemark* case of his "honest services" by (a) denying a motion for recusal while failing to disclose the full extent of his friendship and past financial dealings with his friends and

[1] To the extent that Article I alleges as grounds for Impeachment pre-federal service by Judge Porteous, it should be dismissed as improper. *See* Judge G. Thomas Porteous Jr.'s Motion to Dismiss Article II of the House of Representatives' Articles of Impeachment ("Motion to Dismiss Article II").

former law partners Jacob Amato and Robert Creely, whose firm was counsel for a party in the *Lifemark* case; and (b) after denying that recusal motion, accepting cash and other "things of value" such as meals and entertainment from Messrs. Amato and Creely while that case was still under advisement.[2]

The House chose to phrase the allegations in Article I in terms Judge Porteous's alleged deprivation of the right to honest services, despite the knowledge that the Supreme Court could effectively gut those charges. That is what happened when the Supreme Court issued its decision in *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010), in which the Court ruled that claims of a deprivation of a right to honest services are unconstitutionally vague. While recognizing that this Impeachment is not directly comparable to a criminal proceeding like *Skilling*, the same concepts of unconstitutional vagueness should be equally, if not more, important in an effort to remove a federal judge.

After the House of Representatives submitted the Articles of Impeachment to the Senate, the Supreme Court ruled in *Skilling* and two companion cases that the "honest services" crime is limited to cases involving bribery and kickbacks, and it *cannot* constitutionally encompass other types of financial conflicts of interest, such as the type of conduct alleged in Article I. As a matter of law, therefore, Article I does not allege conduct that could support a criminal "honest

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[2] The House Report regarding this Impeachment emphasized that former state judges Bodenheimer and Green pleaded guilty to honest services charges (*see* H.R. Rep. No. 111-427 (Mar. 4, 2010), Report of the House Judiciary Committee concerning the Porteous Impeachment ("House Report") at 86, 89) and that Louis and Lori Marcotte (persons discussed in Article II) pleaded guilty to conspire "to deprive the citizens of the State of Louisiana of the honest and faithful services" of state officers. (*Id.* at 89, 91). The House Report attempts to tar Judge Porteous with the same brush as these criminally charged and convicted individuals. Yet Article I does not charge Judge Porteous with complicity with Judge Bodenheimer or Judge Green, neither of whom was even involved in the *Lifemark* case. Article II discusses contacts with the Marcottes, but they had no connection to the *Lifemark* case. Other deficiencies in the claims regarding the Marcottes are addressed in the Motion to Dismiss Article II.

services" claim and it must, for much the same reasons, fall short of any impeachable offense. Indeed, if made the basis for removal after the Supreme Court's rejection, this Article would create an entirely arbitrary and ambiguous standard for impeachment. This is precisely what the Framers sought to avoid – leaving judges to guess what conduct might result in their removal. As discussed below, it would create a new version of the rejected standard of "maladministration" that James Madison objected would be "so vague a term [as to be] the equivalent to a tenure during the pleasure of the Senate." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 91 (Harvard Univ. Press 1973).

All that remains in Article I, once the "honest services" claim is debunked, are allegations that Judge Porteous created the appearance of impropriety by not recusing himself from the *Lifemark* case, not disclosing the full extent of his friendships with counsel, and subsequently accepting gifts and entertainment from those old friends while the case was still pending. Article I does not allege that Judge Porteous provided any illegal *quid pro quo,* in the *Lifemark* case or otherwise, in return for those gifts and that entertainment.

The recusal hearing transcript in *Lifemark* verifies that Judge Porteous repeatedly acknowledged his close friendships with lawyers representing the Liljeberg parties. (*See* Transcript of Oct. 16, 1996 Hearing on Plaintiff's Motion to Recuse ("Recusal Tr."), attached as Exhibit 1, at 6-7.) Indeed, those well-known friendships were the basis for the recusal motion filed by Joseph Mole, counsel for the Lifemark parties, who admittedly understood that they "all are indeed very, very close friends." (*Id.* at 6.) Judge Porteous confirmed that they were indeed friends and that they had lunch and socialized. (*Id.* at 7.) Notably, Mole stated that he was more concerned about the timing of their appearance in the case than the friendship itself. (*Id.* at 12 ("Your Honor, it is again not the fact of the friendship, it is the timing.").) Judge Porteous,

however, noted that the case had been delayed for years and bounced from judge to judge – with a long list of counsel joining and leaving the case.[3] He wanted to see the case tried and resolved. This was consistent with his view in other cases.[4]

What happened next is truly jaw-dropping – though the House (which was fully aware of it) omits it entirely from Article I. After Judge Porteous denied the recusal motion, attorney Mole secretly offered Don Gardner, another of Judge Porteous's lawyer friends, $200,000 if Gardner would enter his appearance and somehow get Judge Porteous off the *Lifemark* case ($100,000 retainer up front and $100,000 as a bounty if Judge Porteous recused himself). (*See* Don Gardner Retainer Agreement, dated Feb. 18, 1997, attached as Exhibit 2.) The offer was made in the form of a written retainer agreement, concealed from Judge Porteous until long after the *Lifemark* case was over. This appalling document is attached as Exhibit 2. The price Mole was willing to pay for Judge Porteous's recusal was about 100 times more than the cash gift Judge Porteous allegedly received from his longtime friend, Jacob Amato, three years later. (*See* House Report at 45-46 (Gardner's fees), 50-51 (alleged gift from Amato and Creely).) Yet Judge Porteous frustrated this scheme by ruling against Mole's client – thereby depriving his close friend Gardner of a six-figure bounty – in a decision that was affirmed in part and reversed in part by the Fifth Circuit. *In re Liljeberg Enters., Inc.*, 304 F.3d 410 (5th Cir. 2002).[5] Not only

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[3] Notably, however, Judge Porteous said that he would grant a stay to allow an appeal to the Fifth Circuit because he recognized that "this is an important issue for you and an important issue for your client." (*Id.* at 21.)

[4] Judge Porteous noted that this was the first recusal motion that he had faced in over a decade of serving as a judge. (*Id.* at 10-11.) He noted that, when his cousin tried a case before him as a state judge, he simply disclosed the relationship to the jury and told them that they should not read anything into the relationship. (*Id.* at 17-18.)

[5] It is worth noting that, when cross-examined by Judge Porteous in the proceedings before the Fifth Circuit Judicial Council, Mole admitted that Judge Porteous was "a very good trial judge" and that he did not feel that Judge Porteous's evidentiary rulings were terribly unfair. *See*

did the House omit this fact from Article I, it has listed Mole as one of the witnesses to support removal of Judge Porteous based on his involvement in the *Lifemark* case. Mole was never disciplined for his scheme with Gardner, yet Judge Porteous has been impeached for ***not*** recusing himself even when $200,000 was offered to get him to withdraw from the case.

The alleged appearance of impropriety that resulted from socializing with and later accepting a cash gift from friends involved in the *Lifemark* case is serious, and Judge Porteous has acknowledged that he did not do enough to address it. It is important to note, however, that this appearance of impropriety could have been completely resolved by more disclosure or by a recusal. Such recusal controversies are routine and have been raised in connection from Supreme Court justices like Anton Scalia to municipal court judges. *See, e.g.*, Gina Holland, *Justice Scalia: No Apologies for Hunting Trip with Cheney*, WASH. POST, Feb. 11, 2005; *In re Sybil M. Elias, Judge of the Mun. Court*, No. ACJC 2007-096 (N.J. Adv. Comm. on Jud. Conduct, May 19, 2008) (censuring municipal court judge for conflicts of interest in disposing of traffic ticket). They are largely left to the discretion of the court and rarely result in formal inquiries, let alone reprimands. Absent bribery or some other serious actual impropriety – not alleged here – mere failure to recuse has never, until now, been proffered as grounds for the impeachment of a federal judge.

In light of the Supreme Court decisions and the failure to state an impeachable offense, Article I should be dismissed.

ARGUMENT

After hearing the testimony of several witnesses, the House of Representatives concluded that it could not impeach Judge Porteous on the basis of treason or bribery. Instead, it based

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Transcript of Joseph Mole's Testimony Before the Fifth Circuit Judicial Council Panel, pp. 187-188 (attached as Exhibit 3).

impeachment on the commission of "other high crimes and misdemeanors." (*See* 111 Cong. Rec. S. 1645 (Mar. 17, 2010) (presenting the House's Articles of Impeachment to the Senate, which state repeatedly that Judge Porteous "is impeached for high crimes and misdemeanors.").) The Senate, therefore, may only convict Judge Porteous if the House can prove he committed either a "high crime" or a "high misdemeanor."[6]

I. The Supreme Court in *Skilling* Rejected the House's "Honest Services" Theory.

The House framed Article I as a broad "honest services" claim, despite widespread speculation that the Supreme Court might strike down the "honest services" statute in the then-pending *Skilling* case. The Court proceeded to issue a ruling that directly rejected the theory in Article I and ruled that the statute could only be enforced in a very limited set of cases. Notably, the *Skilling* decision exposes the type of claim found in Article I as unconstitutionally vague – the very concern of the Framers in crafting impeachment standards. The House alleged that, by purportedly making misleading statements and failing to disclose certain information at the recusal hearing in the *Lifemark* case, and then denying the motion to recuse, Judge Porteous "deprived the parties and the public of the right to the honest services of his office." (111 Cong. Rec. S1645 (Mar. 17, 2010).) This "honest services" allegation is based on 18 U.S.C. § 1346, which extends the scope of the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343, respectively) to include "a scheme or artifice to deprive another of the intangible right of honest

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[6] Under the Constitution, the House alone has the power to decide what alleged bases for conviction and removal from office exist and should be presented to the Senate for trial. (U.S. CONST. art. I, § 2, cl. 5 (providing that the House "shall have the sole Power of Impeachment").) The Senate, accordingly, has no power to rewrite or reform the House's articles of impeachment. Instead, it may only consider the articles as presented and either convict or acquit. (U.S. CONST. art. I, § 3, cls. 6-7 (stating that "The Senate shall have the sole power to try all Impeachments"); *see also* Impeachment Trial of Halstead Ritter, S. Doc. No. 200, at 30 (1936) (noting the House Managers offered amended pleadings to the Senate in recognition that the Senate could only convict or acquit based upon the specific articles presented by the House of Representatives).)

services." Such sweeping claims are unconstitutional, the Supreme Court held, because they give the accused no way to predict what conduct may violate a criminal statute.

In basing Article I on the criminal honest services provision, the House continued its longstanding practice of framing articles of impeachment in terms analogous to specific crimes.[7] Such framing serves the important public goal of ensuring that federal judges have no doubt as to the conduct that can result in their removal from office. Article I, as written, does not describe conduct that, after *Skilling*, could support a "deprivation of honest services" offense or prove any other recognizable crime.

In *Skilling*, the defendant was accused of denying honest services by "withhold[ing] material information, *i.e.*, information that he had reason to believe would lead a reasonable employer to change its conduct." *Skilling*, 2010 WL 2518587, at *12. Rejecting such a vague claim, the Supreme Court ruled that, in order to meet constitutional scrutiny, 18 U.S.C. § 1346 must be narrowly construed and that any claim of criminal honest services would be unconstitutional if it went beyond "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *Id.* "[N]o other misconduct falls within [the statute's] province." *Id.* at **26, 30. The Court expressly rejected the notion that "undisclosed self-dealing" and the "non-disclosure of conflicting financial interest," such as "the taking of official action by [a public official] that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," can constitute a criminal deprivation of "honest services." *Id.* at *28. The Court excluded prosecutions for conflicts of interest and

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[7] *See* House Report, at 14 n.58 (explaining that the last four judicial impeachments, of Judges Kent (2009), Nixon (1989), Hastings (1988), and Claiborne (1986), followed earlier criminal proceedings, and that in each instance the House's articles of impeachment "were to a great extent patterned after the Federal criminal charges").

"schemes of non-disclosure and concealment of material information" from the proper scope of the "honest services" offense. *Id.* at *29.

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

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

The *Skilling* Court reached the same result in the other two cases. While *Weyhrauch v. United States*, No. 08-1196, 2010 WL 2518696 (June 24, 2010) was simply reversed in light of the ruling in *Skilling*, the Court issued a stand-alone decision in *Black v. United States*, No. 08-876, 2010 WL 2518593 (June 24, 2010), that again ruled against the type of theory articulated in Article I. There, the Court reversed the appellate decision on the basis of an improper instruction to the jury "that a person commits honest-services fraud if he 'misuse[s] his position for private gain for himself and/or a co-schemer' and 'knowingly and intentionally breache[s] his duty of loyalty.'" *Black*, 2010 WL 2518593 at *3. By the House's own description, Article I alleges "financial entanglements with persons having business before the court." (House Report at 15.) This is precisely the kind of nebulous misconduct that the Supreme Court held could not support an "honest services" prosecution.

Ironically, the Framers also found "corruption" – a far more ambiguous concept than bribery – to be an unacceptable standard for impeachment as well. The early standard of "malpractice or neglect of duty" was converted by the Committee of Detail into "treason, bribery, or corruption." BERGER at 78. The Committee of Eleven then dropped "corruption" as a standard. *Id.* Yet, Article I adopts this very same general claim of "corrupt" practices, specifically rejected by the Framers as a standard for impeachment. The result is an Article of Impeachment that directly contravenes the intent of the Framers *and* is based on a theory roundly rejected by the United States Supreme Court. While the House acts as a grand jury in bringing charges, it is the Senate that preserves clear lines of impeachable conduct. *See generally* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); *see also* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL

ANALYSIS 205 (Univ. of Chi. Press 2d ed. 2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999). Article I is based on an invalid honest services theory and, therefore, fails to state an impeachable offense.[8]

II. The Alleged Appearance of Impropriety, By Itself, Is Not an Impeachable Offense.

Stripped of its "honest services" foundation, little remains of Article I beyond a general claim that Judge Porteous should have recused himself from the *Lifemark* case, or at least have disclosed more information about past financial dealings with his old friends who were counsel of record in that case.[9] Article I also asserts that, after denying a recusal motion, Judge Porteous continued to accept gifts and hospitality from Amato and Creely, both of whom had been Judge Porteous's friends since the 1970s. Article I does not contain any allegation of any actual impropriety. For example, it does not claim that Judge Porteous accepted anything from anyone as a *quid pro quo* for his decision in *Lifemark*, which was ultimately upheld in part and reversed in part by the Fifth Circuit.

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[8] Another concern about Article I is that it depends on a "pattern of conduct" allegedly carried out "while a Federal judge" as the alleged basis for removing Judge Porteous from office. The alleged pattern that supposedly justifies removal is based on a hodgepodge of actions, including "deni[al of] a motion to recuse," "fail[ure] to disclose" all aspects of his relationship with his longtime friends Jacob Amato and Robert Creely, "intentionally misleading statements at the recusal hearing," and "corrupt conduct after the *Lifemark v. Liljeberg* bench trial." Because it depends on such a multiplicity of allegations, Article I also is constitutionally invalid. *See* Judge G. Thomas Porteous, Jr.'s Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated or, in the Alternative, to Require Voting on Specific Allegations of Impeachable Conduct, being filed concurrently herewith.

[9] The only allegation in Article I that even remotely resembles criminal conduct is the reference to a "corrupt scheme" involving curatorships and Messrs. Amato and Creely, which allegedly began "in or about the late 1980's" and unquestionably ended when Judge Porteous became a federal judge. Notably, the House *has not* alleged in Article I that the state court curatorships themselves, or Judge Porteous's receipt of money or other things of value from Amato and/or Creely while on the state bench, are of themselves a basis for impeachment. Such "pre-federal" conduct cannot be the basis for impeachment, as even the House's picked experts agree. *See* Motion to Dismiss Article II, Section III, being filed concurrently herewith.

A. Article I Distorts the Facts of the *Lifemark* Case.

Judge Porteous's denial of the recusal motion filed by attorney Mole in the *Lifemark* case is not, in itself, grounds for impeachment. Indeed, the House could only portray the denial of that motion as improper by ignoring the fact that Mole reacted to the ruling by offering a six-figure bounty for Judge Porteous' recusal. Incredibly, Article I does not even mention that, after his recusal motion failed, attorney Mole and his client hired Don Gardner, another long time friend of Judge Porteous, as counsel of record in *Lifemark*, with a written contract that included a $100,000 retainer and an additional $100,000 contingent fee payable if Gardner could get Judge Porteous to recuse himself. (*See* Don Gardner Retainer Agreement, dated Feb. 18, 1997, attached as Exhibit 2.) Penalizing Judge Porteous – or any judge – for merely thwarting a party's Machiavellian schemes to remove that judge from a case would shock the conscience. In fact, Mole himself admitted that, during the trial itself, Judge Porteous "was a very good trial judge," that he was an easy judge to practice before, and that his evidentiary rulings were not unfair. *See* Testimony of Joseph Mole Before the Fifth Circuit Judicial Council, pp. 187-188 (attached as Ex. 3).

Article I's criticism of Judge Porteous's disclosures in connection with Mole's recusal motion also does not withstand scrutiny. Judge Porteous did not conceal his relationship with Mr. Amato and with another lawyer friend, Leonard Levenson, during the recusal proceedings in the *Lifemark* matter.[10] Judge Porteous's long-time friendship with Mr. Amato was well known in the New Orleans legal community; indeed, it was such a widely known fact that it served as the primary basis for the recusal motion filed by attorney Mole. (*See, e.g.*, Memorandum in Support of Motion to Recuse, pp. 1, 3, 5, 6, attached as Exhibit 4). Moreover, Judge Porteous

[10] Judge Porteous's friendship with Mr. Creely appears to have been a non-issue for Mr. Mole, likely because Creely never entered an appearance in the *Lifemark* case.

expressly confirmed that he had a long-term friendship with Messrs. Amato and Levenson at the very beginning of the October 16, 1996 recusal hearing. (Recusal. Tr. p. 4, attached as Exhibit 1). Judge Porteous also expressly disclosed that he and Mr. Amato had practiced law together over twenty years before the hearing (*id.*) and that he went to lunch with Messrs. Amato and Levenson, as well as any number of other members of the New Orleans bar. (*Id.* at 7).

The main nondisclosure allegation in Article I suggests that Judge Porteous should be removed because he failed to disclose that, before he ever became a federal judge, he had assigned administrative curatorships to the Amato & Creely firm and in the same time period received personal gifts from Creely. This is a thinly-disguised effort to base impeachment on the unconstitutional ground of pre-federal conduct – conduct that occurred prior to the respondent's federal appointment. (*See* Motion to Dismiss Article II, being filed concurrently herewith.) Although Article I contends that this pre-federal conduct constituted a "pattern," any such pattern based on the assignment of state court curatorships unquestionably ended when Judge Porteous assumed the federal bench – years before he declined to recuse himself in the *Lifemark* case.[11]

The allegation that, after denying the *Lifemark* recusal motion, Judge Porteous continued to accept hospitality and, on one occasion, cash from his friend and former law partner Amato is more serious. Such conduct creates the appearance of impropriety and cannot be condoned. But the facts are much less sinister than Article I insinuates. Judge Porteous had been friends with Messrs. Amato, Creely, and Gardner – lawyers on both sides of the *Lifemark* case – for at least twenty years, and had been friends with Mr. Levenson for almost a decade. (House Tr. Part A pp. 20, 99; August 24, 2009 Deposition of L. Levenson, p. 6, attached as Exhibit 5). During the

[11] As curatorships are a creature of the Louisiana state courts, Judge Porteous did not and could not assign curatorships to the Amato & Creely law firm after his appointment to the federal bench in 1994.

extended course of those friendships, which continued while Judge Porteous was on the state and federal benches, Judge Porteous publicly went to lunch with each of the four attorneys, as well as other members of the bar. Sometimes they took hunting or fishing trips together. These social interactions varied little over the course of the many years of their friendship and there is nothing intrinsically wrong with them.

Furthermore, Article I does not allege that Judge Porteous asked for or received cash from Amato, Creely, Levenson, or Gardner between his appointment to the federal bench in 1994 and June 1999, when it is alleged that he accepted about $2,000 from Amato and Creely to help pay for his son's wedding. Even if this allegation, which has yet to be proven, were true, that transaction would have taken place nearly five years after any previous gifts of money to Judge Porteous from Amato or Creely. There was no "pattern" of "corrupt" transactions between Judge Porteous and any attorney who appeared before him on the *Lifemark* case.

The use of the terms "things of value" in Article I is remarkably vague given the serious nature of these proceedings. The Article invites the Senate to jump to the conclusion, unsupported by evidence, that while Judge Porteous was a federal judge his friends plied him with secret and illicit gifts. The reality is quite different. The record of this case shows only that Judge Porteous interacted socially with long-time friends, including hunting, fishing, eating meals together and attending major family events spread over many years. (House Tr. Part A p. 26 (Creely attended Porteous's son's bachelor party); pp. 35-36 (Creely and Porteous ate meals and hunted together); pp. 103-04, 117 (Amato and Porteous have eaten hundreds of meals together); p. 108 (Amato and Porteous have hunted and fished together), p. 119 (Amato gave wedding presents to Porteous's children).) If carrying on long-term friendships through ordinary

social functions were an impeachable offense, it would open the floodgates to politically motivated impeachments.

The only alleged impropriety to which Article I refers with any specificity is the estimated $2000 that Judge Porteous allegedly requested to defray the costs of his son's wedding. Even if true, such a request was made and fulfilled as a private matter between friends, not as a corrupt request for an illegal favor. (House Tr. Part A, pp. 48-49, 126.)

No matter what the intent, accepting $2,000 in cash from a lawyer with a pending case would be a serious lapse of judgment. However, there is no suggestion from these witnesses that the alleged $2000 gift influenced (or was intended to influence) Judge Porteous's judgment in the *Lifemark* case. Indeed, even the $200,000 price that Mole offered to Judge Porteous's longtime friend, Mr. Gardner, did not achieve such a purpose.

B. Impeachment Is an Inappropriate Sanction for the Appearance of Impropriety.

Article I forces the question of when a federal judge's non-criminal lapse in judgment becomes grounds for impeachment. In enacting the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 354(b)(2), Congress reaffirmed the Framers' view that impeachment is to be used to rectify only the most egregious cases, those that cannot be remedied by any other means. (*See* H.R. Rep. No. 96-1313, at 2 (1980) (citing House Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice (96th Cong., 1st and 2d Sess.), at 136 (testimony of Peter W. Rodino, Jr.)).) The House of Representatives Committee on the Judiciary stated at that time: "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an

enormous charge of powder to fire it, and a large mark to aim at." (H.R. Rep. No. 96-1313, at 2 (1980) (quoting J. Bryce, American Commonwealth 212 (1920)).)

For decades, Congress has abstained from direct involvement in judicial discipline proceedings except in the most egregious cases. Self-regulation preserves the constitutional independence of the judiciary. Determining when recusal is advisable, even where it is not mandatory, is a subject that has traditionally contained many gray areas. *See, e.g.,* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (2000); Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 UNIV. OF MICH. J. L. REFORM 1017, 1118 n.395 (2004).

In 1973, Congress adopted a code of conduct for federal judges that provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Supreme Court interpreted that statute in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). There, the trial judge claimed that he had forgotten about his position as a trustee of a university that had an interest in the litigation. Noting the legislative history of the statute, the Court stated that its purpose was "to promote public confidence in the integrity of the judicial process." *Id.* at 860. The Court cited with approval the Fifth Circuit's language upholding the importance of a recusal standard based upon the appearance of partiality:

> The goal of [the statute] is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of the facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can

> avoid the appearance of partiality. Under [the statute], therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Id. at 860-61 (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986) *aff'd*, 486 U.S. 847 (1988)).

The mere appearance of impropriety, without more, has never been enough to justify the extreme and rare measure of impeachment. Rather, impeachment on the basis of a high crime or high misdemeanor has only been imposed where the respondent committed a serious crime (*e.g.*, treason, bribery, tax evasion) or abused or violated the constitutional judicial power entrusted to him, though usually both. Article I would lower the threshold for impeachment far below that applied by the House or enforced by the Senate in any previous case.

When it comes to personal relationships and other conflicts the standards applied to state and federal judges have long been criticized as ill-defined. As Professor Leslie W. Abramson has noted:

> For almost three decades, America's state judges have applied the Code of Judicial Conduct to their own conduct as well as to their judicial colleagues. Too often, for lack of guiding principles, reviewing courts and judicial conduct organizations have not analyzed fully the relation between the judge's conduct and the appearance of partiality. It is time for the ABA and the states to review their Codes in order to: (1) add ethical duties not currently addressed, such as a black-letter judicial duty to disclose any known disqualifying circumstances to counsel and parties; (2) broaden existing duties like the judge's duty to inform himself or herself about personal and family financial holdings; and (3) consider new disqualifying conditions to reclassify general appearance of partiality situations as specific per se grounds for recusal. The ABA and the states are capable of providing additional guidance, whether in the form of new black-letter standards or as added commentary language offered as a relevant analytical tool.

Abramson at 55 (citations omitted). An impeachment trial is not the forum to start to regulate or define the relative line for such conduct.

More importantly, judicial conflict prohibitions to prevent appearances of impropriety were never contemplated to justify impeachment. *See* Reporter's Explanation of Changes: ABA Model Code of Judicial Conduct 9 (2007), *available at* http://www.abanet.org/judicialethics /mcjc-2007.pdf (stating that the appearance of impropriety prohibition was added to Rule 1.2 at the urging of the judiciary and others to establish this standard as an independent basis for discipline; instead, appearances of impropriety were contemplated as run-of-the-mill judicial misconduct that did not warrant extraordinary sanctions such as impeachment); *see also* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010) (examining the disciplinary use of the appearance of impropriety standard from a theoretical and practical standpoint and discussing the chilling effect of a disciplinary system based on perceptions).

Sanctions for judicial misconduct have not been uniformly applied, and lack the certainty needed to support impeachment as a constitutionally permissible remedy. For example, when U.S. District Judge James Ware was nominated to serve on the Ninth Circuit in 1998, it was discovered that his public claims to be the relative of an individual killed in Alabama in 1963 were false. The Judicial Council for the Northern District of California publicly reprimanded Judge Ware, but did not seek to remove him from the bench. He still serves as a District Judge. Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 240 (Winter 2007); *Judge Ware Reprimanded by his Peers*, PALO ALTO ONLINE, Aug. 26, 1998; *Federal Judge Reprimanded for Telling Lies*, THE JOURNAL RECORD, Aug. 20, 1998.

The Sixth Circuit publicly reprimanded Judge John Phipps McCalla, currently serving as Chief Judge for the Western District of Tennessee in 2001 for "improper and intemperate conduct" towards members of the bar, including verbal and possibly physical abuse. Judge McCalla was also placed on leave for six months and ordered to undergo counseling, but was not impeached. Hellman at 238-239; *see also* John Branston, *McCalla Put on Leave*, MEMPHIS FLYER, Aug. 29, 2001.

In 2005, the Judicial Council admonished esteemed Second Circuit Judge Guido Calabresi for remarks he made at an American Constitutional Society conference, in which he advocated that then-President Bush not be reelected, compared President Bush to Hitler and Mussolini, made comments exhibiting political bias, and publicly disagreed with the Supreme Court's decision in *Bush v. Gore*. The Council found that Judge Calabresi had violated judicial canons, but that an apology from the judge was sufficient when paired with an admonishment from the Chief Judge of the Circuit. *In re Charges of Judicial Misconduct*, Case No. 04-8529 (Jud. Conf. 2d Cir. 2005).

The Judicial Council of the Fifth Circuit publicly reprimanded District Judge John H. McBryde in 1997, finding that he had "engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary." *In re Matters Involving Judge John H. McBryde Under the Judicial Conduct and Disability Act of 1980*, No. 95-05-372-0023 (Jud. Council 5th Cir. Dec. 31, 1997). Judge McBryde's conduct included the "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others." Christine Biederman, *Temper, Temper*, DALLAS OBSERVER, Oct. 2, 1997; *see also McBryde v. Comm. to Review Circuit Council*, 278 F.3d 29 (D.C. Cir.), *cert. denied*, 537 U.S. 821 (2002). Rather than recommending Judge McBryde's impeachment,

however, the Fifth Circuit Judicial Council initially suspended him for a one-year period and disqualified him for three years from presiding over cases involving any of twenty-three lawyers who had participated in his investigation. *In re Matters Involving Judge John H. McBryde Under the Judicial Conduct and Disability Act of 1980*, No. 95-05-372-0023 (Jud. Council 5th Cir. Dec. 31, 1997). Judge McBryde is currently serving as a U.S. District Judge in the Northern District of Texas.

Congress itself has expressed a strong preference for correcting judicial misconduct with rehabilitative rather than punitive measures. The legislative history of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 354(b)(2) stressed that most complaints would be handled within the home circuit and that "informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception." (S. Rep. No. 96-362, at 3-4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4317.) Congress did not address the inherent tension between allowing "the great majority of meritorious" misconduct complaints to conclude without any real consequences for the judge and creating a disciplinary system designed "to assure the public that valid citizen complaints are being considered in a forthright and just manner." (1980 U.S.C.C.A.N. at 4321.)

In March 2008, the Judicial Conference adopted the Rules for Judicial-Conduct and Judicial-Disability Proceedings to create "authoritative interpretive standards" and made them binding on all circuit courts. *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 1 cmt. (2008). The binding Rules again express a preference for remedial resolutions in judicial misconduct cases. *See id.* Citing an "implicit understanding that voluntary self-correction or redress of misconduct . . . is preferable to sanctions" (*id.* at R. 11 cmt.), the mandatory Rules encourage the chief judges of each circuit to "facilitate this process [of self-

correction] by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures." *Id.*

The case law interpreting the Act is generally consistent with the nonpunitive philosophy of the Rules. A long line of precedent holds that "correcting" judicial misconduct without punishment is consistent with the Act's purpose, which is "essentially forward-looking and not punitive." *In re Complaints of Judicial Misconduct*, 9 F.3d 1562, 1566 (U.S. Jud. Conf. Nov. 2, 1993); *see also* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 427 (2007) (stating that the "Rules' rejection of a 'punitive' purpose has been widely influential in the administration of the misconduct statutes") (quotation marks in original).

Article I does not allege that Judge Porteous's conduct amounted to anything more than a nonimpeachable appearance of impropriety. As noted in Judge Dennis's dissent to the Fifth Circuit Judicial Council's decision recommending impeachment:

> They never find that Judge Porteous's conduct constituted an actual impropriety, much less an abuse or violation of official constitutional judicial power. The special investigating committee's report finds that none of Judge Porteous's ethical violations was more egregious than his conduct during the Liljeberg case but concludes 1) that Judge Porteous should have advised the parties of his financial relationship with Amato and the Creely & Amato law firm as soon as the recusal motion was filed; and 2) that Judge Porteous should have granted the motion to recuse or given the parties the choice of keeping him as a trial judge. The committee further found that Judge Porteous's asking for and receiving Amato's and Creely's financial assistance with his son's wedding and allowing Creely to pay for his hotel room in connection with his son's bachelor party compounded the appearances of improprieties. **But the committee correctly did not find that anything other than appearances of improprieties, rather than actual improprieties, resulted from this conduct under the Code.** Thus, the committee found that the failure to recuse, Judge Porteous's worst ethical offense, was not an irremediable actual impropriety under the Code but rather an

> appearance of impropriety, which, if disclosed, the parties could have cured by agreement.

In re Complaint of Judicial Misconduct against United States District Judge G. Thomas Porteous, Jr. Under the Judicial Conduct and Disability Act of 1980, Case No. 07-05-351-0085, slip op. at 31-32 (Dennis, concurring) (5th Cir. Jud. Conf. Dec. 20, 2007) (emphasis added).

The Articles of Impeachment in this case do little to distinguish Judge Porteous' alleged misconduct from that of his unimpeached judicial brethren. As in past cases where the Senate has opted to censure an official as an alternative to impeachment, poor judgment should not become the new basis for removal in the federal courts. *See* Emily Field Van Tassel & Paul Finkelman, *Impeachable Offenses, A Documentary History from 1787 to the Present*, CONG. Q., at 185-86 (1999).

Judge Porteous has already been severely sanctioned by the Fifth Circuit Judicial Conference. He has accepted that judicial sanctions are warranted for his use of poor judgment and has resolved to retire from the court in roughly one year. He objects, however, to such poor judgments being a basis for impeachment. Article I would create bizarre new precedent by impeaching a federal judge on the basis of an honest services violation that was recently rejected as unconstitutionally vague by the Supreme Court. The United States Senate should not be the new forum for resolving matters of judicial discipline, particularly in a case where a judge has never been subject to any state or federal prosecution, or even to prior bar discipline, during more than a decade of federal service.

For over two centuries, this body has maintained a clear and high standard for removal of a federal judge – often acquitting accused judges or opting for censure over removal. Article I would render this precedent meaningless by basing removal on an alleged failure to recuse oneself from a case where there is no allegation of a bribe or a kickback. It would effectively

reintroduce the very standard of maladministration rejected by James Madison and the framers in a new form of "honest service" denial. The cost of such a decision would be borne not just by Judge Porteous, but by the judiciary as a whole.

CONCLUSION

The Supreme Court's *Skilling* decision makes clear that Article I fails to allege a viable "honest services" crime – or, for that matter, any crime allegedly committed by Judge Porteous. This places Article I beyond the pale of precedent. All prior impeachment convictions involved judges who committed or, at least, were charged with serious crimes while in federal office.

Article I now threatens all federal judges with impeachment for merely creating the appearance of impropriety. Courts and Congress have struggled for decades to refine a consistent standard for evaluating the appearance of impropriety, with limited success. The appearance of impropriety is no crime. Until now, Congress and the judiciary have sought to correct this type of misconduct with corrective measures rather than the massive and cumbersome machinery of impeachment. This preserves the independence of the judiciary while holding judges to the highest ethical standards.

Judge Porteous does not dispute he should have handled his friendships and the *Lifemark* case differently. He has been severely sanctioned by the Judicial Conference of the Fifth Circuit for that conduct. But the appearance of impropriety, without more, never has been and never should be an impeachable offense.

Article I should be dismissed.

Respectfully submitted,

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United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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EXHIBIT 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

3

4 LIFEMARK HOSPITALS, INC. Docket No. 93-179-4-"T"

5 Plaintiff,

6 v. New Orleans, Louisiana
Wednesday, October 16, 1996
7 LILJEBERG ENTERPRISES, INC. 10:17 a.m.

8 Defendant.

9

10 PLAINTIFF'S MOTION TO RECUSE
BEFORE THE HONORABLE G. THOMAS PORTEOUS, JR.
11 UNITED STATES DISTRICT JUDGE

12

APPEARANCES:

13

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14 Clements
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3 501 Magazine Street, Room 406
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5 Proceedings recorded by mechanical stenography;
6 transcript produced by dictation.

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1 P R O C E E D I N G S
2 MORNING SESSION
3 (Wednesday, October 16, 1996)
4 THE COURT: Let's take up this next matter, which is
5 93-1794 and all consolidated cases also. This is the motion
6 filed with respect to all of the particular cases to recuse.
7 Let me dictate one thing into the record before everybody
8 commences so that everybody is not necessarily on edge as
9 they might think. Bernard v. Coyne, which is 31 F.3d 842
10 involved the request to disqualify a circuit court judge of
11 the 9th circuit. In that decision that Judge wrote, and I
12 cite and "this" (reading) with full acquiescence counsel for
13 a party who believes Judge's impartiality is reasonably
14 subject to question has not only a professional duty to his
15 client to raise the matter but an independent responsibility
16 as an officer of the court. Judges are not omniscient, and
17 despite safeguards overlook a conflict of interest. A
18 lawyer who reasonably believes that the Judge before whom he
19 is appearing should not sit must raise the issue so that it
20 may be confronted and put to rest. Any other course would
21 risk undermining public confidence in our judicial system."
22 I cite that so that everyone understands that I recognize my
23 duty and obligations, and I am fully prepared to listen.
24 All right, go ahead.
25 MR. MOLE: I appreciate your remarks. It is not a very

1 easy thing to confront the federal judge with the suspicion
2 that he probably doesn't want to hear. I am sure that in
3 the course of trying -- I don't know you very well, Judge,
4 and I have gotten to learn about you only through this
5 case --
6 THE COURT: You told me the last time we graduated from
7 Cor Jesu.
8 MR. MOLE: That's about all we have in common. What I
9 learned about you from trying to investigate what I should
10 do about what I have raised that you probably did read
11 briefs and gave it some intelligent thought. So I don't
12 want to go back through everything I have said.
13 What I would like to emphasize is mainly by what has
14 been established in response to my motion to recuse. I have
15 gotten to know Mr. Levenson and Mr. Amato.
16 THE COURT: Let me make also one other statement for
17 the record if anyone wants to decide whether I am a friend
18 with Mr. Amato and Mr. Levenson, I will put that to rest for
19 the answer is affirmative, yes. Mr. Amato and I practiced
20 the law together probably 20-plus years ago. Is that
21 sufficient?
22 MR. MOLE: Yes.
23 THE COURT: 20-plus is sufficient. So if that is an
24 issue at all, it is a non-issue.
25 MR. MOLE: What prompted us to file the motion is the

1 timing of what happened. This case is 10 years old, the
2 oldest part is 10 years old. The lawyers who are in the
3 case now are these previous to September 12th when you
4 granted leave to add Mr. Amato and Mr. Levenson, who has
5 been in for years. The case was set for trial, and you had
6 an emphasis about keeping the trial date. They were added
7 within two months of the trial date. And the case with that
8 length I don't know Mr. Levenson or Mr. Amato very well. I
9 know they are fun to practice against; they have a sense of
10 humor, and they have given me by doing this quite literally
11 none to my knowledge other than they are your friends. They
12 have been given 11 percent contingency fee in a case that
13 the Liljebergs, everybody -- I disagreed -- value at $140
14 million, at least part of this we have a percentage of. And
15 I think that bears even more weight when you consider Mr.
16 Liljeberg has taken the position that he doesn't give
17 contingency fees. Jim Cobb has sued him in Bankruptcy Court
18 for a fee claiming he had continued standing of plaintiff
19 Liljeberg as a matter of the plaintiff doesn't give those
20 away. This is like how we do it at the last minute. Mr.
21 Levenson in his response to my reply brief says he has been
22 in the case for a lot longer than the time when he showed
23 up. It raises additional questions. Mr. Levenson is also,
24 indeed, your friend: Has he discussed the case with us
25 before at that time he appeared when he was investigating

1 it? Did he wait to see when you would hold on to the case
2 rather than pass it on to Judge Lemmon? Those are the sort
3 of questions that are going to be in the case no matter what
4 happens forever if you be the Judge.
5 Mr. Levenson has accused me and my client of engaging
6 innuendo. I looked up the word. Innuendo is a generally
7 derogatory and witty way of making accusations indirectly.
8 I don't think I have done that. I have been very direct.
9 Mr. Levenson, and I think it is a good tactic, has tried to
10 dare me to say what I think is the nature of the
11 relationship between you and him and you and Mr. Amato, that
12 are the two gentlemen behind me. And if they have something
13 to contradict the statement that I made, which is that you
14 all are indeed very, very close friends, I would have
15 assumed that he would have made it. I am happy to tell the
16 Judge what the public perception is of the relationship.
17 THE COURT: Well, the case you cite by the way involved
18 the judge's wife. So I assume they were fairly close
19 friends, too.
20 MR. MOLE: Probably. You don't have to stipulate.
21 THE COURT: Well, it could be a question sometimes.
22 MR. MOLE: I understand, Your Honor. I don't know what
23 the Court wants to do with that issue, whether or not the
24 Court wants to make a statement or accept the statement.
25 THE COURT: No, I have made the statement. Yes, Mr.

1 Amato and Mr. Levenson are friends of mine. Have I ever
2 been to either one of them's house? The answer is a
3 definitive no. Have I gone along to lunch with them? The
4 answer is a definitive answer yes. Have I been going to
5 lunch with all of the members of the bar? The answer is
6 yes.
7 MR. MOLE: I understand.
8 THE COURT: Has, in fact, at the last status conference
9 I had I saw Mr. Lane here I think in reality aligned with
10 your side who spoke with me, and Mr. Lane and I have been to
11 lunch together. I mean there is not a hell of a lot of
12 lawyers in this city I haven't maintained a very open,
13 friendly relationship with. So if you want to explore in
14 detail, feel free to explore it. I don't have a problem
15 with exploring it. But I don't know what you want to make
16 with it.
17 MR. MOLE: Well, Your Honor --
18 THE COURT: And I also must say something for the
19 record I think other than connecting the dots that the last
20 status conference I had I virtually told everyone I was
21 continuing this case. So this rush to trial that you
22 suggest I am maintaining, I did all but connect the dots the
23 last time.
24 MR. MOLE: Well, I understand.
25 THE COURT: The lawyers have come to this case like a

1 storm cloud through Louisiana. Look at the list. I ran a
2 chaser sheet. Up until I think maybe Mr. Steeg and Mr.
3 O'Connor. Mr. O'Connor were attorneys and they are out for
4 whatever reason. They had a conflict situation. I have no
5 idea what it was. Then you all got in it. Welcome, jump
6 in. I mean I tried to make it clear at the last conference
7 I don't care how many people are on the side or "X" amount
8 of people are talking. Did I not say that?
9 MR. MOLE: It was pretty clear, Your Honor. Well, I
10 would emphasize, Your Honor, that the standard is what a
11 reasonable person would perceive if they knew all the facts.
12 I think the timing of the appearance of Mr. Amato and Mr.
13 Levenson creates the biggest concern along with the fact
14 that they did not practice law together. All they have in
15 common is that they are your close friends. The public
16 perception is that they do dine with you, travel with you,
17 that they have contributed to your campaigns.
18 THE COURT: Well, luckily I didn't have any campaigns.
19 So I'm interested to find out how you know that. I never
20 had any campaigns, counsel. I have never had an opponent.
21 One time I had an opponent --
22 MR. MOLE: I had a campaign return from the --
23 THE COURT: The first time I ran, 1984, I think is the
24 only time when they gave me money.
25 MR. MOLE: 1990 is what I have.

1 THE COURT: 1990 that was the Justice for All Program
2 where they gave to every judge probably, but I could be
3 wrong there.
4 MR. MOLE: I'm sorry if I'm wrong.
5 THE COURT: I don't know. You got the record. What
6 did it say? Let me see them. Don't hide them if there is
7 something in there that's deeply devious, tell me about it.
8 MR. MOLE: May I approach the bench?
9 THE COURT: Sure.
10 (Counsel Mole hands document to the Court.)
11 THE COURT: Yeah, I think if you look at this, you will
12 find that whatever those numbers total, and I'm not a
13 mathematician, but I think those numbers on these pages
14 total more than $6,794. I am fairly certain adding that up.
15 Did you?
16 MR. MOLE: I did not, Your Honor.
17 THE COURT: Well, let's go to the, pick a page at
18 random starting with the firm of Anderson Tranthene and
19 Mateern. There is over $200 on that page, one page out of I
20 don't know how many it is. I think you will find that that
21 was a function that was thrown by the entire judiciary of
22 Jefferson Parish for which I received I forget whatever my
23 portion was, but I reported it, which was $6,794 is what it
24 looks like what it says here. And that's what it was. So,
25 yes, I don't doubt that they contributed. I mean I don't

1 know. Maybe it is pertinent. Maybe microscopes and maybe
2 that's why we shouldn't have it. But, yeah, okay, it's
3 there.
4 MR. MOLE: Your Honor, I appreciate the Court's remarks
5 at the beginning. What I have done again is in an effort to
6 represent my client at the risk of offending the Court --
7 THE COURT: You haven't offended me. But don't
8 misstate, don't come up with a document that clearly shows
9 well in excess of $6700 with some innuendo that that means
10 that they gave that money to me. If you would have checked
11 your homework, you would have found that that was a Justice
12 for all Program for all judges in Jefferson Parish. But go
13 ahead. I don't dispute that I received funding from
14 lawyers.
15 MR. MOLE: Right, Your Honor.
16 THE COURT: No question.
17 MR. MOLE: If the perception is that my client, and I
18 have it that Mr. Levenson and Mr. Amato are not any more
19 sinister than any other member of the bar, then we would be
20 happy to have them or you dispel that. I think you have
21 been honest with us. There is not much more I can say.
22 THE COURT: I understand. Let me tell you, no, it is a
23 uncomfortable position you find yourself in, counselor. You
24 know, I have been doing this for awhile. With all candor I
25 must admit this is the first time a motion for my recusal

1 has ever been filed. Did it get my attention? Yeah, I
2 guess it got my attention. But does that mean that any time
3 a person I perceive to be friends who I have dinner with or
4 whatever that I must disqualify myself? I don't think
5 that's what the rule suggests. I, likewise, don't think
6 that's what the Court had in mind. And even in your own
7 pleadings and even in the case, it is the Travelers case
8 from the Fifth Circuit published opinion which you gave, me
9 that courts even recognized in citing from Murphy in its
10 cite, and I think it is important to state (reading) "In
11 today's legal culture friendship among judges and lawyers
12 are common. They are more than common, they are desirable.
13 A judge need not cut himself off from the rest of the legal
14 community. Social as well as official communications among
15 judges and lawyers may improve the quality of the legal
16 decisions. Social interaction also makes some on the bench
17 quite isolated and as a rule more tolerable to judges. Well
18 qualified people would hesitate to become judges if they
19 knew that wearing the robe meant either discharging one's
20 friends or risking disqualification in a substantial number
21 of cases. Courts have held that a judge need not disqualify
22 himself just because a friend, even a close friend, appears
23 as a lawyer." And that is a Seventh Circuit case but was
24 cited in the Fifth Circuit decision.
25 Now that's a predicament all of us find ourselves in.

1 Mr. Amato and Mr. Levenson have both appeared before me and
2 they have both won and both lost.
3 MR. MOLE: Your Honor, it is again it is not the fact
4 of the friendship, it is the timing. Anyone who you would
5 describe the situation to I think would generally be
6 concerned that the timing is odd that a case of this length
7 amply lawyered when other lawyers appear within the
8 contingency fee in the way they have and that's why we made
9 the motion.
10 THE COURT: I understand it, and it is a perception,
11 clearly it is perception. I agree with you, but again even
12 before this motion was even urged because I believe the
13 status I had before you filed the motion, in fact, I know it
14 was I made it plain that this November 4th date was probably
15 fixed in everybody's mind. I mean I don't know what else to
16 tell you. That was a near fix. We will see what we have
17 got, but I understand, counselor and appreciate your
18 position. And you have to urge these things, and I
19 understand that. I take no animus toward you on that. If
20 you did that, I don't need to repeat that.
21 MR. MOLE: Judge, what you said -- it is the first time
22 I have had to do thie myself. I would think one of the
23 lawyers opposing me asked me how many times did you sit
24 around discussing this with your client or your partners,
25 and his answer was to a political extent easy to do. But we

1 convinced ourselves we had to do it.
2 THE COURT: All right.
3 MR. MOLE: Only after great deliberation.
4 THE COURT: All right.
5 MR. LEVENSON: Judge, I feel a little peculiar in this
6 situation as well. I don't recall in the twenty years I
7 have practiced law being in this situation. I think that
8 you must take into consideration the admission by Lifemark
9 in their pleading that they do not question your
10 impartiality. And if they had done any investigation in
11 connection with this matter, they could come up with no
12 other result but that. And that is the test in this type
13 of situation. It is the appearance to a well-informed,
14 thoughtful, objective observer as stated in Jordan. And
15 I think the key point there is well informed. Both well
16 informed about our friendship, well informed about our
17 reputation, well informed about the reputation and
18 experience of Mr. Amato as well as that of myself.
19 Mr. Mole stated that the timing is odd. Well, I
20 think it is correct that from the time that I was
21 originally contacted by the Liljeberg attorneys in
22 connection with this matter the Frilot firm has been
23 involved in this case a very short period of time longer
24 than I.
25 Mr. Mole brought up that when he first learned of that

1 yesterday he questioned why I waited so long to get into the
2 case. Well, when I saw file cabinet upon file cabinet upon
3 file cabinet of the paper, it wasn't candidly a very easy
4 thing to assess for myself nor for Mr. Amato to take and
5 became quite a bit of work to determine whether or not I
6 wanted to dedicate a substantial portion of my future effort
7 to this case which would deprive me of other income and
8 other work as well. Mr. Mole didn't know that because he
9 didn't ask me.
10 The next point Mr. Mole made was that there is nothing
11 in common between Mr. Amato and myself except your
12 friendship. That is incorrect. Another question Mr. Mole
13 should have perhaps inquired into.
14 In Mr. Mole's brief he somewhat criticized my
15 experience or perhaps the lack thereof in his mind in
16 matters of this sort. Mr. Amato and myself have acted as
17 primarily personal injury lawyers. That, of course, is not
18 true. Mr. Amato and myself have tried hundreds if not
19 thousands of cases and rules before juries, judges, state
20 and federal, bankruptcy and federal court and just about
21 every other court I can think of. In fact, at the risk of
22 blowing my own horn, I think that I am probably the only
23 lawyer in this room and maybe the only lawyer with all of
24 the firms combined who has been written up in the WALL
25 STREET JOURNAL in connection with litigation I had handled,

1 and it was not personal injury cases. My experience
2 involves personal injury admittedly in recent years due to
3 the change in the economy this year but also involved
4 commercial litigation, bankruptcy, real estate and title law
5 expertise which I think will become very important in this
6 litigation.
7 Mr. Mole has alluded that in his pleadings that Mr.
8 Amato and myself are your two closest friends. I find it
9 interesting that Mr. Amato and myself are your closest
10 friends that we were not contacted in connection with the
11 background check which must be performed in connection with
12 your appointment. Maybe other people don't think our
13 friendship is viewed the same as Mr. Mole.
14 Finally, Mr. Mole says that we have contributed money
15 to your campaign. Your Honor, as you know I didn't even
16 know you when you ran for office. I only met you in the
17 course of litigating cases in your court. To the best of my
18 knowledge I have never given a campaign contribution to you.
19 To the best of my knowledge you have never had a campaign to
20 which to contribute to. The Justice for All Ball was
21 something that was put together so that all of the judges of
22 the 24th Judicial District Court could have a single fund-
23 raiser, and I think the intent of that was to make it easier
24 on lawyers who contributed to judge's campaigns, and there
25 was some particular form as to how those proceeds were

1 divided up. I don't think they were divided up equally,
2 although how they were distributed I wasn't part of.
3 THE COURT: I don't remember the breakdown, but I do
4 know I was the smallest for what that's worth.
5 MR. LEVENSON: Judge, I think that the rule under
6 Section 455 in the casee make it clear that whether or not
7 we are your friend or even your close friend that is not
8 ground for recusation, and I think that the motion should
9 properly be denied.
10 THE COURT: Mr. Mole anything else you would like to
11 add again?
12 MR. MOLE: Yes, Your Honor. One of the difficult
13 decisions to make is how much of a record should I try to
14 make on this without a balance of the fact that I have to
15 practice law with these gentlemen and before you the rest of
16 my life but that I have a duty to my client. But I think
17 that the record that is made here today is enough, because I
18 don't think Mr. Levenson and Mr. Amato, they have said that
19 they dared me to say what I think are rumors. I don't want
20 to do that. They have not denied what I have said about the
21 relationship between you and them.
22 THE COURT: I have not denied it, and I don't think
23 they deny it.
24 MR. MOLE: Then the fact of the matter is Mr. Levenson
25 could very well deny it if he wanted to, and he has chosen

1 not to do that. That speaks more loudly than anything I
2 could say.
3 THE COURT: Well, you know the issue becomes one of, I
4 guess the confidence of the parties, not the attorneys.
5 Because when it is all said and done you all have been but
6 the spokesperson for the true people in interest and that's
7 the litigants. My concern is not with whether or not
8 lawyers are friends and for whatever value that contribution
9 is to a group as a whole. My concern is that the parties
10 are given a day in court which they can through you present
11 their case, and they can be adjudicated thoroughly without
12 bias, favor, prejudice, public opinion, sympathy, anything
13 else, just on law and facts. That's basically the charge we
14 give juries. We are no longer the juries, but if it was a
15 non-jury trial, we are the trier of fact. And there is a
16 ton of case law that says that I should charge myself
17 according to the same way I would charge a jury.
18 I have always taken the position that if there was ever
19 any question in my mind that this Court should recuse itself
20 that I would notify counsel and give them the opportunity if
21 they wanted to ask me to get off. That includes a case
22 wherein my cousin, Billy, Billy Porteous tries a case in
23 front of me in Gretna, and the plaintiff's lawyer is
24 absolutely delited. And I have got to go fully explain to
25 the jury that I never practiced with him and that they are

1 not to read anything into it. I don't fault you for your
2 filing. I think it is a situation where because of this
3 upward ongoing quick activity of this case because of dates
4 approaching that on its face it appeare to be evil or bad or
5 improper. The reality is that none of the above are true.
6 The reality is that if anyone thinks they gain favor from me
7 because someone is in a case need only basically look at
8 what I have done in the past to know that that is a fiction.
9 The question is again in that Bernard case the court
10 said Section 450 requires not only that a Judge be
11 subjectively confident of his ability to be even handed but
12 there is a informed, rational objective observer would not
13 doubt his impartiality. Well, everything we do in the
14 judiciary is under a microscope anyhow. But if the rules
15 were such that every time a contributor and you take a case
16 with current contributions have been made, not 1990
17 contributions, have allowed the Judge to sit where
18 friendship, even "Close friendships are not to be
19 considered," I don't have any difficulty trying this case.
20 Now, after I rule can a party feel that they were
21 wronged? I can't stop that feeling. There is no tie:
22 somebody wins, somebody losee. Are they then upset?
23 Possibly. But that's not for me to concern myself with
24 because again whichever side wins by the evidence and the
25 law will win by the evidence and the law. And as I have

1 told plaintiff lawyers in the past, if 40 percent of zero is
2 zero, I assure you eleven percent of zero is still zero.
3 Now, does that ease your client's mind? I don't know. I
4 can't help you there. Does that make the informed observer
5 satisfied? I don't know. But in my mind I am satisfied
6 because if I had any question as to my ability, I would have
7 called and said, "Look, you're right." Do not think for one
8 moment that this Court went out and solicited this case.
9 This case this Court drew because some other members of the
10 bench couldn't hear it. The pool of judges was very small,
11 and I drew it.
12 Now, I ran the chaser sheet on this, and the reason I
13 talk about a flurry of activity up until the time I drew
14 this case, which was on January 16, 1996, document No. 190
15 or entry 190 in the case re-alloted Judge G.T. Porteous,
16 Jr., since that day when only 190 over a 3-year period
17 entries had been made we have to date, now we have had 102
18 entries made. It always happens that when we get close to
19 trial people get real, real interested. I can't explain it.
20 It just happens. I don't read anything devious or bad about
21 it. In fact, since the time you have come into the case or
22 your firm which was entry No. 210, we have had 82 of them.
23 So there has been a lot of activity, and I will attend to
24 it.
25 I received a multitude of pleadings to find out in

1 taking up other issues today, and I had issued an order and
2 I am hoping everyone got a copy of it. And if they didn't,
3 I don't know what happened. But entry no. 278 says, "Having
4 received the plaintiff's Motion to Recuse, the Court finds
5 it is in the best interest of justice that all motions are
6 deferred pending resolution of the motion to recuse.
7 MR. MOLE: I got that.
8 THE COURT: So I don't know what to tell you all other
9 than I do not believe this is a case where 28 USC 455 is
10 applicable. I don't think a well-informed individual can
11 question my impartiality in this case. Part of me has to
12 sit here and make sure that I don't over help or hurt either
13 one of you. That's always going to be a problem if you know
14 somebody on one side. I'm human, but I assure you I have
15 done this long enough that it won't bother me at all.
16 Saying no is the easiest thing. Saying zero is just a
17 number. Whether it is worth $140 million as you suggest, I
18 don't know. I don't know enough about this case. I don't
19 even know if you all know enough about this case given the
20 rash of pleadings that go back and forth. I'm not even sure
21 it is that complex, but it is sure being made fairly
22 complex.
23 Now, having said all of the above, I tell you now that
24 there is no way on this earth that I can get through any of
25 the motions pending and have a trial date by November 4th.

1 You all can forget it. It is actually impossible, which is
2 exactly what I virtually said when we had the status. I
3 won't be pushing anybody to trial on November 4th. I do
4 want, however, that these things remain in effect. The
5 requirements, those witness lists are cast in stone. I
6 think you all both submitted them. That much is a finished
7 deal. We are not going to be adding witnesses absent a
8 hearing for good cause shown why they should be added. Now,
9 I am not going to say that, I guess something could come up.
10 But that's cast in stone. Both Magistrate Wilkinson and I
11 have told you all that we are available for whatever
12 assistance you need because this is a non-jury trial. I
13 don't intend to enter into any discussions with you all on
14 that. I told you that I believe that Magistrate Wilkinson
15 did. My input is over at that point then. He acts as an
16 arbitrator or mediator if that ever gets to that. If it
17 doesn't, we try your case.
18 Because I know this is an important issue for you and
19 an important issue for your client, I am, in fact, going to
20 issue a judgment denying your motion to recuse myself. It
21 is significant, it is important. If you think it deserves
22 attention by the Fifth Circuit, that's why I am giving you
23 the judgment. If you go there, you do it with no offense to
24 me. And if they disagree with me, then they disagree with
25 me. I don't have a problem with that, counselor. I don't

1 want the issue to be left that you didn't have a mechanism,
2 and I don't think any of you want to do this thing twice.
3 So if you choose to go there, go there. Would I
4 conceive of any grant of a stay? Yes. Would I ask that
5 they expedite it? Probably, yes. And I would hope that you
6 would ask that they expedite it because that does not innure
7 to either side's benefit in this case.
8 MR. MOLE: One of the things that occurred to us and
9 that is that we have a remedy for a writ of mandamus, and we
10 haven't decided to do that.
11 THE COURT: That's why I thought a judgment was
12 necessary, and I don't know if an order would have given you
13 that ability. I am issuing it as a judgment denying your
14 motion to recuse for the reasons I stated on the record,
15 which you can get a transcript of it, of course. But, yes,
16 I told you now that's what I am going to do is give you the
17 guidance to do that.
18 MR. MOLE: One of my concerns is that we have a
19 November 4th trial date. I would have to try to get
20 discovery before then.
21 THE COURT: Does anyone here really believe I can
22 dispose of all of your motions before November 4th? I'm not
23 super human. I have continued all your motions because of
24 this motion to recuse myself.
25 MR. MOLE: We didn't file them to delay things. But I

1 understand Your Honor.
2 THE COURT: I didn't take it for that, but I'm saying I
3 did that on my own motion. Nobody asked me to stay it. I
4 could have done it, but I think whenever somebody asks for a
5 judge to recuse themselves, although technically I can
6 continue a proceeding and particularly in the ruling I had
7 made I think they are entitled for me not to do anything
8 more until we take up the issue. We took the issue up. If
9 you want to go across and do that, I am giving you the
10 procedural tool to do it.
11 MR. MOLE: I appreciate that.
12 THE COURT: Okay, anything else I can dispose of?
13 MR. LEVINSON: On October the 23rd it is scheduled to
14 appear for a pretrial conference.
15 THE COURT: Ignore it. Ignore it. There is no way on
16 earth I am going to do your pretrial. You have got too many
17 motions especially that you would have in the pretrial that
18 the motions are open.
19 MR. LEVENSON: I understand that, Judge. But would you
20 consider making it as a status conference so we can proceed?
21 THE COURT: I will do that as a status conference with
22 you all.
23 MR. MOLE: And no pretrial order?
24 THE COURT: No, obviously not. They will issue an
25 order that the pretrial order is hereby converted to a

1 status conference for whatever time I had it set. Just
2 whatever if that time is blocked out, we keep it at that
3 time.
4 MR. LEVENSON: That's fine, Judge.
5 THE COURT: Discovery I suggest that I believe should
6 be closed at this point in time.
7 MR. MOLE: I think we have everything scheduled that
8 needs to be scheduled, but we still have depositions going
9 on through the last one is October 28th.
10 THE COURT: That's fine. But that's by agreement?
11 MR. MOLE: That's by agreement.
12 THE COURT: That's by agreement. And then as I
13 understand it discovery will be closed?
14 MR. MOLE: Yes, Your Honor. We are cooperating pretty
15 much.
16 THE COURT: Depending on what you do, whether you will
17 be going to go forward and whether there is a stay over
18 there or request for expedited hearing, will depend on when
19 I give you a trial date. Maybe by the 23rd I would ask you
20 and if you are not in position to do it, counselor, I
21 understand. But on the 23rd it is a status conference. If
22 it is your client's desire to proceed with a mandamus or
23 appeal or whatever procedural remedy that is at his disposal
24 with the Fifth Circuit, if you will simply notify me to that
25 effect whether I would or would not set a date. I'm going

1 to set a date with that pending, I am not going to pass on
2 this case while the ruling of mine which may have some
3 impact on whether to recuse myself on this case. So if you
4 could let me know by that date.
5 MR. MOLE: We will do that, Judge.
6 THE COURT: Okay, all right. Thank you all.
7 MR. MOLE: Thank you, Judge.
8 (Hearing concludes.)
9 REPORTER'S CERTIFICATE
10
11 The undersigned certifies, in his capacity of Official
12 Court Reporter, United States District Court, Eastern
13 District of Louisiana, the foregoing to be a true and
14 accurate transcription of his Stenograph notes taken
15 Wednesday, October 16, 1996.
16 New Orleans, Louisiana, this 21st day of October, 1996.
17
18
19 David A. Zarek
20 David A. Zarek
Official Reporter, Section "A"
21
22
23
24
25

EXHIBIT 2

FRILOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.
ATTORNEYS AT LAW
3600 ENERGY CENTRE
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WRITER'S DIRECT DIAL NUMBER
599-8006

WRITER'S DIRECT DIAL FAX NUMBER

February 18, 1997

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

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

Dear Don:

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

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

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

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

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

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

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

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

HP Exhibit 35(b)

SC00397

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

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

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

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

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

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

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

I look forward to meeting with you later this week.

Very truly yours,

Joseph N. Mole

JNM:kcb

cc: Gary K. Ruff, Esq.

EXHIBIT 3

Mole

1 JUDGE LAKE: Please be seated.
2 Mr. Woods, you may proceed.
3 MR. WOODS: Thank you, your Honor.
4 JOSEPH MOLE, DULY SWORN, TESTIFIED:
02:47 5 DIRECT EXAMINATION
6 BY MR. WOODS:
7 Q. Mr. Mole, will you state your name to the Special
8 Committee, please?
9 A. My name is Joseph Nicholas Mole, and I am a --
02:48 10 Q. Okay. And how are you employed, sir?
11 A. I'm an attorney here in New Orleans.
12 Q. How long have you been an attorney in New Orleans?
13 A. Thirty years.
14 Q. Are you with a firm?
02:48 15 A. Yes, I am.
16 Q. And which firm?
17 A. The firm is Frilot, LLC -- actually, it's Frilot Partridge.
18 Q. What type of practice do you engage in?
19 A. I've always done principally commercial litigation.
02:48 20 Q. All right. Calling your attention to the years '96 and
21 '97, were you involved in a case -- one of the parties being
22 named Liljeberg?
23 A. Yes, I was. I was retained by Tenet to represent them.
24 Q. What was the case -- what was the style of the case?
25 A. Liljeberg Enterprises, Inc. and the St. Jude Hospital of

48 1 Louisiana, Inc. were the plaintiffs. The defendant was
2 Lifemark Hospitals of Louisiana, which was a Tenet subsidiary.
3 Q. Okay. And you represented Lifemark, then?
4 A. That's correct.
02:49 5 Q. Okay. Do you recall what month of '96 you became involved
6 in the case?
7 A. I believe it was April of '96.
8 Q. All right.
9 A. The case was set for trial.
02:49 10 Q. Have you had a chance to look over the pleadings, the
11 motion to recuse in that case?
12 A. I have.
13 Q. Okay. And have you looked at the docket sheet?
14 A. Yes, I have. I looked at my own pleadings index.
02:49 15 Q. Okay. You got on the case in April, '96.
16 The case had been active since how long, as you
17 recall?
18 A. Well, it's an interesting question. It began, to my
19 knowledge, as litigation in civil district court, in
02:49 20 New Orleans state court in, I believe, '87. It migrated to
21 federal bankruptcy court when the Liljebergs filed a Chapter
22 11. And, so, it had gone back to '87. The federal court
23 litigation kicked off in 1993, I believe.
24 Q. Okay. And you then got involved in 1996. Is that correct?
25 A. That's correct. Yeah, I enrolled.

Q. Now, before we go further, your attorney had requested an immunity order for you; and I want to present that to you.

MR. WOODS: It's Exhibit Number 45, your Honors.

BY MR. WOODS:

02:50 Q. And you have seen a copy of that before, have you not?

A. Yes, I have.

Q. Okay. And you realize that you're testifying under immunity and that anything you say cannot be used against you, except for any false statements or perjury?

02:50 A. I understand.

Q. When you were in -- involved in --

JUDGE BENAVIDES: I would like to get something straight.

MR. WOODS: Yes, sir.

02:50 JUDGE BENAVIDES: I'm trying to think. There's nothing in any of the reports that we have that suggested that Mr. Mole has done anything wrong.

MR. WOODS: No, there's not.

JUDGE BENAVIDES: But he -- but nonetheless, is it

02:50 your position, Mr. Mole, that you will not testify unless you have an immunity order?

THE WITNESS: No, it's not, your Honor. My attorney felt that it was best. I testified to the grand jury, and I was interviewed by the FBI in connection with this matter; and you will have to ask him. I don't do criminal work, but he

02:51 1 thought it was best that I get --
2 JUDGE BENAVIDES: So, your position is you would
3 testify without the immunity order; you're just doing it at the
4 request of your attorney?
02:51 5 THE WITNESS: At his advice.
6 JUDGE BENAVIDES: All right.
7 MR. WOODS: Thank you, your Honor.
8 BY MR. WOODS:
9 Q. Mr. Mole, when you got on the case in April, '96, was Jake
02:51 10 Amato or Lenny Levenson involved in the case on the other side?
11 A. No, they were not, to my knowledge.
12 Q. And was Don Gardner involved on your side?
13 A. No, he was not.
14 Q. Do you recall approximately when Amato and Levenson became
02:51 15 attorneys of record for the other side?
16 A. I can place it by saying that I think the trial date, when
17 I got in, was sometime in late October, early November of 96.
18 Jake and Lenny signed up or enrolled as counsel about five or
19 six weeks prior to that date.
02:51 20 Q. In September, '96, or so?
21 A. That sounds right.
22 And Don enrolled, I believe, for us in late
23 February, early March of '97. The trial date was continued.
24 Q. Okay. We'll get to Gardner's involvement; but when the two
;2 25 of those became involved in 9 -- September of '96, before an

02:52 1 October or November trial date of '96, did that cause any
2 concern on your part?
3 A. Yes, it did.
4 Q. And would you explain to the Committee what concern you had
02:52 5 with those two individuals entering this complex case at such a
6 late date?
7 A. Well, I felt that it was odd, in a case that was a bench
8 trial, that two lawyers who had no previous involvement would
9 sign up that close to trial. I had gotten involved in April of
02:52 10 '96 and had some idea of how much history there was and how
11 much in the way of complex legal issues were involved in the
12 case. I also had some knowledge that the Liljebergs were very
13 prone to trying to influence the judicial process through
14 whatever means they could. So, it was a concern to me, yes.
02:53 15 Q. All right. What did you do based on that concern?
16 A. I began asking people -- i had some familiarity with --
17 well, with the legal community and the Jefferson Parish
18 politics. So, I began to call people who knew that world and
19 asked them what they thought. And a lot of people wouldn't
02:53 20 talk to me, but my concerns were substantiated that Jake and
21 Lenny were close to Judge Porteous and that there was a risk
22 that their presence in the case would be a problem for my
23 client.
24 Q. Okay. Had they basically taken over as counsel for that
53 25 client?

A. The client already had numerous lawyers, bankruptcy specialists, Don Richard who was the trial lawyer. Hans Liljeberg was on the case. Doug Draper was a bankruptcy lawyer. And I believe there were other lawyers. So, they had -- they already had a stable of lawyers involved.

In the pretrial proceedings that we had yet to go, they -- they took some interest; but they were never, in my perception, the laboring oar.

Q. Okay. When did you file the motion to recuse?

A. I believe in September. I believe it was heard October 16, if I recall, 1996. So, it would have been a few weeks before that.

Q. Okay. I'm going to show you what has been marked and admitted into evidence as Exhibit Number 19, which is the motion to recuse. If you would, take a look at that.

Does that refresh -- that's a certified clerk's copy of the motion -- the pleadings in the motion to recuse.

A. Yeah, that's my signature and my motion.

Q. At the time you filed the motion, were you aware of any financial relationship between Amato and Levenson and Judge Porteous?

A. No.

Q. And by "financial arrangement," I include the giving of money or cash to Judge Porteous by Levenson or Amato.

A. No, I was not aware of that. If I -- if that were the

02:55 1 truth and I had known it, I certainly would have raised it in
2 this motion. I had no such information.
3 Q. And during the pendency of that motion, before it's ruled
4 on, did Judge Porteous mention to you or any of the parties
02:55 5 that he had received cash from Amato or Levenson?
6 A. No, he did not.
7 Q. Who responded to the motion in limine for the other side?
8 A. Looking at the part of the package you handed me as
9 Exhibit 19, I believe there's an opposition signed by Lenny
02:55 10 Levenson. No. That's Jake Amato.
11 I don't know whose signature it is. But the
12 signature block is for Lenny Levenson, and there's a signature
13 that may well be his. And then Ken Fonte, who was another one
14 of the Liljeberg lawyers, is below that.
02:56 15 Q. In that pleading, did they acknowledge that Amato or
16 Levenson had provided cash to Judge Porteous?
17 A. No. I don't recall exactly what they said, but they
18 certainly never reported --
19 JUDGE BENAVIDES: I missed that last answer, the one
02:56 20 before that. You went through a list of names, and then you
21 said that seems to be blocked out.
22 Did Amato, in fact, sign that response?
23 THE WITNESS: I cannot read the signature.
24 JUDGE BENAVIDES: But there's a signature line for
02:56 25 Amato with a signature on it?

02:56 1 THE WITNESS: I'm looking at the reply memo, and
2 it's -- there's a signature line for Lenny Levenson and a block
3 with no signature line for Ken Fonte --
4 JUDGE BENAVIDES: All right.
02:56 5 MR. WOODS: Judge, I can put it on the Elmo. And it's
6 Exhibit 19 in your books.
7 BY MR. WOODS:
8 Q. Where did you see "Amato"?
9 A. No. If I said "Amato," I misspoke.
02:57 10 Q. Okay. So --
11 JUDGE BENAVIDES: So, Amato didn't sign it?
12 THE WITNESS: That's my -- my supposition is that's
13 Lenny's signature, because there's three letters of the same
14 sort. And it's Leonard L. Levenson; so, I assume it's his.
02:57 15 BY MR. WOODS:
16 Q. Okay. And there's no acknowledgement in those pleadings of
17 any prior cash being given by Amato or Levenson?
18 A. No. I've never received that information anywhere.
19 Q. And was there a denial in the response that there was any
02:57 20 special relationship between them and Judge Porteous, based on
21 what you raised in your motion to recuse?
22 A. Well, you know, in my motion to recuse, I danced around
23 that issue pretty carefully because I didn't want to accuse the
24 judge that was going to try my case of doing something of which
57 25 I had no evidence. So, it was an act of trying to suggest that

58 1 that was, you know, something that I was concerned about,
2 without actually saying it. So, I don't know that I raised the
3 issue that squarely.
4 Certainly, there was a denial, to my
02:58 5 recollection, from the other side that there was anything like
6 that.
7 Q. Okay.
8 A. But that's a very general answer based on my recollection.
9 JUDGE BENAVIDES: Counsel, if you pardon my
02:58 10 interruption.
11 MR. WOODS: Yes.
12 JUDGE BENAVIDES: At the time that you filed your
13 motion that included the recusal request, did you copy just
14 Levenson and -- or did you copy all the lawyers, including
02:58 15 Amato and Creely, or did you --
16 THE WITNESS: It's my practice to copy all lawyers who
17 are listed.
18 JUDGE BENAVIDES: Okay. So, you -- you noticed
19 everyone?
02:58 20 THE WITNESS: To my recollection, your Honor.
21 JUDGE BENAVIDES: And prior to that time, were there
22 any pleadings in the case from opposing counsel where Amato
23 signed a pleading as opposed -- in other words, was the way
24 this response was signed, was that consistent with the way
59 25 pleadings from the other side would have been signed after

02:59 1 Amato and Creely came into the case?
2 I'm trying to get as to whether there -- whether
3 there was pleadings before signed by Amato. There's a motion
4 to recuse that's filed that alleges an improper relationship;
02:59 5 and for some reason, the response does not have Amato's
6 signature on it.
7 THE WITNESS: You know, I don't recall, your Honor.
8 JUDGE BENAVIDES: Okay.
9 THE WITNESS: There were so many lawyers, I never
02:59 10 focused on who signed, to be honest with you.
11 JUDGE BENAVIDES: Thank you.
12 BY MR. WOODS:
13 Q. And was there a ruling on the motion in limine?
14 A. The motion to recuse?
02:59 15 Q. The motion to recuse. I'm sorry.
16 A. I believe it was heard on October 16. It was denied from
17 the bench and there was a ruling the next day and it was
18 entered into the record.
19 Q. All right. When was that?
02:59 20 A. I believe it was October 17, it seems like, the order.
21 Q. And what did you do in response to that ruling?
22 A. We sought a writ of mandamus from the Fifth Circuit. It
23 was denied.
24 Q. And then what did you do?
25 A. We went on with preparing for trial. My client was

Speculation Hearsay

concerned because they obviously knew what I was concerned with myself and asked if there was someone or some way we could protect them from what I was led to believe could be an unbalanced playing field. And we -- I looked into that. We ultimately hired Don Gardner for that reason.

Q. All right. You mentioned that you were trying to level the playing field. Was that at your insistence or your client's insistence?

A. It was my client's insistence.

Q. And how did you go about trying to level the playing field? How would you determine who to hire to level the playing field?

A. Well, I made a lot of phone calls. And I used to be partners with Magistrate J. Wilkinson and, through him, members of my firm and -- Tom Wilkinson, who was the parish attorney for Jefferson Parish, I talked to him. And ultimately, he led me to Don.

Q. All right. And what was the recommendation for Don Gardner? Why did you go to Don Gardner? What -- what led you to him?

A. Tom told me that he was a close personal friend of the judge and that for purposes of leveling the playing field that I couldn't do better, that Don was as close as people got to Judge Porteous and if that's what I wanted that Don would be the person.

Q. What did you feel about doing this as an attorney?

— Where is Court getting idea to be worried

A. I didn't like it, would not have done it; but my clients insisted. You know, I've been in situations where I felt -- there was many times where I felt that the other side had an advantage because of a relationship with the Court; and I've always felt that the best way to deal with that is to stand up against it, not to play that game.

What about your advantage

Q. Okay.

CHIEF JUDGE JONES: You mean this court or just courts in general?

THE WITNESS: Jefferson Parish. Never in federal court.

JUDGE LAKE: Can you pull the microphone to you, please?

Thank you.

Clearly Mole wants to get an advantage

BY MR. WOODS:

Q. And, Mr. Mole, did you then meet with Mr. Gardner?

A. I did.

Q. And did you discuss a fee arrangement?

A. In a general sense.

Q. Okay. And did you discuss his role in the case?

A. I did.

Q. Did you understand what kind of practice he had?

A. I learned that he was primarily a domestic dispute lawyer, divorce work.

Q. And did this case involve divorce work or domestic

03 1 relations?
2 A. It did not.
3 Q. Okay. Did you ultimately end up with a written fee
4 agreement with Don Gardner?
03:03 5 A. I did.
6 Q. I'm going to show you what's marked and admitted into
7 evidence as Exhibit 10. And if you would, take a look at that
8 and see if that is a copy of the fee agreement you entered
9 into.
03:03 10 A. It is.
11 Q. I'm going to show this on the Elmo, Mr. Gardner. If you
12 would explain --
13 A. "Mole."
14 Q. Yes, sir.
03:03 15 If you would, explain -- see if I can get it here
16 to --
17 This is dated February 18th, '97.
18 A. Yes, sir. I see that.
19 Q. And this is after the motion to recuse has been overruled
03:04 20 and your mandamus to the Fifth Circuit had been denied?
21 A. That is correct.
22 Q. And you're set for trial when?
23 A. I don't recall what the setting was then, but ultimately it
24 was set for June of '97.
14 25 CHIEF JUDGE JONES: I'm sorry. Is there a Bates

03:04 1 number on that exhibit?

2 MR. WOODS: No, your Honor, not on the one I have.

3 But let me see if there is --

4 CHIEF JUDGE JONES: You called it Exhibit 10, and it's

03:04 5 not 10 in my book.

6 Oh, well, maybe -- maybe I --

7 MR. WOODS: It's the last two pages of Exhibit 10,

8 your Honor.

9 CHIEF JUDGE JONES: Oh, okay. Sorry.

03:04 10 Thank you. Yes.

11 BY MR. WOODS:

12 Q. Mr. Mole, would you read for the Committee the fee

13 agreement that you had with Mr. Gardner?

14 A. I can just read from the letter. "Lifemark is willing to

03:05 15 offer you a fee for assisting with the Liljeberg case as

16 follows. Retainer of $100,000 payable upon enrollment as

17 counsel of record"; and, then, 2, "a fee of two hundred if

18 after trial there is a judgment allowing Lifemark to terminate

19 the pharmacy agreement with no liability for future damages."

03:05 20 And then it goes on. Do you want me to keep

21 reading?

22 Q. Yes, please.

23 A. "The following sums will be added to the above retainer and

24 fee based upon the level of damages contained in the judgment

25 provided the judgment allows Lifemark to terminate the pharmacy

03:05 1 agreement with no liability for future damages."
2 Number 3 is -- and then it goes on with numbered
3 paragraphs.
4 "3, A fee" should be "of 100,000 if the damages
03:05 5 for past actions are less than 15 million in principal, for a
6 total fee of 400,000; 4, a fee of two hundred if the damages
7 are less than 5 million in principal, for a total fee of
8 500,000; and a fee of 300,000 if the damages are zero, for a
9 total fee of 600,000.
03:06 10 "Further, Lifemark will pay you $100,000 as a
11 severance fee in the event that Judge Porteous withdraws or if
12 the case settles prior to trial. This results in a total of
13 200,000, one hundred retainer plus one hundred if the case
14 settles or Judge Porteous ceases to be our judge. This is to
03:06 15 satisfy your concern" -- I didn't catch the last few words --
16 "concern" --
17 Q. -- "that involvement in --"
18 A. -- "this time consuming case will harm your present
19 practice, as you explained, if the trial is continued beyond
03:06 20 June because Judge Porteous withdraws and gives the case to a
21 new judge, you will not be able to remain involved. Also,
22 Lifemark wants to give you some incentive to be involved even
23 if the case settles."
24 And, then, do you want me to keep reading?
07 25 Q. Yes, sir.

.07 1 A. "To reiterate, Lifemark is willing to offer you an outcome
2 determinative fee. You would receive the following fees based
3 upon the results described. 200,000 if Judge Porteous
4 withdraws or if the case settles prior to trial; one hundred
03:07 5 retainer plus one hundred severance.
6 "Two, 300,000, this would be the minimum payable
7 for any result that allows Lifemark to terminate the pharmacy
8 agreement with no liability for future damages.
9 "Three, four hundred, for a judgment or other
03:07 10 result allowing Lifemark to terminate the contract with no
11 liability for future damages and with damages for prior -- past
12 actions in an amount less than 15 million in principal.
13 "Four, 500,000, this sum would be payable if the
14 damages are less than 5 million in principal and Lifemark is
03:07 15 able to terminate the contract as described above.
16 "Five, 600,000, this fee would be payable if the
17 trial resulted in a judgment allowing Lifemark to terminate the
18 contract and damages are zero.
19 "I look forward to meeting you -- with you later
03:08 20 this week. Very truly yours." And then it's my name.
21 Q. Now, Mr. Mole, there's some unusual contingencies listed
22 there. Would you explain to the Committee why you had those
23 different fee levels for Mr. Gardner's involvement?
24 A. Well, this was not a negotiated -- this proposal was
)08 25 accepted by Don as written. So, that was entirely the product

03:08 1 of my way of thinking.

2 We wanted to get him involved and keep him

3 interested. The pharmacy agreement that's alluded to in the

4 letter is -- was a very onerous contract between the

03:08 5 Liljebergs, who ran the pharmacy, and the Kenner Regional

6 Medical Center, which Tenet then owned and which was owned by

7 the subsidiary Lifemark.

8 That pharmacy agreement resulted in having a

9 pharmacy that served the patients of the Kenner Regional

03:09 10 Medical Center, but it had been in litigation with that

11 hospital since 1987. It was a very acrimonious relationship.

12 It hindered the health care in the hospital. The nurses and

13 doctors and staff felt that they were held hostage by the

14 pharmacy. They did not always get the medications from the

03:09 15 pharmacy that they needed, quickly. Or if there was a cost

16 concern, the pharmacy would sometimes hold up the medication.

17 It was a very bad contract. In addition, it cost

18 the hospital, we estimated, between one and a half and two

19 million dollars a year in extra payments above and beyond what

03:09 20 a normal contract would have cost. So, that was the driving

21 motivation for the -- for the fee arrangement, to get rid of

22 that contract. So, that was very important to us.

23 I also had some concern hiring Don, who was a

24 nice guy but I didn't know him. I didn't want me and my client

25 to be made a fool of, and I wanted his loyalty to be a hundred

.. :0 1 percent to us and not -- not distracted. I wanted him to be
2 interested in the outcome.
3 Q. So, several of those provisions were to ensure his loyalty
4 to your side. Is that correct?
03:10 5 A. That's correct. And to a good result.
6 Q. And did you do that because you understood that he was a
7 friend of the judge and he was a friend of the other two
8 lawyers on the other side?
9 A. Yes.
03:10 10 CHIEF JUDGE JONES: This looks as if it's payable
11 whether or not he put in -- in any work.
12 THE WITNESS: Yes. Yes, your Honor, it was.
13 BY MR. WOODS:
14 Q. And did Mr. Gardner take part in the preparation of the
03:10 15 trial or did he merely just sit through the trial as a lawyer
16 at the table and not question witnesses?
17 A. He sat through the trial. He did not -- he did not take
18 any witnesses. I don't believe -- I don't know that he
19 attended any depositions, but he certainly didn't take any or
03:11 20 prepare any pleadings.
21 Q. So, did you ultimately end up paying him a hundred thousand
22 for his role in the case?
23 A. We did. The client did.
24 Q. And that was for the purpose of leveling the playing field?
:1 25 A. That's an accurate way to sum up the motivation.

03:11 1 Q. Did Gardner -- during the course of your relationship on
2 this representation, did he ever mention anything concerning
3 Judge Porteous?
4 A. Yeah, we talked about Judge Porteous.
03:11 5 Q. What did he say?
6 A. You know, he gave me some insight into the judge's
7 personality. Don -- I have to say Don was always steadfast in
8 saying that he was not going to be able to influence the
9 judge's determination of the case.
03:11 10 He told me about his social relationship with the
11 judge, that he would drink wine with him, go to his house,
12 entertain him, attend social functions with him, things like
13 that. He offered me the insight that the judge's mother had
14 been a nurse, I think a head nurse at Baptist Hospital, and
03:12 15 that may have created some normal human prejudices or beliefs
16 concerning the issues in how -- a case that involved nurses and
17 hospitals.
18 Q. Do you remember being interviewed by the FBI prior to your
19 grand jury testimony?
03:12 20 A. I do.
21 Q. And you've reviewed that memorandum of interview, have you
22 not?
23 A. I believe in your presence, Mr. Woods, yes.
24 Q. Okay. Do you recall Don Gardner saying anything about
25 Judge Porteous' behavior on the federal bench as opposed to the

03:12 1 state bench?
2 A. I don't remember at what point in the proceeding, but I
3 remember him telling me that he felt the judge needed to stop
4 this kind of behavior, that it was okay on the state bench but
03:12 5 now that he was a federal judge he shouldn't be doing it. And
6 I don't remember the precise context."
7 JUDGE BENAVIDES: What kind of behavior are you
8 referring to?
9 THE WITNESS: His relationship with Jake and Lenny.
11:59 10 BY MR. WOODS:
11 Q. All right. And there was one other comment you made -- or
12 that you related to the FBI concerning Gardner telling you
13 something about the Jeep leases or the Jeep purchases?
14 A. Apparently -- I have no direct knowledge of this -- the
03:13 15 judge's son or sons had a Jeep or Jeeps; and there was some
16 statement to me from which I inferred that Don had some concern
17 that those had been provided by Jake and/or Lenny in some way.
18 Q. Okay. And you've reviewed your grand jury testimony, and
19 it's true and accurate?
03:13 20 A. As I recall, yes.
21 Q. And the memorandum of interview was true and correct?
22 A. As I recall, yes.
23 Q. Okay.
24 MR. WOODS: Thank you. I pass the witness,
25 your Honor.

CHIEF JUDGE JONES: I have a question. What -- how did you develop this one hundred, two hundred -- this sliding scale of payments? Was that totally of your own devising or the client's devising or did somebody suggest those -- that?

03:14 THE WITNESS: Those were numbers that were arrived at between my client and myself.

CHIEF JUDGE JONES: Numbers, yes; but what about the idea of the scale, the contingencies and all that?

THE WITNESS: It was -- it was largely my creation, 03:14 and it was reflecting my client's concerns that the -- the priorities of what we would reward with fees were their concerns.

JUDGE BENAVIDES: What was the -- what was the -- apart from the sliding scale, apparently if Judge Porteous 03:14 withdrew then Gardner would get another hundred thousand dollars.

THE WITNESS: Don had expressed some concern that he was investing time and that he had a very active practice. And, you know, I have witnessed that. I have been in Jefferson 03:15 Parish. And he -- you know, just randomly, where -- he would have to give up a lot of work on small -- relatively smaller cases that he made money on in volume and that was -- it would interrupt the flow of his work.

JUDGE BENAVIDES: Well, how would -- how would it take more of his time? If he was invested for a hundred thousand

dollars, what --

THE WITNESS: He would lose the opportunity --

JUDGE BENAVIDES: -- why -- why would he get another hundred thousand dollars if Porteous withdrew?

03:15 It seems like if Porteous stayed on the case, he would be staying on the case longer for this hundred thousand dollars than getting the hundred thousand dollars if Porteous withdrew. So, I mean, it seems -- it seems just the opposite of his -- of the value of his time.

03:15 If this judge -- if this judge never withdraws for the next five or six or seven years, I only get a hundred thousand dollars. If he withdraws, I can go back to my busy -- busy practice and take another hundred thousand dollars with me.

03:15 I mean, I'm trying to see the justification for the extra payment if -- if Judge Porteous were to withdraw.

THE WITNESS: Well, if the judge withdrew, we would have remaining an agreement with Don. I didn't want him to continue in the case --

03:16 JUDGE BENAVIDES: So, that would keep --

THE WITNESS: Yeah.

JUDGE BENAVIDES: -- keep him -- kind of buy him out of that lawsuit, because it was going to take an extended period of time regardless of whether it was Judge Porteous or not. Was that your thinking?

16 1 THE WITNESS: Yes.

2 CHIEF JUDGE JONES: Judge Porteous, do you have any

3 questions?

4 JUDGE PORTEOUS: Just a few, your Honor.

03:16 5 **CROSS-EXAMINATION**

6 BY JUDGE PORTEOUS:

7 Q. Just very briefly. The -- again, you brought in Gardner,

8 you said, to even the playing field?

9 A. Yes, sir.

03:16 10 Q. Why would that then suggest that I would withdraw?

11 A. I'm not sure there's a direct link between those. I think

12 it was Don's concern -- my concern that if you withdrew I would

13 no longer need Don and -- but he would still be on a contract

14 with us, and I wanted some closure to that.

03:17 15 Q. Well, the question is why did you think Don getting in the

16 case would cause me to withdraw?

17 A. I'm not sure that I was --

18 Q. You're bringing him in on your side to even the playing

19 field.

03:17 20 A. Yes, sir.

21 Q. What made you believe that I would withdraw now that Don

22 was in the case? Did you want him to talk to me?

23 A. I thought there might be some concern on your part that it

24 would be difficult for you to decide a case with friends on

17 25 both sides.

03:17 1 Q. But judges try, traditionally, cases all the time with
2 friends on both sides.
3 A. Yes.
4 Q. During your trial, I think you indicated that I was a
03:17 5 gentlemen, professional, and polite and let you argue as a
6 lawyer evidentiary rules. Is that right?
7 A. That's correct.
8 Q. And I believe you also indicated that -- now, of course
9 trial lawyers always think they have lost when somebody rules
03:18 10 against them.
11 A. Whenever I lose, I think the judge has got it wrong.
12 Q. Of course. Did you also testify that I'm a relatively easy
13 person to appear in front of?
14 A. I don't think I testified, because I wasn't under oath; but
03:18 15 I think I probably said that.
16 Q. Well, under the grand jury, you were under oath, weren't
17 you?
18 A. Oh, okay. Then -- I thought you were reading from the
19 trial transcript.
03:18 20 Q. No, no.
21 A. I would agree with that.
22 Q. Okay. And we didn't waste time or do foolish things that
23 an inexperienced judge would do?
24 A. I thought you were a very good trial judge.
18 25 Q. And you said you "didn't feel he was terribly unfair about

03:18 1 evidentiary rulings"?
2 A. No.
3 Q. You said that, though?
4 A. I would agree with it now. I don't recall my exact words.
03:18 5 Q. Well, do you want me to show it to you?
6 A. No.
7 Q. Okay. Mr. Mole, there was also a point in the trial -- and
8 I think it had been going on awhile, on a Friday, and I lost my
9 temper.
03:18 10 A. It was a Thursday.
11 Q. Whatever it was.
12 And threw some binders. I think we had been in
13 this trial awhile.
14 A. I remember it well.
03:19 15 Q. And is it fair to say that this was a pretty tedious type
16 of trial, where you had a lot of exhibits, a lot of technical
17 stuff going on at all times?
18 A. Yes.
19 Q. You had hundreds, if not thousands, of exhibits, did you
03:19 20 not?
21 A. We had a lot of exhibits, yes, sir.
22 Q. Well, certainly more than a hundred?
23 A. A lot more.
24 Q. Okay. Now, it was after, I believe, you had called a
03:19 25 witness direct, crossed by the other side, direct again by

03:19 1 yourself, and then I asked some questions?
2 A. I recall that.
3 Q. And then you wanted to ask some additional questions?
4 A. I asked if I could follow up.
03:19 5 Q. And I said no?
6 A. You did.
7 Q. And I think words to the effect was I was exceeding my
8 authority?
9 A. Yeah. I think I referenced one of the Federal Rules of
03:19 10 Evidence.
11 Q. And I got --
12 A. You were pissed.
13 Q. And "pissed" is a fair statement.
14 And we shut it down?
03:19 15 A. Yes.
16 Q. Now, if it was a Thursday, we must have been off for -- did
17 we take a day off? Because I don't recall Friday.
18 A. We came back Monday.
19 Q. Monday?
03:20 20 A. I believe, yeah.
21 Q. When we came back, did I, in fact, dictate an order into
22 the record?
23 A. Yeah. You had what appeared to be a fairly well prepared
24 thought out ruling.
03:20 25 Q. Allowing -- saying that I didn't think I had exceeded my

40 1 authority and allowing myself to follow up. Is that right? Or
2 words to that effect?
3 A. You overruled my objection but allowed me to go ahead and
4 follow up, as I recall.
03:20 5 Q. Right.
6 And not only did I allow you to follow up, I gave
7 you a copy of the questions I had asked that witness, did I
8 not?
9 A. Yes.
03:20 10 Q. And so I did let you, uninterrupted, have additional
11 questions?
12 A. That's correct.
13 Q. Did you think I was fair doing that?
14 A. Yes.
03:20 15 Q. So, I changed my mind because I was wrong?
16 A. I don't know what your thought process was but --
17 Q. But I let you ask them?
18 A. But you did, yes, sir.
19 Q. And after that, I didn't have -- nothing different changed
03:20 20 about my demeanor on the bench, did it?
21 A. Nope.
22 Q. Still finished the trial?
23 A. Yes.
24 Q. Now, isn't it also an accurate statement that this was and
0 25 had been contentious for years and years and years?

A. Extremely.
Q. And that -- I think this case may have gone to this court on a couple of occasions and maybe even to the Supreme Court on one occasion.
03:21 A. Well, between this and related litigation with Travelers, the case had been to the Fifth Circuit, I think I once counted, four or five times and the Supreme Court at least once or twice.
Q. And the Travelers case also had some part and parcel to do
03:21 with this case at some point?
A. Pretty much, yeah.
Q. And you had never really gotten any trial dates that stuck before it came to me?
A. Well, there was one trial date when I stepped in; and I
03:21 think, at the parties' request and your advice, we moved it to the summer of '07. And that was it.
Q. And we kept to a schedule so you folks could get this case tried?
A. We got it tried.
03:21 Q. That they hadn't been able to do up until that point in time?
A. Yes.
Q. And it had gone from judge to judge to judge?
A. Yeah. It had been with a number of federal judges, but you were the only one I saw.

03:22 1 Q. And I believe I said, "I'm the last federal judge you-all
2 are going to see. We're going to get your case tried."
3 A. I believe you said words to that effect, yes.
4 Q. Okay.
03:22 5 JUDGE PORTEOUS: I don't have any additional
6 questions, Judges.
7 CHIEF JUDGE JONES: All right.
8 MR. WOODS: I have a couple of follow-up.
9 **REDIRECT EXAMINATION**
10 BY MR. WOODS:
11 Q. Mr. Mole, Judge Porteous had excellent recall as to dates
12 and questions and losing temper. During the course of that,
13 did he ever tell you that he had a financial relationship with
14 Jake Amato?
03:22 15 A. No.
16 Q. Did you become aware or were you ever advised that during
17 1999, while this case was pending -- as I understand, the case
18 was tried in the summer of '97 and a ruling wasn't relayed or
19 wasn't given until April 26, 2000. Is that correct?
03:22 20 A. That is correct.
21 Q. Were you aware that Judge Porteous had received cash from
22 Amato in May or June of '99 of approximately $2,000?
23 JUDGE PORTEOUS: With all due respect, your Honor, I
24 must object. That's well outside the scope of any
25 cross-examination. Nothing in my cross-examination suggested

03:23 1 it. That's an area that counsel certainly could have explored
2 in direct. He chose not to.
3 CHIEF JUDGE JONES: That's a very pertinent objection
4 for a man of your limited abilities, sir, that you claim. And
03:23 5 it is overruled because we are not bound by the conventional
6 rules of evidence here and there's clearly been evidence. And
7 if you want to examine him again later, you can do that.
8 JUDGE PORTEOUS: Your Honor, you now have referenced
9 twice to my mental stability. Is your Honor still okay trying
03:23 10 this case?
11 CHIEF JUDGE JONES: Absolutely. Every --
12 JUDGE PORTEOUS: You referenced it twice.
13 CHIEF JUDGE JONES: Every time you open your mouth,
14 Judge Porteous, I'm more and more convinced of your mental
03:23 15 acuity.
16 JUDGE PORTEOUS: I didn't even know that was part of
17 the hearing today. It's not included in the charge.
18 CHIEF JUDGE JONES: Sir, you may sit down.
19 JUDGE PORTEOUS: All right.
03:24 20 BY MR. WOODS:
21 Q. Were you aware of any cash changing hands in '99 during the
22 pendency of this suit?
23 A. No. I would have been very alarmed to find out that Jake
24 was giving money to the judge during the case as being under
24 25 submission for decision by Judge Porteous.

24 1 MR. WOODS: Okay. Thank you.
2 JUDGE PORTEOUS: May I have one potential follow-up?
3 CHIEF JUDGE JONES: Yes, sir.
4 JUDGE PORTEOUS: Or just a couple?
03:24 5 CHIEF JUDGE JONES: Yes, sir.
6 JUDGE PORTEOUS: Not even on that.
7 **RECROSS-EXAMINATION**
8 BY JUDGE PORTEOUS:
9 Q. Are you aware that, again, while this case was under
03:24 10 advisement, that your counsel Mr. Gardner accompanied me and my
11 family to Las Vegas for a bachelor party?
12 A. No, I did not know that.
13 Q. So, he went -- if I represent to you that he went, do you
14 find anything wrong with that?
03:24 15 A. You know, I find something wrong with the whole system that
16 allows that to happen, Judge Porteous. So, yeah, I do.
17 Q. Okay. But if he -- should I have recused because I went
18 with Gardner?
19 A. Well, I'm not the judge here but --
03:25 20 Q. I'll withdraw that question.
21 A. Yeah, you should. I think you should.
22 JUDGE PORTEOUS: I'll withdraw the question. I don't
23 have any further questions now.
24 MR. WOODS: May he be excused, your Honors?
25 25 CHIEF JUDGE JONES: Yes.

03:25 1 Mr. Mole, thank you for testifying.
2 MR. WOODS: We would call Robert Creely next.
3 Mr. Creely is down the hall in 204. Can you
4 bring him in, please?
03:25 5 *(Witness being summoned to the stand)*
6 CHIEF JUDGE JONES: What I alluded to earlier,
7 Judge Porteous, is the fact that up until about six weeks ago,
8 you were vigorously asserting through counsel that you were
9 unable to assist in your own defense mentally, that you had
03:26 10 limited memory and limited ability. And I just want you to
11 know that, as far as I am concerned, you're doing a splendid
12 job of representing yourself.
13 JUDGE PORTEOUS: Well, your Honor, when I'm placed in
14 a position where I have to defend myself, no matter what
03:26 15 abilities I actually have, I have to try and assert the
16 minimum, because I've not been allowed to get additional
17 counsel.
18 And I understand your position. But I am dealing
19 with my life in this situation, your Honor. And to suggest
03:26 20 that that in some way reflects other periods of time that I've
21 been seeing this mental healthcare professional, is a mighty
22 microscopic view of my position. So -- but I understand yours.
23 CHIEF JUDGE JONES: Yes, sir.
24 MR. WOODS: Your Honor, this is Mr. Creely and his
26 25 attorney, Ralph Capitelli.

EXHIBIT 4

10/16/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LIFEMARK HOSPITALS OF LOUISIANA, INC., ET AL.	*	CIVIL ACTION
	*	NO. 93-1794
	*	C/W 93-4249
VERSUS	*	C/W 95-2922
	*	C/W 95-3993
LILJEBERG ENTERPRISES, INC.	*	SECTION "T"

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
OCT 2 10 35 AM '96
LORETTA G. WHYTE
CLERK

MOTION TO RECUSE

NOW INTO COURT, through undersigned counsel, comes Lifemark Hospitals of Louisiana, Inc. ("Lifemark"), who respectfully submits that Liljeberg Enterprises, Inc.'s ("LEI") last minute enrollment of Jacob Amato and Leonard Levenson as trial counsel in this matter creates an appearance of impropriety prohibited under 28 U.S.C. §455(a).

Lifemark is in no way suggesting that this Court could not be impartial in determining this matter. But, as set forth fully in the Memorandum in Support attached hereto, the mere appearance of impropriety requires recusal. Thus, for the foregoing reasons and the reasons set forth in the memorandum, Lifemark respectfully requests that this Court recuse itself from this matter prusuant to 28 U.S.C. §455(a).

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ORDER
HEARING
DOCUMENT No. 277

006277

SC00553

Respectfully submitted,

Miles P. Clements (La. #4184)
Joseph N. Mole, T.A. (La. #09538)
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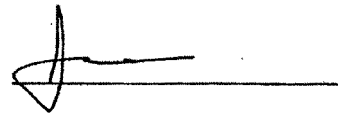
ATTORNEYS FOR PLAINTIFF,
LIFEMARK HOSPITALS OF
LOUISIANA, INC.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading on this 1st day of October, 1996 by hand delivery on all counsel of record.



UNITED STATES DISTRICT COURT
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LILJEBERG ENTERPRISES, INC.	*	SECTION "T"

* *

MEMORANDUM IN SUPPORT OF MOTION TO RECUSE

With great reluctance, Lifemark Hospitals of Louisiana, Inc. ("Lifemark") finds it necessary to request that this Court exercise the discretion granted it under 28 U.S.C. §455 and recuse itself from further handling of this matter.

QUESTION PRESENTED

The question presented by this motion is as follows. The standard of recusal under 28 U.S.C. §455(a) is this: Does the situation at hand create an appearance of impropriety "to the well-informed, thoughtful and objective observer, rather than the hypersensitive,cynical and suspicious person?" United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995). This is an objective test - the Court's actual bias is not at issue. Id. The facts of this case that create a §455(a) appearance are these: (1) this litigation has a decade-long history; (2) trial in this matter, without a jury is set for November 4, 1996; (3) the Liljebergs already had five long-standing counsel of record when, on September 12, 1996 they added Jacob Amato and Leonard Levenson, two of the Court's closest friends, as additional counsel; (4) the Liljebergs seek at least $110 million as damages in this extremely complex case, and they gave Messrs.

Levenson and Amato an 11% contingency fee for less than three months involvement; and (5) the Liljebergs have a documented and clear history of attempting to use political influence and they have accused others of attempting to acquire improper influence over the judiciary. Given these facts, Lifemark believes that the answer to the §455(a) question as posed by the Fifth Circuit in United States v. Jordan is a clear yes.

BACKGROUND

This lawsuit had its genesis in a lawsuit filed in the Civil District Court in New Orleans in 1987 by Liljeberg Enterprises, Inc. ("LEI") against Lifemark concerning the interpretation of a contract between Lifemark and LEI. When LEI filed bankruptcy in January 1993, it also filed a motion to force assumption of this contract pursuant to 11 U.S.C. §365. Thereafter, Lifemark counterclaimed, removed the CDC litigation to the Bankruptcy Court, and successfully moved for withdrawal of the reference so that the entire controversy concerning LEI and Lifemark moved to the District Court. LEI's original pleading in this case in this Court was filed in May 1993. Thus, if the history of this litigation is measured by the Civil District Court filings, it is almost ten years old. If it is measured by the original pleading filed in Federal Court, it is over three years old. Trial without a jury is scheduled to begin on November 4, 1996. The Liljebergs seek over $110 million in damages from Lifemark and its parent AMI.

LEI has had numerous lawyers during the history of this controversy. As of one month ago, it had five lawyers signed on to this case, most of whom have been involved for years in the specific controversy that is set to go to trial before this Court on November 4, 1996. Nonetheless, on September 12, 1996, LEI sought and was

granted leave to add two more attorneys, Jacob J. Amato, Jr. and Leonard L. Levenson. Messrs. Levenson and Amato were given an 11% contingency fee. The Liljebergs have given none of their other lawyers a contingency fee. The Liljebergs also apparently have asked one of their other lawyers, William Connick, to withdraw, leaving six counsel of record. This is an extremely complicated lawsuit involving numerous issues that have been in discovery and litigation for almost ten years. The addition at the very last minute of two lawyers who are unfamiliar with the file is of questionable value as to potential contribution to the preparation and presentation of the evidence. The circumstances of their addition as counsel create concern because of their personal relationship with Your Honor.

Your Honor's relationship with Messrs. Amato and Levenson is well known to the legal community. It needs no elaboration in this memorandum. This would be of no concern were it not for the timing of their addition, and the fact that the Liljebergs and LEI clearly believe that influence with governmental bodies, including judges, can be bought. Attached hereto as Exhibit "A" is the Fifth Circuit's unpublished opinion in the controversy between Travelers and LEI. In that litigation, following an adverse result, LEI accused Judge Mentz of being influenced by his membership in social organizations whose membership included attorneys for Travelers. The Fifth Circuit characterized the Liljebergs' accusations as "lengthy, unsworn, and extremely intemperate (if not contemptuous) . . . ." They alleged that Judge Mentz' membership in the Boston Club along with "several attorneys" from law firms representing Travelers

supposedly created "a situation in which a reasonable person would question the judge's impartiality, mandating disqualification and vacation of the judgments." See Exhibit A at pp. 7-8. The Liljebergs further attacked Judge Mentz by alleging that "two of the partners of the law firm representing Travelers 'had a reputation in the New Orleans area community as being . . . influential Republican Party patron[s] who had significant contact with party officials responsible for making recommendations for federal appointments.'" Id. at note 5.

Attached as Exhibit "B" is an Affidavit signed by J. Larry Lidell. In 1986, Mr. Lidell was terminated by Lifemark as its director of public relations of the St. Jude Hospital after four months employment. In 1995 he signed the Affidavit attached as Exhibit B while in the offices of the Liljebergs' attorney and before a court reporter. At his deposition, it became obvious that the Affidavit was framed by the Liljebergs and their counsel. Significantly, on the second page of the Affidavit, Mr. Lidell recited the following: "Mr. Scott Athens [an executive of Lifemark's parent, AMI] also bragged repeatedly how well-connected their attorneys, Mr. Harry Hardin and his associate, Mr. Dirk Wegman, both with Jones, Walker, were with the courts and how strong they were with certain judges. Lifemark/AMI was confident they could get a favorable ruling for Lifemark/AMI against the Liljebergs."

Finally, attached as Exhibit "C" is a memorandum authored by John McDaniel, who was employed by Lifemark as the chief executive officer of the hospital from 1985 to 1990. On May 24, 1988 he wrote this memo to Donna Erb, an in-house lawyer at

AMI, concerning the never-ending controversy with the Liljebergs and their multifarious demands, most of which are still part of this litigation. Mr. McDaniel identified the document at his deposition. On page 5 he recited the following:

> Donna, Mr. Liljeberg was adamant about negatively impacting AMI if these issues could not be resolved through settlement efforts and indicated his intentions to cause a "public movement" against AMI involving both mayorial and city council resolutions, key community leader and physician support against AMI. He indicated that he would enlist civic organizations, federal, state and parish politicians, and even the Catholic Church in his effort to discredit AMI.

Clearly, the Liljebergs believe that public officials, including judges, can be influenced through social contact. They have accused others of doing it, and they have threatened to do it themselves.

ARGUMENT

Neither Mr. Amato nor Mr. Levenson have any particular expertise in cases of this sort. Both are primarily personal injury lawyers. The case has a long and complicated history, and it is unlikely that they can be of significant assistance at trial. It is respectfully submitted that the Liljebergs ostensibly believe, albeit mistakenly, that they can influence Your Honor by hiring two of Your Honor's closest social, political and professional friends immediately before trial. They seek to gain the Court's favor and achieve partiality, a tactic not foreign to their personal concepts of achieving results by that means. Indeed, they have been the subject of two Fifth Circuit opinions on the subject, one of which has reached the Supreme Court. Travelers Insurance Company v. St. Jude Hospital of Kenner, La., Inc., attached as Exhibit A;

Liljeberg v. Health Service Acquisition Corp., 486 U.S. 847; 108 S.Ct. 2194 (1988). As observed by the Fifth Circuit in Travelers, their litigation tactics are intemperate and they have only contempt for the judicial system. Their cynicism is again on display in this case.

While Lifemark does not suggest that Your Honor could or would be influenced through the last minute hiring of two apparently unnecessary lawyers who are both extremely close to the Court, it is clear, based upon their own incredible record of litigation tactics, that the Liljebergs believe the opposite to be true. Under the circumstances, it is respectfully submitted that Your Honor is duty bound to remove any appearance of impropriety. In spite of Your Honor's attempts to be fair, the obviousness of the Liljebergs' intentions, coupled with the timing of the hiring of these lawyers, will always leave questions in the eyes of any objective observer, the "man in the street", who is aware of the Court's relationships with Messrs. Amato and Levenson and the Liljebergs' attitudes toward the political and judicial systems. See Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980). Under such circumstances, Lifemark suggests that Your Honor, the federal courts, and the litigants in this case (including the Liljebergs) are all best served by Your Honor's recusal.

The legal standard for recusal under these circumstances is set forth in 28 U.S.C. §455:

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

As the Fifth Circuit has recently held, the appropriate inquiry under Section 455 "is an objective inquiry." The question is "how things appear to the well informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person." United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995). The Fifth Circuit noted that it has established a body of case law applying the Section 455(a) standard, but that "no case is precisely on point; after all, each Section 455(a) case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." As in this case, United States v. Jordan involved a close personal relationship between the judge and a lawyer involved in the case. The Court noted that there was absolutely no question of the judge's bias, but that nonetheless, an objective observer, fully informed of the relationships and facts involved in that case might harbor some suspicion of impropriety. As the Fifth Circuit has noted in another case on this subject:

> Because 28 U.S.C. §455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all

> of the circumstances, would harbor doubts about the judge's impartiality. (Emphasis Added)

Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980). In United States v. Jordan, the Fifth Circuit relied heavily upon Liljeberg v. Health Services Acquisition Corp. In that case, the Supreme Court noted that a judge does not even have to have knowledge of the facts that create an appearance of impropriety "so long as the public might reasonably believe that he or she knew." 108 S.Ct. at 2194.

In this case, Your Honor's relationships with Mr. Levenson and Mr. Amato are very well known. It is unfortunate that the Liljebergs have attempted to capitalize on those personal relationships in an apparent attempt to achieve an unfair advantage. An impartial observer aware of the nature of the Court's relationships with these gentlemen, and aware of the implications of the timing of LEI's enrollment of them as counsel in this long and complicated litigation, would understandably believe that the Liljebergs were attempting to acquire influence over the Court. This would be reinforced by the knowledge that the Liljebergs have accused others of using, and have themselves threatened to use, improper judicial and political influence.

One of the reasons cited by the Fifth Circuit for denying the Liljebergs' request for recusal of Judge Mentz in the Travelers litigation was the Liljebergs' timing. "Only after being unsuccessful [in a jury trial in one of three cases they lost] did they seek recusal in all three." The cynicism of the timing of their attack on Judge Mentz reinforced the Fifth Circuit's result. See Exhibit A at pp. 11 and 13. The Fifth Circuit

noted that "a party feeling there is a basis for disqualification must make that known to the Court at the earliest possible moment." Id. at pp. 13-14. The Fifth Circuit specifically refused to "reward the Liljebergs" for their calculated timing. Once again, the Liljebergs' "calculated" timing, in this case in hiring two unneeded lawyers at the last minute, has revealed their intent. That timing should not be rewarded. In Travelers, the Liljebergs simply waited too late to alert the judge of their alleged concerns. "Had the Liljebergs acted promptly, the district judge could have considered disqualification before entering judgment . . ." Id. Unlike the Liljebergs, Lifemark has filed this motion as soon as practicable, before the Court has taken any substantive action of which either party could complain.

CONCLUSION

Lifemark regrets that this has occurred, and in the event this motion is granted, believes that the parties have been deprived of a competent judge who is well suited to try this case:

> [Our] stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

United States v. Jordan, supra, 49 F.3d at 157. Lifemark finds it offensive that because LEI has put Your Honor in this position, it has been forced to file this motion. However, given the standards set forth by the Fifth Circuit and Supreme Court under 28 U.S.C. §455, and given the risk that the result of this case would be questioned by

the "average person on the street" regardless of the Court's unbiased decisions, it is necessary that Lifemark ask Your Honor to recuse himself.

Respectfully submitted,

Miles P. Clements (La. #4184)
Joseph N. Mole, T.A. (La. #09538)
Michael R. Phillips (La. #21020)
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ATTORNEYS FOR PLAINTIFF, LIFEMARK HOSPITALS OF LOUISIANA, INC.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading on this 1st day of October, 1996 by hand delivery on all counsel of record.

EXHIBIT 5

```
* * * * * * * * * * * * *
IN RE:                  *
                        *
IMPEACHMENT INQUIRY OF  *
UNITED STATES           *
DISTRICT JUDGE          *
G. THOMAS PORTEOUS, JR. *
* * * * * * * * * * * * *
```

TESTIMONY OF **LEONARD LEVENSON**

TAKEN ON MONDAY, THE 24TH DAY OF AUGUST, 2009 IN THE OFFICES OF THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF LOUISIANA, ROOM 210B, HALE BOGGS FEDERAL BUILDING, 500 POYDRAS STREET, NEW ORLEANS, LOUISIANA, 70130.

ORIGINAL

APPEARANCES:

MARK H. DUBESTER, ESQ.
SPECIAL IMPEACHMENT COUNSEL
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
B-353 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

AND:

HAROLD DAMELIN, ESQ.
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U.S. HOUSE OF REPRESENTATIVES
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H2-365 FORD HOB
WASHINGTON, D.C. 20515

REPRESENTING THE DEPONENT:

FRANZ ZIBILICH, ESQ.
131 AIRLINE DRIVE
METAIRIE, LOUISIANA, 70001

REPORTED BY:

JULIE M. CARROUM, CCR, RPR
CERTIFIED COURT REPORTER
REGISTERED PROFESSIONAL REPORTER

1 LEONARD LEVENSON
2 having been first duly sworn, was examined
3 and testified as follows:
4 EXAMINATION
5 BY MR. DUBESTER:
6 Q. Okay. Please state your name and
7 spell your last name.
8 A. Leonard Levenson, L-E-V-E-N-S-O-N.
9 Q. And what do you do for a living
10 and where's your practice?
11 A. I'm an attorney in New Orleans.
12 Louisiana.
13 Q. Okay. And Mr. Levenson, you're
14 here pursuant to a subpoena issued by the
15 House of Representatives in Washington, D.C.
16 signed by John Conyers, Chairman of the
17 Judiciary Committee dated July of 2009. In
18 connection with your testimony you've been
19 served with an order compelling your
20 testimony, and it's calling for an immunity
21 order. You were provided that in connection
22 prior to your testimony here today.
23 A. Yes.
24 Q. Is that correct?
25 A. That's correct, sir.

1 Q. Okay. And you're here with a
2 lawyer; is that correct?
3 A. That's correct.
4 Q. What's his name?
5 A. Franz Zibilich.
6 Q. Okay. If at any point in time you
7 want to stop to consult with Mr. Zibilich
8 about any part of your testimony or to --
9 simply ask for a break and you'll be
10 afforded a break. Okay?
11 A. Thank you.
12 Q. Okay. Now, Mr. Levenson, some of
13 these matters I'm about to discuss you've
14 discussed on other occasions, but just
15 simply as a way of starting, I'm going to
16 ask you some preliminary questions and we'll
17 go from there. Okay?
18 A. Okay.
19 Q. First of all, just a little bit
20 background. When did you graduate from law
21 school?
22 A. 1976.
23 Q. And where did you go to law
24 school?
25 A. Loyola.

1 Q. And at some point in your legal
2 career did you come to be friends with, I'm
3 going to call him Judge Porteous?
4 A. I did.
5 Q. And just for the record, just
6 describe how that came about.
7 A. I tried a case over in state
8 court, 24th JDC. And I guess it was over a
9 span of a couple of days. And just as a
10 result of being in court and trying that
11 case, we had become friendly.
12 Q. What was the name of that case?
13 A. Egudin versus Carriage Court
14 Condominiums, et al.
15 Q. And will you spell Egudin?
16 A. E-G-U-D-I-N.
17 Q. And was that a win for you?
18 A. Yeah. Yes.
19 Q. Okay. And in what way was it less
20 than a complete win and what way was it a
21 good win?
22 A. It was a good win because my
23 client succeeded in, at least temporarily,
24 obtaining title to a condominium that he had
25 put up the full purchase price in cash as a

1 deposit. However, he was not familiar with
2 the rule of state law, and there was an
3 existing mortgage on the property that was
4 eventually foreclosed. That case then from
5 the State Court ended up in Bankruptcy Court
6 and then in the Federal District Court.
7 Q. Okay. And was that a jury trial
8 or a non-jury trial?
9 A. It was non-jury trial everywhere.
10 Q. So your trial was before Judge
11 Porteous; is that correct?
12 A. The initial trial was in front of
13 Judge Porteous, that's correct.
14 Q. And in connection with that
15 verdict that you won, did Judge Porteous
16 award you legal fees?
17 A. I believe he did.
18 Q. And do you recall the approximate
19 amount of the legal fees?
20 A. I don't recall the amount, but I
21 think someone suggested it was in the
22 neighborhood of like 27,000.
23 Q. Okay. Subsequent to that time did
24 you form a social relationship or a
25 friendship with Judge Porteous?

1 A. I did.
2 Q. And if that case started in 1987,
3 would that basically mark the beginning of
4 your friendship with Judge Porteous?
5 A. Yes. I'm a little surprised it
6 was '87, but yes.
7 Q. And just to put a bookmark on
8 this, did there come a point in time where
9 your friendship with Judge Porteous came to
10 an end?
11 A. Yes.
12 Q. And if you can associate that with
13 a date, do so. If you can associate that
14 with an event, then please do so.
15 A. The event would have been the
16 first time that I received a visit from the
17 Federal Bureau of Investigation, which
18 someone has mentioned was around 2003.
19 Q. Okay. So that's -- whenever that
20 was, whenever the actual date it was, it was
21 approximate -- it was around the time that
22 you were interviewed by the Bureau; is that
23 correct?
24 A. Yes. And on advice of counsel I
25 was to not have any contact with Judge

1 Porteous.
2 Q. Okay. Now, I'm going to ask you
3 about a couple of things that occurred
4 during this period involving your
5 relationship with Judge Porteous. First, I
6 want to ask you about some -- the following:
7 Did you ever go on hunting trips in which
8 Judge Porteous was an attendee?
9 A. I did.
10 Q. And tell me what you recall about
11 the, about those hunting trips. Let me
12 start as follows: How many hunting trips
13 did you go on?
14 A. I only remember going on two
15 hunting trips.
16 Q. Okay. And do you recall aspects
17 of the two trips in chronological order?
18 A. The first trip would have been to
19 a friend's farm in Mississippi outside of
20 Jackson, Mississippi. I don't recall exact
21 name of the town. And it was a weekend
22 trip. And as I recall, I went up for part
23 of a day and an evening.
24 Q. Okay. And who was the friend?
25 A. Allen Usry.

1 Q. How do you spell the last name?
2 A. U-S-R-Y.
3 Q. Is he also an attorney?
4 A. He is.
5 Q. And who else went on that trip?
6 A. My recollection is that it was a
7 gentleman by the name of David, whose last
8 name escapes me, who was a friend and/or
9 neighbor of the judge. Of course, the
10 judge. Allen was there. I believe his son
11 was there. Allen's partner, Pete Matthews,
12 was there.
13 Q. And was there --
14 A. I think Judge Brahney was there.
15 Q. And Judge Brahney is from which
16 court?
17 A. He was a bankruptcy judge in the
18 Eastern District.
19 Q. Who was the host of this trip?
20 A. Allen Usry.
21 Q. And what expenses or costs did you
22 have to assume personally for this trip?
23 A. None. I guess I paid for my
24 driving there and back.
25 Q. Okay.

1 A. Oh. And I think I had to buy a
2 permit to sit in the stand.
3 Q. Do you know -- is it your
4 assumption that Allen Usry also paid for
5 Judge Porteous?
6 A. Well, he was --
7 MR. ZIBILICH: I'm only going to
8 object, I'm only going to object to the
9 question because, paid for what? I don't
10 know if -- do you understand the question?
11 THE WITNESS: I was going to say,
12 he was a guest at his house. I don't know
13 that he paid for anything. I mean, he
14 certainly, I guess, fed him.
15 BY MR. DUBESTER:
16 Q. Now, does the fact that Judge
17 Brahney was present at this trip give you
18 any information as to whether or not this
19 occurred when Judge Porteous was a federal
20 judge or a state judge?
21 A. I think it would have been in the
22 nineties, so he would have been a federal
23 judge.
24 Q. Okay. And also because Judge
25 Brahney is a bankruptcy judge with practice

1 in the federal system; is that right?
2 A. Correct.
3 Q. Okay. Now, the second trip,
4 please describe that.
5 A. That was a trip at a place north
6 of Baton Rouge. Again, I'm not a hunter, so
7 I can't tell you the name of it. I'm sure
8 it's near some small town. I can't tell you
9 that either. It would have been sometime
10 after the first trip. There were several
11 people who were supposed to go, and at the
12 last minute it ended up being just Judge
13 Porteous and myself.
14 Q. And who, who had set up this trip?
15 A. I believe Allen Usry did.
16 Q. And was this at the same property
17 or --
18 A. No.
19 Q. -- a different property?
20 A. This was a different property.
21 This was a property up in, I want to say
22 north Louisiana, but I guess it's more like
23 central Louisiana.
24 Q. Whose property was it? Or was it
25 a property that was rented or leased for the

1 purpose of hunting trips --
2 A. Yeah.
3 Q. -- if you know?
4 A. Well, no. I think it's a place
5 where you go there and you pay to hunt.
6 Q. Okay. And do you know who had,
7 who had leased that property for that
8 purpose?
9 A. I believe Allen set it all up.
10 Q. Okay.
11 A. That's the answer, if that's the
12 question.
13 Q. And was anybody -- did you have
14 to -- was anybody asked to pay the pro rata
15 share of whatever the leasing costs were, or
16 was everybody a guest on this trip as you've
17 described the first trip?
18 A. Well, I thought I was to pay a
19 portion of the trip, but I couldn't find any
20 records where I did. I would have suspected
21 I would have had to pay for myself, which
22 would have been less than, I guess, going
23 there, because I just went there to watch
24 and eat. But because it ended up only being
25 two people, I don't know that I paid

1 anything and couldn't find any record where
2 I paid anything.
3 Q. Okay. Now, you've indicated that
4 this was the second of the two trips
5 chronologically; is that right?
6 A. I believe. Yes.
7 Q. So did you -- so on this trip it
8 was just you and Judge Porteous; is that
9 right?
10 A. By the time the smoke cleared,
11 that was it.
12 Q. Did you drive to this location
13 together?
14 A. Yes.
15 Q. And who drove?
16 A. I drove.
17 Q. And how long were you there?
18 A. Maybe two days.
19 Q. And what did you do during these
20 two days?
21 A. I brought some work with me. I
22 rode the property. I ate. I drank. I
23 don't think I got to sit in a stand there,
24 which was okay with me.
25 Q. Who provided the food?

1 A. Well, they do where this place is.
2 Q. I see. So it's, is it a lodge or
3 some facility which has meals and that sort
4 of thing?
5 A. Yeah, it wasn't very fancy, but
6 lodge would be, I guess, a good term. It
7 was like cabins.
8 Q. Right. Did you spend -- did you
9 share a room with Judge Porteous in the
10 cabin?
11 A. Yes.
12 Q. And so you -- and that was for two
13 nights?
14 A. I'm going to guess two nights. It
15 was more than one.
16 Q. And can you give your best
17 estimate of when this occurred?
18 A. In the nineties.
19 Q. Just as a marking point in time,
20 you became an attorney -- you were brought
21 into the Liljeberg case in September of '96,
22 if you just accept that as a date. On
23 either the first trip or the second trip,
24 were those before or after you were an
25 attorney, after the Liljeberg case had

1 commenced with you being an attorney? I'm
2 sorry. That was awkwardly phrased.
3 Neither the first trip or the
4 second trip had you already started
5 representing the Liljebergs?
6 A. I'm not certain. But if there was
7 another sentinel date in there, I could
8 probably answer that better. I mean, '96 is
9 when I got into the Liljeberg case?
10 Q. Accept that for purposes of this
11 question.
12 A. So that would have been...
13 MR. ZIBILICH: Counsel, if you
14 wouldn't mind reminding him about when Judge
15 Porteous arrived over at Federal Court, that
16 might help him.
17 BY MR. DUBESTER:
18 Q. Judge Porteous became a federal
19 judge in October '94.
20 A. And what was the question? Was
21 it, the hunting trips, after my involvement
22 with the Liljeberg case?
23 Q. Yes.
24 A. If I had to guess, I would guess
25 yes.

1 Q. So it was while the Liljeberg case
2 was pending. Is that correct?
3 A. If I had to guess, I would think
4 yes.
5 Q. Okay. Are there records that
6 exist anywhere which would clarify the
7 precise dates of those trips to the best of
8 your knowledge?
9 A. I don't think I had any records,
10 but whatever records I had, I've previously
11 turned over subject -- in response to a
12 subpoena.
13 MR. ZIBILICH: So the record is
14 clear, turned over to whom?
15 THE WITNESS: Either the Federal
16 Bureau of Investigation or the Department of
17 Justice.
18 BY MR. DUBESTER:
19 Q. Now, were there occasions that you
20 went to Las Vegas either as part of a group
21 or individually in which Judge Porteous was
22 present either as part of that same group or
23 as coincidentally or for other reasons and
24 you happened to meet him in Las Vegas?
25 A. Yes.

1 Q. Okay. So I'm going to ask you
2 this at a very general level. Can you
3 describe what you recall about the separate
4 trips and the circumstances where that --
5 the circumstances surrounding those trips?
6 And then from there my next set of questions
7 is going to be, what specifically do you
8 recall your contacts were with Judge
9 Porteous and what meals and/or entertainment
10 you provided to Judge Porteous on those
11 trips?
12 A. I can recall going on at least
13 one, what has been referred to as Bill Hall
14 trips --
15 Q. Okay.
16 A. -- which were the fundraising
17 trips for Bill Hall who had run for office
18 and lost. And I think he was trying to pay
19 back his campaign debt. I went on at least
20 one of those, maybe two, that Judge Porteous
21 was on.
22 Q. Okay. So these would have been
23 when Judge Porteous was still a state judge?
24 A. I know one for sure was when he
25 was still a state judge. The second one I'm

1 not certain.
2 Q. Okay. And when you say the second
3 one, you're saying if there is a second one?
4 A. Yes, if there was a second one.
5 But it seems there was another trip that
6 sounded to me based upon some of the facts
7 that I've heard, would have been a Bill Hall
8 trip, because it involved the Riviera Hotel
9 or Hotel Riviera, whatever they call it.
10 And I think that's where he did his trips.
11 Q. Do you remember going to the
12 Riviera Hotel?
13 A. I went to the Riviera Hotel. I
14 remember it.
15 Q. Okay. And in one of the trips
16 which we've called the Judge Hall trips, do
17 you remember whether or not you shared a
18 room with Judge Porteous?
19 A. I shared a room with Judge
20 Porteous at the Riviera on one trip at
21 least.
22 Q. And on that trip, did you pay for
23 any meals or entertainment for Judge
24 Porteous?
25 A. I don't have any specific

1 recollection, but I can tell you that
2 certainly we probably took turns buying
3 drinks and dinner and things, people who
4 were on the trip, other lawyers who were on
5 the trip.
6 Q. Okay. And you say by the word we,
7 who are you talking about?
8 A. Other people who would have been
9 on the trip.
10 Q. Name some of the people who would
11 have been part of the group providing buying
12 drinks.
13 A. I believe that Chip Forstall was
14 on at least one trip, maybe Don Gardner.
15 That's kind of a stretch, but I think maybe
16 he was on a trip.
17 Q. Do you remember that on the trip
18 that you roomed with Porteous, Forstall
19 roomed with Giacobbe?
20 A. That's correct.
21 Q. And when you say you don't have a
22 specific recollection of what you paid for,
23 can you state with confidence that you're
24 confident that you paid for some aspects of
25 drinks or meals or other entertainment --

1 A. Yes.
2 Q. -- for which Judge Porteous would
3 have been a beneficiary?
4 A. Yes.
5 Q. And, okay. On a subsequent --
6 describe any --
7 A. Okay.
8 Q. -- any subsequent trip you took to
9 Las Vegas in which Judge Porteous would have
10 been present.
11 A. I remember a trip, but for some
12 reason the year 1999 comes to mind. I'm not
13 confident it's 1999. I think maybe some
14 records we turned over may have referred to
15 that. It seems that I was in Las Vegas in
16 1999 with my wife, and Judge Porteous was in
17 Las Vegas with his wife in 1999. I don't
18 recall traveling with him. I do remember
19 going to a national bull riding championship
20 with him out there. I remember going to
21 dinner one time with him out there. I don't
22 want to use the word concert, but we went to
23 something at, I think it was at Caesars
24 Hotel that he had access to, like Tracy
25 Lawrence or somebody was playing.

1 Q. On any of these events you've
2 described, national bull riding, a dinner at
3 Caesars, and a concert, did you pay for
4 Judge Porteous?
5 A. I paid for the dinner. I don't
6 recall where the dinner was. I paid for the
7 dinner.
8 Q. Who else was at this dinner in
9 addition to Judge Porteous?
10 A. His wife and my wife.
11 Q. And if this was in '99, to the
12 best of your recollection, then that would
13 have been during the pendency of the
14 Liljeberg case; is that correct?
15 A. Yes. Also there may have been
16 other trips that involved the Jefferson Bar
17 Association where we would have been in Las
18 Vegas together sometime during the period of
19 the state bench in 1999. Excuse me, the
20 state bench. My first trip out there on the
21 Bill Hall excursion in 1999.
22 Q. And if you were out there and
23 Judge Porteous was out there on one of these
24 Jefferson Bar Association trips, again are
25 you confident that at some point you would

1 have been picking up meals and/or other,
2 and/or drinks and other entertainment for
3 Judge Porteous?
4 A. I would expect that probably,
5 probably a meal. If not a meal, certainly
6 drinks.
7 Q. Okay. I want to turn to trips to
8 D.C. for the D.C. Mardi Gras. Did you ever
9 come to Washington, D.C. for an event called
10 the D.C. --
11 A. Mardi Gras Ball.
12 Q. -- Mardi Gras in D.C.?
13 A. Yes, twice.
14 Q. And the first time, what were the
15 circumstances of that trip?
16 A. Judge Porteous' daughter was a
17 princess in the Mardi Gras Ball. And many
18 of his friends, including myself, went up to
19 D.C. for the event.
20 Q. And in Washington, D.C., tell --
21 would you describe some of the festivities
22 or what occurred?
23 A. Well, there's the ball, and I want
24 to say there was a, another event. Maybe it
25 was a dinner or maybe the dinner was part of

1 the ball. But there's at least one or two
2 events that you go to, including the ball,
3 where you buy tickets and you attend. And I
4 would have attended those.
5 Q. When you mentioned Judge Porteous'
6 friends went up for Judge Porteous'
7 daughter, who were some of his other friends
8 who went to Washington?
9 A. I know, I think his name is John
10 Gordon, is a friend of his, Dr. Finan who I
11 think is a John. That's why I'm a little
12 hesitant on the first name.
13 Q. How do you spell the last name?
14 A. Finan, F-I-N-A-N, Gordon,
15 G-O-R-D-O-N, I believe.
16 Q. Are those two, are those, are
17 those --
18 A. Non-lawyers?
19 Q. Yes.
20 A. Non-lawyers. Dr. Finan is an
21 Ob/Gyn.
22 Q. And was there a Dr. Cenac,
23 Christopher Cenac, who had something to do
24 with these parties in Washington?
25 A. Dr. Cenac was the king when my

1 daughter was the princess.
2 MR. ZIBILICH: Tell him how to
3 spell Cenac.
4 THE WITNESS: C-E-N-A-C.
5 BY MR. DUBESTER:
6 Q. How did he get to be the king?
7 A. I don't know. I would guess he's
8 selected by who runs the Mardi Gras. Back
9 then would have been Senator Breaux who runs
10 the Mardi Gras Ball.
11 Q. When you were in Washington for
12 Judge -- for the D.C. Mardi Gras associated
13 with Judge Porteous' daughter, did you pay
14 for any meals or other entertainment for
15 Judge Porteous?
16 A. I don't think I would have paid
17 for any meals, because I think back then
18 almost all the meals were provided. But I'm
19 sure we probably had a round of drinks,
20 several of us at the bar, that I would have
21 paid for.
22 Q. Do you have any -- what is your
23 best estimate of the date, if you have one,
24 for Judge Porteous' daughter?
25 A. Three or four years before my

1 daughter's maybe.
2 Q. Okay. And we'll go to the next
3 one. Was there a second time you came to
4 Washington for one of these events?
5 A. Yes, there was.
6 Q. And tell me about that.
7 A. My daughter was a princess in the
8 Mardi Gras Ball, and I went up there for
9 that.
10 Q. And how did it come to be that
11 your daughter became the princess?
12 A. My daughter wanted to be the
13 princess in the Mardi Gras Ball, which leads
14 me to believe that my daughter perhaps may
15 have gone on the first trip with us up
16 there. Otherwise, I don't know how she
17 would have known about it and wanted to do
18 it. And I had --
19 MR. ZIBILICH: Maw.
20 THE WITNESS: Huh?
21 MR. ZIBILICH: It's called Maw.
22 THE WITNESS: Yeah. No, it wasn't
23 her mother. It was her. And I remember
24 asking Rhonda and Judge Porteous if they
25 could see if my daughter could do it.

1 BY MR. DUBESTER:
2 Q. And what happened next?
3 A. She got selected.
4 Q. Do you know what either Rhonda or
5 Judge Porteous did to help your daughter get
6 selected?
7 A. Exactly, no. But I think they
8 spoke to John Breaux's aide, Kyle France.
9 Q. And how do you spell Kyle?
10 A. K-Y-L-E, I think.
11 Q. And did you have personal
12 conversations with Judge Porteous about this
13 or with Rhonda about this or with both?
14 A. I would say both. There wouldn't
15 have been many conversations other than, "MY
16 daughter would like to do this."
17 Q. You have used the term Rhonda.
18 Who is she?
19 A. Rhonda Danos was Judge Porteous'
20 secretary.
21 Q. To the best of your recollection,
22 can you -- do you have any sense of when
23 that was? And if you don't know the actual
24 date, is there any event that you associate
25 that with?

1 A. Yeah. I can tell the event. The
2 event, the day of the actual Mardi Gras
3 Ball, which was probably on a Saturday, was
4 the day that the space shuttle exploded.
5 Because I remember going down to have to get
6 some tickets. Senator Breaux and some
7 people were in the room watching the
8 television. I was unaware this had just
9 happened. It was a very somber mood.
10 Actually I think they had talked about
11 canceling the ball.
12 Q. So the second -- and in connection
13 with the second event, did you provide meals
14 and/or entertainment or anything else of
15 value to Judge Porteous?
16 A. Again, I certainly would have
17 bought a round of drinks. I remember one
18 night we went out to dinner with my friends
19 who had come up there. And I don't really
20 recall if he would have been there or not.
21 He certainly was invited.
22 Q. Okay.
23 A. But he would have known many, many
24 people there, so I can't say with absolute
25 certainty that he came to dinner.

1 Q. Now, did you ever purchase tickets
2 or arrange travel through Rhonda Danos?
3 A. I did.
4 Q. And how is it that she being Judge
5 Porteous' secretary would be a person that
6 you would go to to arrange tickets for
7 travel?
8 A. She was a travel agent on the
9 side.
10 Q. And why did you purchase travel
11 through her as opposed to having your own
12 secretary do it or just do it yourself?
13 A. Well, I usually schedule my own
14 travel and depo -- I handle my own calendar.
15 So when there's a mistake, I get to yell at
16 no one but myself.
17 Q. Did you, when you have to make
18 travel, did you call her at her office in
19 Judge Porteous' chambers?
20 A. I probably would have called her
21 there and at her house.
22 Q. Well, you were never specifically
23 told you can't call me at work, you have to
24 only call me at home or anything like that?
25 A. No.

1 Q. So you would have just called her
2 where you could reach her --
3 A. Yes.
4 Q. -- in order to accomplish whatever
5 you needed to do --
6 A. Yes.
7 Q. -- is that right? When you
8 were -- when Judge Porteous was a state
9 judge, just ask you to list the, just list
10 the restaurants that you would take him to.
11 A. Mandina's, M-A-N-D-I-N-A, the Beef
12 Connection, Ruth's Chris.
13 Q. Red Maple?
14 A. Oh, Red Maple.
15 Q. Bon Ton?
16 A. Bon Ton maybe.
17 Q. Okay. And who were some of the
18 other attorneys or other persons who you
19 would see around the courthouse who you
20 would see taking Judge Porteous to lunch?
21 A. Dick Chopin, Don Gardner, Ray
22 Pelleteri.
23 Q. Creely and Amato?
24 A. Creely and Amato. And I'm sure
25 there's others that I'd give some thought

1 to.
2 Q. Now, when you would see Judge
3 Porteous with Dick Chopin, would that be
4 when Judge Porteous was a federal judge or
5 when he was a state judge?
6 A. If -- I would say probably both.
7 Q. What restaurants do you remember
8 seeing Chopin at with Judge Porteous?
9 A. Oh, another restaurant might have
10 been The Rib Room.
11 Q. What other --
12 A. Probably.
13 Q. What restaurants do you recall
14 seeing --
15 A. Probably, you know, restaurants
16 that I told you that we frequented. It was
17 probably the same restaurants, some of the
18 same restaurants.
19 Q. Were you invited to Las Vegas for
20 his, in 1999, for his son's bachelor party?
21 A. I don't remember the year, but
22 yes, I was.
23 Q. Did you go?
24 A. I did not go.
25 Q. Do you know if you went to that

1 son's wedding?
2 A. I remember going to the reception.
3 Q. Well, you've had several cases in
4 Federal Court with Judge Porteous. I'm just
5 going to read off the name of the case.
6 Just tell me what you remember about that.
7 This is just sort of to establish what they
8 were or to the best of your recollection. I
9 understand there's several. The Alliance
10 General Insurance Company versus Louisiana
11 Sheriff's Association?
12 A. That was a lawsuit involving an
13 excess insurer suit against numerous
14 sheriffs and the sheriffs' underlying self
15 insurance fund to attempt to rescind an
16 excess insurance policy or policies. And I
17 was -- there were several defendants on the
18 defense side. Did I say several defense
19 attorneys? Let me rephrase that. I don't
20 know what I said. There were several
21 lawyers who represented various defendants
22 in that case.
23 Q. Okay. Were you one of the lead
24 defense lawyers on that?
25 A. I was certainly one of the

1 lawyers. I guess I was -- I believe the
2 sharp defendant was -- yes.
3 Q. And what was the disposition of
4 that?
5 A. Summary judgment was granted in
6 favor of all defendants.
7 Q. Did Judge Porteous grant you that?
8 A. He did. He granted in favor of
9 all defendants.
10 Q. And was Mr. Usry one of the
11 attorneys who was also representing the
12 defendants?
13 A. It was either he or his partner,
14 Pete Matthews.
15 Q. If the records from the court show
16 he was the named person who had submitted
17 his appearance in the case, does that tell
18 you who actually was doing the work or not?
19 I mean, does that, does that tell you who
20 actually appeared in court, or, or is
21 that --
22 A. Not necessarily. Pete Matthews
23 and Allen Usry sometimes interchanged in
24 these type of cases.
25 Q. Would one of them sometimes appear

1 for a party and then at a subsequent --
2 A. It will be the other one, yeah. I
3 mean, when I say they're interchangeable,
4 you may have Allen there today, Pete there
5 tomorrow, Allen there the next day, Pete
6 there. They're, they're literally
7 interchangeable.
8 Q. The hunting trips that you've
9 talked about, do you know whether or not
10 these occurred prior to, during, or
11 subsequent to the pendency of the Alliance
12 General case? And to help you with that, it
13 appears that went from March of '96 to
14 roughly May of '99.
15 A. If I had to guess, I would say
16 prior to and/or pending.
17 Q. Okay. The First National Bank of
18 Chicago versus Evans, it appears -- and this
19 will refresh your recollection. Do you
20 recall being somehow appointed or named as a
21 curator for a missing defendant or missing
22 party named Paulette Weber Evans?
23 A. I remember being appointed to
24 locate an absentee defendant, and I believe
25 that was the case.

1 Q. And who appointed you?
2 A. Judge Porteous.
3 Q. If the court records show that you
4 received $473.32 as payment in
5 reimbursement, does that sound about right?
6 A. I wouldn't dispute it.
7 Q. Would you have gotten any other
8 fees from representing this --
9 A. No, not --
10 Q. -- missing defendant?
11 A. Excuse me. I didn't mean to cut
12 you off.
13 Q. Would you have received anything
14 else from representing any missing party in
15 a case like that?
16 A. No.
17 Q. Okay. Do you recall a case,
18 Joseph versus Sears Roebuck and Company, in
19 front of Judge Porteous?
20 A. I do not.
21 Q. Do you recall a case Siddiqui
22 Group versus Shell Oil Company which was in
23 front of Judge Porteous?
24 A. I remember being involved in the
25 Siddiqui case. And certainly if the record

1 shows that it was in front of Judge
2 Porteous, I wouldn't dispute it.
3 Q. And what was the Liberty Mutual
4 Fire Insurance Company versus Ravannack
5 case?
6 A. It was my neighbor's case that
7 involved a lawsuit against his builder that
8 we filed in state court. And I believe
9 Liberty Mutual then filed some type of
10 declaratory action in federal court under
11 the homeowner's policy to deny coverage, and
12 I think to demand access to the property by
13 an expert engineer that I opposed.
14 Q. This was -- this ended up being a
15 very complicated piece of litigation which
16 went on for years; is that correct?
17 A. One of them, yes.
18 Q. And it went on -- it was filed in
19 April 2000. It was pending up until 2006
20 when it was reassigned to Judge Barbier; is
21 that correct?
22 A. That's correct.
23 Q. Do you remember the Holmes versus
24 Consolidated Companies, Inc. case in which
25 you represented Consolidated Companies

1 involving -- in their defense of an
2 employment discrimination case?
3 A. I do now, yes.
4 Q. And tell, tell me what -- or state
5 for the record what that was about.
6 A. That was a -- actually I think
7 there were, I actually think there were two
8 cases. Maybe one was in another court. And
9 I was brought in for Conco because they were
10 afraid that their lawyer, who although was
11 very good at employment discrimination and
12 knew what he was doing, in the event he was
13 not going to be successful in summary
14 judgment, that they wanted somebody with
15 more trial experience, because he didn't
16 have very much jury appeal. And so I was
17 being brought in to get up to speed to try
18 the case to the jury. It settled. They
19 both settled after I became involved for a
20 minimal amount.
21 Q. Was that a winner for you?
22 A. It was certainly a winner for the
23 client, and they were able to settle it and
24 stop the bleeding of attorneys' fees.
25 Q. Did, in that case, did Judge

1 Porteous dismiss the plaintiff's claims,
2 which I guess were retaliatory discharge,
3 constructive discharge, intentional
4 infliction of emotional distress?
5 A. I'm going to tell you my
6 recollection was it was settled, and it was
7 voluntarily dismissed. I think the summary
8 judgment was filed on behalf of the
9 defendants, and the summary judgment was
10 denied, is my recollection.
11 Q. Okay.
12 A. Is that wrong?
13 MR. ZIBILICH: Today you don't get
14 to ask questions.
15 THE WITNESS: Okay.
16 MR. ZIBILICH: Sorry.
17 THE WITNESS: I mean, my, my
18 recollection of that case was that the
19 summary judgment was a foot and a half, two
20 foot, two feet thick that was denied. And
21 then we sat down and settled the case for a
22 minimal amount.
23 MR. ZIBILICH: Can we go off the
24 record for a second?
25 (Off-the-record discussion.)

1 BY MR. DUBESTER:
2 Q. What about the Loehn versus Hardin
3 case? Loehn is spelled L-O-E-H-N.
4 A. I don't remember the case. Tommy
5 Loehn is a friend of mine who I went to law
6 school with. I represented him in other
7 cases. I remember one case that was in the
8 state court proceeding that we did a whole
9 lot of work in.
10 Q. What about Salatich,
11 S-A-L-A-T-I-C-H, versus America Online?
12 A. That was a case that I was brought
13 into that was going to be an MDL in
14 California, and I ended up getting out of
15 the case.
16 Q. Okay. What about Morales V.
17 Trippe?
18 A. I believe Morales was a friend of
19 my secretary's, and I believe it was a
20 personal injury case that may have been
21 removed to federal court.
22 Q. Now --
23 A. And I believe settled.
24 Q. And who did you represent,
25 plaintiff or the defendant?

1 A. The plaintiff.
2 Q. And were you satisfied with the
3 settlement?
4 A. I think there was a limitation,
5 because I think there was an insufficient
6 amount of insurance coverage. So I think
7 that the -- we probably, if I recall the
8 case right, I think we had policy limits.
9 But the case would have been worth more
10 because of the nature of the industry --
11 injury. But if my recollection is right, it
12 was settled for the policy.
13 Q. Now, during the course of any of
14 these cases that we've gone over, do you
15 recall Judge Porteous formally alerting
16 counsel who is on the other side of you to
17 any facts or circumstances surrounding his
18 relationship with you?
19 A. I do not recall that.
20 Q. Okay. And if he had, if he had
21 done so, I take it that's something which
22 you would recall? In other words, if he had
23 sat down with parties and said, by the way,
24 you should know this about Mr. Levenson,
25 we're old friends, I helped his daughter

1 become a princess at the Mardi Gras, we've
2 shared rooms on hunting trips, we've shared
3 rooms in Las Vegas, he's taken me out to
4 many, many, many meals including meals at
5 high end restaurants, you should know that
6 as we proceed down the road of this
7 litigation, if he had done that to any -- in
8 any case in which you were one of the
9 attorneys, that's something which would
10 stand, which would stand out and you would
11 remember well? Isn't that right?
12 A. I think I would recall that.
13 Q. Okay. Can we go off the record
14 for one second?
15 (Off-the-record discussion.)
16 BY MR. DUBESTER:
17 Q. Okay. Was Judge Porteous a friend
18 of Leonard Cline's?
19 A. I believe so.
20 Q. And what is it that causes you to
21 have that recollection?
22 A. I think that maybe I saw him and
23 Lenny out at lunch one day, or maybe Lenny
24 told me they were friends or something.
25 Lenny and I were close friends in law

1 school, and we still speak from time to
2 time. We're cordial when we see each other.
3 And, you know, I'm not sure how I learned
4 that, but yeah, they were friends.
5 Q. Do you, by the way, do you know if
6 Judge Porteous presided over some big
7 verdicts for Lenny Cline?
8 A. I don't know that.
9 Q. You mentioned in the Egudin case
10 that Judge Porteous awarded attorney's fees?
11 A. Correct.
12 Q. Do you recall that?
13 A. Yes.
14 Q. And assuming the amount, some
15 amount over $20,000, roughly what portion of
16 that did you end up collecting because of
17 problems with the plaintiff and/or problems
18 with the defendant?
19 A. A small portion. I'm trying to
20 find some records on that. But I would --
21 if -- it's certainly less than half, way
22 less than half. Because remember now, I got
23 to go to Bankruptcy Court and I got to go to
24 Federal District Court, all of which I don't
25 believe I was paid for either.

1 Q. I appreciate that you didn't get
2 paid in full. I'm just asking on the amount
3 that Judge Porteous awarded, the $27,000,
4 how much of that do you think you got to the
5 best of your recollection?
6 A. I'd say less than half.
7 Q. Okay.
8 A. Subject to my finding something.
9 Q. And in the Liljeberg case, do you
10 ever remember an incident where Judge
11 Porteous lost his temper at the opposing
12 counsel, Mr. Mole?
13 A. I do.
14 Q. Tell, please state and please just
15 describe that.
16 A. As I recall, there was a witness
17 on the stand. And at the conclusion of the
18 witness being examined, I believe the judge
19 asked the witness some questions. And then
20 Mr. Mole wished to ask some follow-up
21 questions. And at this point I don't
22 remember whether the witness was on the
23 stand or not. Judge Porteous said he would
24 not allow the follow-up questions because
25 they were not proper. And Mr. Mole kind of

1 lost his temper or became perhaps curt. And
2 I think the judge became very angry and made
3 it known he was angry and adjourned for the
4 day. If my recollection is correct, it was
5 on the afternoon of a Friday.
6 And then on Monday morning when we
7 went back into court, my recollection is
8 that the judge either apologized to Mr. Mole
9 or said that he had re-thought the matter,
10 and he would allow him to question the
11 witness further.
12 Q. But in addition to just getting
13 mad verbally, is there anything else Judge
14 Porteous did?
15 A. There were lots of bench books on
16 his bench. And I don't know if he knocked
17 them over intentionally or they -- because
18 he was doing -- leaving the bench, they fell
19 over. It made a loud noise, and it caught
20 everyone's attention.
21 Q. And did you -- have you ever given
22 Judge Porteous any significant amount of
23 cash directly or paid for any significant
24 financial obligations of his?
25 A. No.

1 Q. I'm talking about anything of the
2 following nature: Helping provide vehicles
3 for him or his family, paying tuition bills,
4 paying home mortgage payments, giving him
5 cash in the amounts of some amount because
6 he claimed he needed it for various personal
7 purposes?
8 A. No.
9 Q. Okay. I think with that, we're
10 done.
11 MR. ZIBILICH: No questions.
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25

1 WITNESS CERTIFICATE

2

3 I have read or have had the foregoing
4 testimony read to me and hereby certify that
5 it is a true and correct transcription of my
6 testimony with the exception of any attached
7 corrections or changes.

8

9

10

11

12

13 _____

14 LEONARD LEVENSON

15

16 PLEASE INDICATE

17

18 ( ) NO CORRECTIONS

19 ( ) CORRECTIONS; ERRATA SHEET(S) ENCLOSED

20

21

22

23

24

25

1 CERTIFICATE

2 I, Julie M. Carroum, Certified Court
3 Reporter, in and for the State of Louisiana,
4 do hereby certify that the testimony
5 contained herein, given by the named witness
6 in this volume, was reported by me in
7 stenographic machine shorthand and
8 transcribed under my personal direction and
9 supervision and is a true and correct
10 transcript to the best of my ability and
11 understanding.
12 I further certify that I am not of
13 counsel or related to any person
14 participating in this cause; and I am in no
15 way interested in the outcome of this event.
16
17
18
19 JULIE M. CARROUM, CCR, RPR
20 Certified Court Reporter (#85118)
Registered Professional Reporter
21
22
23 OFFICIAL SEAL
24 JULIE M. CARROUM
Certified Court Reporter
in and for the State of Louisiana
Certificate Number 85118
Certificate expires 12-31-09
25

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 DISMISS ARTICLE II OF THE HOUSE OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

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Dated: July 21, 2010

TABLE OF CONTENTS

FACTUAL BACKGROUND 4

ARGUMENT 6

I. By Alleging Pre-Federal Conduct, Article II Violates the Language and Intent of the Impeachment Clauses of the United States Constitution. 7

II. The Senate Has Convicted Judges Only For Misconduct Committed During Federal Service 10

III. The House's Own Experts Rejected Pre-Federal Conduct as a Proper Basis For Impeachment. 18

IV. The Post-Federal Conduct Alleged in Article II – Socializing and Networking – Involved No Dishonesty and Is Not an Impeachable Offense. 25

CONCLUSION 29

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, and files this Motion to Dismiss Article II of the Articles of Impeachment.[1]

Article II alleges that, as a state court judge, Judge Porteous engaged in conduct with certain bail bondsmen – Louis Marcotte and Lori Marcotte (brother and sister) – whereby he "solicited and accepted numerous things of value" and also took "official actions that benefitted the Marcottes." (111 Cong. Rec. S1645 (Mar. 17, 2010), hereinafter "Article II.")[2]

If sustained by the Senate, Article II would create a new and dangerous precedent that would allow Congress to remove judges and other federal officials on the basis of their alleged conduct prior to assuming federal office. Such a standard would be a direct threat against the independence of the judiciary and would allow for reciprocal removals of judges by rivaling parties. Even in the absence of a prior indictment of such conduct, Article II expressly relies on conduct going back decades before federal service to claim a basis for removal. This clearly was not the intent of the Framers in their careful crafting of the impeachment clauses of the Constitution. From the beginning of this Republic, impeachments have been limited to conduct

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[1] This Motion should be considered as a Motion to Dismiss under the Federal Rules of Civil Procedure, Rule 12(b)(6), and assumes the facts alleged in Article II. As stated, however, the allegations in Article II, and in the underlying Report of the House of Representatives, as prepared by House Impeachment Counsel, are factually incorrect, or contain overstatements, half-truths, and over-statements. This Motion takes the position that, putting all of that aside, the allegations in Article II do not state charges that are properly the subject of an impeachment.

[2] The allegations in Article II were raised repeatedly over a ten-year period. The FBI looked into the allegations before Judge Porteous's confirmation. The Metropolitan Crime Commission, an independent body, also examined these issues. According to documents from the Metropolitan Crime Commission, the FBI reportedly also looked into the allegations again soon after confirmation, including review under the Hobbs Act. Then, Judge Porteous was investigated with other Jefferson Parish judges as part of the Wrinkled Robe investigation. None of these investigations produced evidence to support a charge against Judge Porteous – as opposed to the Marcottes, who were indicted and ultimately agreed to plea deals offered by the government.

occurring while an individual was in the subject federal office as opposed to conduct that occurred prior to taking that position. As recognized by the Congressional Research Service, the Senate has never before applied the powers of impeachment to conduct occurring before the tenure in the office held at the time of the impeachment investigation.[3] Indeed, in prior cases, the Senate specifically has declined to convict on articles of impeachment based on conduct that was alleged to have occurred before the accused assumed the office that is the subject of the impeachment.

Despite this long-standing precedent, Article II focuses on conduct alleged to have occurred prior to Judge Porteous taking the federal bench. Indeed, in crafting Article II, the House reached back over 25 years (including 10 years before Judge Porteous took the federal bench) to find alleged impeachable conduct. Not only was the House contradicted by the precedent of this body, it was contradicted by the testimony of its own expert witnesses who warned that "[t]he State court stuff, well, that's arguably just State Court stuff" and that "there's not been any successful impeachment; that is to say, moved through the House and the Senate" based on events that took place prior to the person being a federal officer. (Hearing Before the Task Force on Judicial Impeachment of the House Committee on the Judiciary, December 15, 2009, at 47, 51-52, hereinafter "Dec. 15th Hearing.") The reasons for this are obvious. If the

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[3] The Congressional Research Service concluded, in reviewing the issues underlying this case, that:

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

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

Constitution could be used to impeach judges for conduct occurring prior to taking the federal bench, then impeachment could be wielded as a dangerous weapon for partisan or other improper purposes by effectively re-litigating, on a random basis, a judge's qualifications to hold office.

The House does little to disguise the fact that Article II depends entirely on "pre-federal" conduct, or conduct alleged to have occurred prior to Judge Porteous taking the federal bench. After its own constitutional experts failed to support a pre-federal article, the House added a brief, vague statement that "while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business." (Article II.) This is the only misconduct in Article II alleged to have occurred during Judge Porteous's federal judgeship.[4] The House Report concedes that, while on the federal bench, Judge Porteous could no longer set bonds for the Marcottes but nevertheless argues that because Judge Porteous conversed with the Marcottes at a cocktail reception, ate several restaurant meals with the Marcottes, and introduced the Marcottes to other State Court Judges on various occasions, he used the "strength" and "power" of his office improperly. (*See* Report 111-427 at 80-85, hereinafter "House Report.")

The House invites the Senate to convict Judge Porteous for nothing more than socializing and networking with friends whom the House finds disreputable. This sets a very dangerous precedent. If federal judges must fear impeachment merely for associating with people of whom the House disapproves, the risk of partisan abuse of the impeachment process increases exponentially. This could revive the specter of the "Impeach Earl Warren" campaign in the

[4] Article II also alleges that one of the bail bondsmen, Louis Marcotte, "made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." That, however, is not even alleged to be an action taken by Judge Porteous. Moreover, the exact language is also used in Article IV.

1950s and 1960s, in which the Chief Justice of the United States was threatened with impeachment because of his rulings on desegregation.

In effect, the House alleges that Judge Porteous's supposed attendance at a handful of lunches – over the course of seven years[5] – totaling an overall gift of approximately $246 (or an average of about $40 per lunch)[6] – amounts to an impeachable offense. As the House would have it, a half-dozen lunches with state bail bondsmen would be placed on a par with treason. Such an allegation makes a mockery of the constitutional standard and impeachment process.

Judge Porteous respectfully requests that the Senate dismiss Article II in its entirety as failing to state an impeachable offense.

FACTUAL BACKGROUND

Judge Porteous was elected Judge of the 24th Judicial District Court in the State of Louisiana in 1984 and remained in that position until October 1994. In August 1994, Judge Porteous was nominated by President Clinton to serve as United States District Court Judge for

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[5] It is not at all clear that Judge Porteous even attended four of the six lunches the House Report alleges he attended where he supposedly exerted his "power and prestige" with other state judges. *See* House Report at 81. For four of the lunches, the best evidence the House presents is that the lunch bill includes a reference to "Abs" or "Abso" which the House believes references an order for Absolut vodka – a drink Judge Porteous is claimed to favor. This appears to require the Senate to take some form of judicial notice that so few people in Louisiana drink Absolut that an appearance of a reference to that libation on a lunch bill inevitably leads to the conclusion that Judge Porteous must have attended the lunch.

[6] The $246 figure was calculated based on the total bill divided by number of people who reportedly attended these lunches:

(1) 8/6/1997 Lunch $287.03 total bill – five attendees – Porteous's alleged share = $57;
(2) 8/25/1997 Lunch $352.43 total bill – ten attendees – Porteous's alleged share = $35;
(3) 11/19/1997 Lunch $395.77 total bill – ten attendees – Porteous's alleged share = $39;
(4) 8/5/1998 Lunch $268.84 – nine attendees – Porteous's alleged share = $29;
(5) 2/1/2000 Lunch $328.94 – eight attendees – Porteous's alleged share = $41;
(6) 11/7/2000 Lunch $635.85 – fourteen attendees – Porteous's alleged share = $45.

These receipts are attached as Exhibit 1 to this Motion.

the Eastern District of Louisiana. Judge Porteous was confirmed by the Senate on October 7, 1994 and began serving in that position on October 28, 1994.

Article II begins by vaguely alleging that Judge Porteous "engaged in a longstanding pattern of corrupt conduct...." (Article II.) Article II states that this conduct began "in or about the late 1980s **while he was a State court judge** in the 24th Judicial District Court in the State of Louisiana...." (*Id.*) (emphasis added). Article II further defines this conduct, alleging that Judge Porteous "solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit...." (*Id.*) The Article alleges that while Judge Porteous solicited and accepted these things of value, he took "official actions that benefitted the Marcottes...**while on the State bench**." (*Id.*) (emphasis added).

Article II fails to make a single specific claim regarding federal bench activity, but explicitly details the actions Judge Porteous is alleged to have taken while on the State bench (i.e. accepted "meals, trips, home repairs, and car repairs" and "setting, reducing, and splitting bonds...and improperly setting aside or expunging felony convictions..."). (*Id.*) The House then attempts to salvage the Article from purely pre-federal office allegations by tangentially alluding to the federal bench at various points in the Article. The Article alleges that the "pattern of corrupt conduct" continued while Judge Porteous was on the federal bench, but fails to allege any act other than that "Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business." (*Id.*) The Article does not provide any additional information regarding this use of "power and prestige." (*Id.*) As discussed above, the House Report provides only a handful of vague references to Judge Porteous interacting with the Marcottes on several occasions over the course of seven years.

Finally, Article II attempts to attribute the alleged bad conduct of Louis Marcotte to Judge Porteous by alleging that "Judge Porteous well knew and understood" that Louis Marcotte "made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." (*Id.*) The Article does not allege that Judge Porteous suborned false statements or made a single false statement himself. Even accepting as true the bizarre speculation that Judge Porteous was somehow privy to the FBI agents' full interview with Marcotte, such an allegation, if successful, would make impeachment the sanction for merely suspecting false statements made by others – a standard that would defy limitation or logic.

ARGUMENT

Article II should be dismissed for several reasons. First, as a matter of precedent, the Senate has never convicted an individual on the basis of conduct which occurred prior to the individual taking the office for which he was being impeached. Article II would create new and dangerous precedent – endorsing a standard that would allow judges to be removed for alleged conduct that occurred decades before federal confirmation. Worse yet, this new precedent would be forged in a case where the defendant has not even been indicted, let alone convicted, of such wrongdoing. The House has made such allegations in past impeachments, but the Senate has specifically declined to convict on such pre-office conduct grounds, recognizing that such allegations would directly contradict the intentions of the Framers and untether the standard of impeachment from its constitutional moorings.[7] In fact, the House's own constitutional experts

[7] By "pre-office" conduct, we refer to activity that occurs before a current judicial office; "pre-federal" conduct more specifically refers to activity that occurs before holding any federal judicial office.

revealed that they do not believe that the conduct alleged in Article II can give rise to a conviction in the Senate.

Once the pre-federal conduct is removed, Article II is trivial, alleging that Judge Porteous, in some unspecific manner, engaged in a supposedly "high Crime" or "high Misdemeanor" by accepting no more than a half-dozen lunches averaging about $40 apiece over roughly a seven-year period. Article II should be dismissed in its entirety.

I. By Alleging Pre-Federal Conduct, Article II Violates the Language and Intent of the Impeachment Clauses of the United States Constitution.

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

been to confine impeachment of a federal judge to conduct while serving in the position for which the judge is being impeached, as opposed to "pre-federal" or "pre-office" conduct. This is an obvious and necessary distinction since Article III of the Constitution guarantees judges life tenure "during good behaviour" in office. (U.S. CONST. art. III, § 1.) Likewise, under Section 4 of Article II of the Constitution, the standard for impeachment refers to acts directly violating the oath of office in the cases of treason or bribery – neither of which is alleged in this case. Similarly, the meaning of "other high crimes and misdemeanors" historically has been confined to misconduct which occurred during a judge's tenure in office.

The record from the Federal Constitutional Convention reflects an intent by the Framers to confine impeachment to acts committed in office. Early language was tied directly to an officer's performance in office, allowing impeachment only for "malpractice or neglect of duty" which became, in the Committee of Detail, "treason, bribery, or corruption." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 78 (Harvard Univ. Press 1973). Ultimately, "corruption" was dropped by the Committee of Eleven.[8] *Id.* The additional Constitutional language, "high Crimes and Misdemeanors," was added after George Mason suggested on the floor of the Convention that "maladministration" be added to allow impeachment beyond the narrow categories of treason and bribery. *Id.* Madison remarked that "so vague a term [as maladministration] will be the equivalent to a tenure during the pleasure of the Senate," whereupon Mason substituted "high crimes and misdemeanors," which was adopted without demur. *Id.* at 91. Justice James Wilson, who had been a leading Framer, referred to

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

"malversation in office, or what are called high misdemeanors." *Id.* at 78. Alexander Hamilton, in Federalist No. 65, observed that:

> [t]he subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[9]

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

The record from the Constitutional Convention reveals an exclusive focus on conduct in office. While it is accepted that the standard is not just limited to the abuse of judicial functions, it is limited to conduct during office.[10] The only exception recognized by one of the House's own expert witnesses – Professor Akil Amar – is the act of concealing facts during confirmation, which forms the purported basis for Article IV. (*See* Dec. 15th Hearing at 17-18, 45-47.) The impeachable act, in such an example, is concealment in the run-up to confirmation and not the substantive acts (all pre-federal) which are being concealed. Article II would combine the rejected "corruption" standard with pre-federal acts in direct contradiction of the language and underlying intent of Section 4 of Article II of the Constitution. If allowed, judges would be faced with precisely the open-ended standard that Madison wanted to avoid, serving "tenure during the pleasure of the Senate" since, on an arbitrary fashion dictated by partisan interests, they could be removed for acts going back decades before they became federal judges.

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

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

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

One of the House Managers' own experts stressed previously that "no one has ever been impeached, much less removed from office, for something he or she did prior to assuming an impeachable position in the federal government." GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS, at 108. Throughout the history of the United States, only fifteen federal judges have been impeached by the House of Representatives.[11] Of these fifteen, only seven have been convicted and removed from office by the Senate. An analysis of their cases shows that the Senate has removed from office only those judges who explicitly abused the official federal constitutional powers bestowed upon them while in the office for which they were being impeached:

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

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

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

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

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

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

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

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

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

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

Archbald served as a district court judge in the Middle District of Pennsylvania from 1901 to 1911. *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 217-18 (Univ. of Illinois Press 1992). In 1911, Archbald was assigned to

a circuit judgeship on the United States Commerce Court, a federal judgeship. *Id.* at 218. During his time on the Commerce Court, Archbald was also appointed to, and confirmed for, a seat on the United States Court of Appeals for the Third Circuit. *Id.*

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

- Senator Bryan (D-FL) stated that he was "convinced that articles of impeachment lie only for conduct during the term of office then being filled." (S. Doc. No. 1140, 62d Cong., at 1635 (1913).)
- Senator Brandegee (R-CT) stated: "I vote 'not guilty' on article 13 because it alleges offenses some of which are alleged to have been committed by the respondent while he was... [in an] office he does not hold at present and did not hold at the time the articles were adopted[.]" (*Id.* at 1647.)
- Senator du Pont (R-DE) stated: "My vote of 'not guilty' upon the articles of impeachment against Judge R.W. Archbald numbered 7, 8, 9, 10, 11, 12, and 13 was based, in the main, upon the fact that the offenses therein charged were alleged to have been committed...when he was not holding his present office." (*Id.* at 1647.)
- Senator Works (R-CA) stated: "I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to his present office." (*Id.* at 1635.)

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[12] Article 13 was a "catch-all" count that charged Archbald with making a "regular business of profit" from the conduct alleged in the preceding articles. (*See* 62 Cong. Rec. S1647 (1913).) It specifically incorporated conduct from Archbald's district court judgeship, circuit court judgeship, and Commerce Court judgeship. For more detail regarding Article 13, see pages 15-16, below.

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

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

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

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

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

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

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

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

- Senator Works (R-CA) stated: "[t]he Constitution provides, in express terms, that judges appointed 'shall hold their offices during good behavior.' Therefore if a judge has maintained his good behavior during that time he has done nothing to forfeit his office . . . [n]either can such misbehavior, committed before his appointment, warrant a judgment disqualifying him from holding office[.]" (*Id.* at 1635-36.)

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

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

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

See id. at 1652. Senator du Pont (R-DE) reiterated this point by stating: "[t]he legality of the impeachment, so far as such offenses is concerned, is questionable, and in any event a precedent fraught with danger is created." *Id.* at 1647; *see also id.* at 1634 (Senator Borah (R-ID), voting not guilty on Articles 7-12 "because of a doubt I entertain as to the law"); *id.* at 1675 (Senator F.M. Simmons (D-NC), voting not guilty on Articles 7-12 because "I felt it my duty to give the respondent the benefit of this doubt").[14]

By impeaching Judge Porteous for pre-federal conduct, the House of Representatives seeks to reverse the Senate's long-standing precedent as set in the Archbald impeachment. (*See* H.R. Res. 1031, 111th Cong., at 18 (2010).) Indeed, if Judge Porteous is convicted on the basis of Article II, it would repudiate the Senate's vote of "not guilty" on each and every article relating exclusively to Judge Archbald's pre-office conduct (Articles 7-12) and over-rule 206 years of Senate precedent.

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

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

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

> That during the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court he...sought wrongfully to obtain credit from and through certain persons who interested in the results of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which [he was] a member.
>
> That the said Robert W. Archbald, being United States circuit judge and being then and there a judge of the United States Commerce Court...did undertake to carry on a general business for speculation and profit...for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and in furtherance of his efforts to compromise such litigation...willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce [relevant individuals]...to enter into various [] contracts and

> agreements in which he was then and there financially interested....[15]

The House Report's reliance on the conviction on the basis of Archbald's Article 13 is misleading, because several Senators expressly stated that their votes of "guilty" on Article 13 were based solely the Commerce Court misconduct. *See* S. Doc. No. 1140, at 1660 (Senator M'Cumber (R-ND), voting "not guilty" on Articles 7-12 because pre-office conduct is not impeachable, but voting "guilty" on Article 13 because "in doing so my vote was intended to express my conviction only as to those specific charges included in Article 13 upon which I had already voted 'guilty'"); *see also id.* at 1675 (Senator Simmons (D-NC), voting not guilty on Articles 7-12 because there was "doubt as to whether [senators] had the right to impeach the respondent for acts committed in an office which he no longer held," but voting guilty on Article 13 because "the charge contained therein was sustained if he was guilty of some of the material acts of misconduct therein charged while he was holding the office of circuit judge").[16] In regard to Article 13, Senator George Sutherland (R-UT), discussed the dilemma created by voting on an Article so general that it touched upon most of the charges leveled against Archbald. (*Id.* at 1642.) Sutherland noted that Article 13 included the various articles that preceded it, on some of which he had voted guilty and on some not guilty: "It occurs to me that I can not consistently vote upon this article one way or the other." (*Id.*) Eight other senators asked to be excused on the same grounds. *Id.*

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

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

The House Report also misconstrues the Archbald precedent by analogizing Archbald's pre-office conduct in a federal office to Judge Porteous's pre-federal conduct in a State office. The House Report argues that "the 'prescribed functions' of Judge Porteous's prior office as State court judge were 'of the same general nature' as the office of district court judge that he presently occupies, and were thus 'susceptible to the same malversations and abuse.'" (House Report at 18.) In contrast to Judge Porteous's position as a state court judge before becoming a federal judge, the Brief on Behalf of the House of Representatives for Archbald's impeachment emphasized the interchangeability of the federal district and circuit court offices, and noted that the senior circuit judge could "designate and appoint any circuit judge of the circuit to hold said district court." *See* S. Doc. No. 1140, at 1063 ("There is such a close interrelation between the duties and powers of United States **district** and **circuit** judges as to make the two offices substantially the same within the contemplation of the constitutional provisions relating to impeachments") (emphasis added). The Archbald Impeachment Report accordingly argued that Archbald held "civil office, within the meaning of the Constitution, of the same judicial nature as the office held by him at the time of the commission of the offenses." *Id.* This commonality of function and office is obviously different under our Constitutional system when the office in which the questioned conduct allegedly took place was a *state* judgeship and the office from which the impeachment occurs is a *federal* judgeship. (*See, e.g.*, LA. CONST. art. V, § 22 (requiring Louisiana States judges to be elected, rather than appointed.) The effort to fudge the difference between federal and state offices and requirements of conduct is both transparent and unavailing. To cross this constitutional rubicon would allow future judges to be impeached for any prior conduct that suggests some failing that, while expressly not treason or bribery, could be claimed to show a corrupt tendency.

III. The House's Own Experts Rejected Pre-Federal Conduct as a Proper Basis For Impeachment.

Realizing that impeachment of a federal judge for pre-federal conduct would be unprecedented, the House sought the support of three different law professors – Charles G. Geyh, Michael J. Gerhardt, and Akil Reed Amar – to testify that the alleged conduct "provides a sufficient basis for impeachment." (Dec. 15th Hearing at 1.)[17] The House labeled these witnesses their "experts" and used their testimony as the basis for passing the Articles. (*Id.*) While endorsing the theoretical basis for Article IV's impeachment for concealing prior bad acts at confirmation, the witness testimony directly refuted the premise of Article II that pre-federal conduct may be a proper basis for impeachment.

In his testimony, Professor Gerhardt notes that "whether or not somebody may be subject to impeachment conviction and removal for conduct done prior to occupying that particular position...can be a difficult question." (*Id.* at 24.) In fact, Professor Gerhardt, upon questioning by Judge Porteous's counsel conceded that "there's not been any successful impeachment; that is to say, moved through the House or the Senate" based on events that took place prior to the person being a federal officer. (*Id.* at 52.) Professor Gerhardt broke down such pre-federal into "three kinds of misconduct . . . "

1. Misconduct that is committed prior to becoming a Federal judge and that is both inconsequential and unknown (or undisclosed) at the time of a judge's confirmation proceeding;

2. Misconduct that is known at the time the judge is confirmed; and

3. Misconduct that is egregious but not known at the time of the judge's confirmation proceedings.

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[17] Professor Geyh's testimony focused on the applicable Judicial Codes of Conduct, as opposed to the validity of charging and convicting on pre-federal conduct. Accordingly, his testimony will not be analyzed in this Motion.

(*See id.* at 29.) Professor Gerhardt concludes that "the Constitution clearly permits impeachment in the third circumstance **but not necessarily in either of the other two.**" (*Id.* (emphasis added).) Gerhardt suggests that the first type of misconduct is by definition "unimportant, innocuous, or trivial," and, "[a]s such it is the kind of misbehavior (if one wants to use that term) which no one would expect a nominee to disclose or that would, if disclosed, make any difference to the outcome." (*Id.*) In fact, much of what is alleged in Article II falls into this first category of misconduct that Professor Gerhardt identifies, including the acceptance of six lunches – valued at or less than $50 apiece – over a seven year period.[18] These lunches after Judge Porteous took the federal bench are among the variety of disparate allegations contained within Article II – a constitutional defect in and of itself[19] – intended to aggregate a series of acts which, individually and together, were not deemed sufficient to warrant any investigation, let alone a sanction, from the Louisiana State courts or the Louisiana State Bar.

In his testimony, Professor Gerhardt continued to explain that the "second type of misconduct is likely not to be impeachable, because the proper authority – the Senate – effectively ratifies the misconduct at the time it decides to confirm the judge." (*Id.* at 30.) Professor Gerhardt finishes by arguing that only the "third kind of misconduct" – misconduct that is "egregious and not known at the time of confirmation" – is impeachable behavior because it is bad behavior that by itself demonstrates a level of "moral depravity and bad judgment that is completely incompatible with the responsibilities of a judge." (*Id.*) Professor Gerhardt states

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[18] Judge Porteous does not necessarily accept the delineation and categorization of types of misconduct advanced by Professor Gerhardt but, for purposes of this motion, submits his own analysis of the facts as they apply to that framework.

[19] The aggregation of claims inherent in Article II and the other Articles is discussed in great detail in Judge G. Thomas Porteous, Jr.'s Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated or, in the Alternative, to Require Voting on Specific Allegations of Impeachable Conduct, being filed concurrently herewith.

that it is his understanding "that Judge Porteous has been charged with misconduct that falls into this third circumstance." (*Id.*) Later Professor Gerhardt states "I'm pretty confident that they [the Senate] didn't know anything about this." (*Id.* at 46.) Moreover, Professor Gerhardt stated that "I don't think the Senate knew this information. I'm confident had the Senate known it, it would not have done what it did." (*Id.*)

Contrary to Professor Gerhardt's supposition, discovery in this case shows that the underlying allegations in Article II were reported to and investigated by the FBI and submitted to the Senate before confirmation,[20] but were correctly found to be unsubstantiated and not warranting further action. Beginning on June 24, 1994, during its background investigation of Judge Porteous for his federal judgeship nomination, the FBI interviewed numerous witnesses. A review of the results of that background investigation, which was undertaken for the purpose of review by the Senate, reveals that the government was informed of the allegations of improper state court conduct contained in Article II. For example, the FBI was clearly aware that Judge Porteous maintained a relationship with the Marcottes. The FBI specifically interviewed Louis Marcotte during its background investigation of Judge Porteous, and Marcotte explained that he had known the Judge professionally and socially for the past ten years and that he sometimes went to lunch with Judge. (*See* PORT000000471, attached as Exhibit 2.) Moreover, confidential informants told the FBI that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PORT000000526, attached as Exhibit 3.) Based on

[20] While the House Managers supplied a general listing of all documents in their possession to defense counsel in the Hastings impeachment, Judge Porteous has been denied such limited discovery and House Impeachment Counsel have held back material that they deem unrelated to the Articles of Impeachment without concern for what the defense may find useful in establishing Judge Porteous's innocence. The American Bar Association and the Department of Justice have refused to directly provide documentation of their investigations into Judge Porteous to the defense. These matters are the subject of Motions for Assistance, which were previously filed with the Senate and are currently under review by the Committee.

this information, the FBI conducted additional interviews and further investigation and specifically sent an additional "note to DOJ" – all of which was provided to the Senate. (*See* PORT000000530, attached as Exhibit 4.) The additional information known to the Senate prior to Judge Porteous's confirmation is detailed in the chart below.

Claim In Article II	Information In FBI Background Investigation of Judge Porteous Provided to Senate Prior to Confirmation
Judge Porteous knew and was associated with the Marcottes.	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI that "he has known the candidate for approximately ten years" and that he "knows the candidate professionally and socially." (PORT000000471, attached as Exhibit 2.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous dined with the Marcottes	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI "that he sometimes goes to lunch with the candidate and attorneys in the area." (PORT000000471, attached as Exhibit 2.)
Judge Porteous accepted things of value from the Marcottes, including meals, trips, home repairs, and car repairs	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that the Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks" (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous set, reduced, and split bonds as requested by the Marcottes	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PORT000000526, attached as Exhibit 3.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge Porteous "frequently sign[ed] bonds ahead of time for bondsmen." (PORT000000526, attached as Exhibit 3.). (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that the candidate "indirectly received $10,000 from an individual in exchange for the candidate reducing his bond." (PORT000000463, attached as Exhibit 5); the FBI interviewed an individual, whose identity has been redacted from discovery documents, who reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take $12,500.00 to get [the boyfriend] out of jail" and that "$10,000.00 of this would go to Judge Porteous for the bond reduction." (PORT000000524, attached as Exhibit 6.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Porteous was "paid to reduce a bond" in a different case and "had been given $1,500 to reduce a bond" in that matter. (PORT000000526, attached as Exhibit 3.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous improperly set aside or expunged felony convictions	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]." (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)

Professor Gerhardt is not alone in believing that what the Senate knew prior to the confirmation would be material to impeachment proceedings based on pre-federal conduct. One of the House Managers, Congressman Gonzalez, stated that he was concerned about "[w]hat was the Senate was privy to." (Dec. 15th Hearing at 45.) He asked rhetorically, "How much did the Senate know?" (*Id.*) This concern was well founded and appears to be of even greater import in light of the information that House Impeachment Counsel now has made available to the defense, despite failing to cite it in the House Report.

Thus, even if the Senate were to conclude that the Porteous case did not fall into either of the first two Gerhardt categories, the case would not qualify for impeachment under the testimony of the House's own witnesses. Indeed, putting aside the fact that these allegations were known before confirmation, the Senate, according to Professor Gerhardt, would need to determine that the alleged misconduct rose to the level of "moral depravity," a high standard that would seemingly not apply to the alleged receipt of things of small value like meals, car maintenance, and the like. If accepting occasional lunches from professional associates in the small and closely connected legal community of Jefferson Parish, Louisiana, is a case of "moral depravity," not just courts but legislatures must be considered dens of depravity. In fact, both the House and Senate rules currently provide a general *de minimis* exception for gifts from private sources and allow for the acceptance of a gift (including the gift of a meal) if the gift has a value of below $50. House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, para. 1(a)(2). In fact, prior to 1996, there were no limits on the acceptance of free meals by members of Congress. (*See* House Ethics Manual, Cmte. on Standards of Official Congress, (2008 ed.), at 27-28.[21]) Judge

[21] The gift rules have changed repeatedly over the last several decades:

Porteous's acceptance of the gifts from the Marcottes each appeared to be of a value below or close to $50.00. As such, to convict Judge Porteous for the acceptance of these gifts, if they occurred, would assert evolving ethical standards that the Senate, acting as a jury in this matter, has rejected in its own ethical rules.

Finally, even if it is assumed that the acceptance of such gifts and other allegations in Article II did occur and was not disclosed to the Senate prior to confirmation, the third (and only impeachable) category for pre-federal conduct described by Professor Gerhardt would be the basis not of Article II, but Article IV. Professor Gerhardt concludes that "fraudulent suppression or misrepresentation of prior misconduct" is the most logical type of pre-federal behavior that would give rise to an impeachment of a federal officer. (Dec. 15th Hearing at 52.) Article IV alleges the failure to disclose such conduct. Article II seeks to remove Judge Porteous based on the underlying conduct itself. There is a fundamental difference. One act – the failure to disclose information about these acts – allegedly occurred during confirmation, as described in

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- From 1968 to 1990, the gift rules restricted the ability "to accept gifts from persons with a direct interest in legislation" but otherwise did not place a limit on meals or gifts received by members of Congress.
- From January 1, 1992, through December 31, 1995, the gift rules prohibited the acceptance "of gifts worth a total of more than $250 from any source in any one year." Exempted from this limitation, however, were "gifts of food and beverages consumed not in connection with gifts of lodging, *i.e.*, local meals, without any restriction as to cost or the source of the payment."
- In 1996, the House approved a new gift rule "that imposed significant, new limitations" on the acceptance of gifts, including the elimination of the meal exemption. The Senate gift rule included a provision that "generally allowed the acceptance of any gift valued below $50, with a limitation of less than $100 in gifts from any single source in a calendar year." In 1999, the House amended its gift rule to incorporate this provision of the Senate rule, allowing acceptance of gifts, including meals, if valued below $50.

See House Ethics Manual, Cmte. On Standards of Official Congress, (2008 ed.), at 27-29. *See also*, Robert F. Bauer et al., *Lobbying Under the New Disclosure and Gift Ban Requirements* (Am. Law. Inst.- Am. Bar Assoc. Course of Study, Feb. 21, 1997).

Article IV. The other acts, described in Article II, allegedly occurred over the course of a decade-long State judgeship. Notably, Professor Gerhardt recognized that even the third category presents "a difficult question," but it is a question that is raised only by Article IV, not Article II. (*Id.* at 24.)

The House Managers' other expert, Professor Akhil Reed Amar, also identified only a couple of specific circumstances in which a judge can be impeached for pre-federal conduct: (1) an individual "who bribes his very way into [the impeachable] office," and (2) "a person who procures a judgeship by lying to the President and lying to the Senate." (*Id.* at 18.)

Like Professor Gerhardt, Professor Amar focuses on whether information was falsified at confirmation as opposed to the underlying pre-federal conduct. Indeed, when pressed, Professor Amar states that "**the State court stuff, well, that's arguably just State Court stuff,**" indicating he did not believe that it, on its own, rose to the level of an impeachable offense. (*Id.* at 47 (emphasis added).)

Professor Amar does not identify any additional pre-federal or pre-office conduct that amounts to an impeachable offense and notably does not substantively discuss or apply his own standards to the conduct alleged in Article II. The House Managers probed whether Professor Amar would agree that an article of impeachment could be based solely on the pre-federal conduct as opposed to the failure to disclose information at confirmation. Professor Amar tellingly answered by describing Article IV, rather than Article II, in this exchange with Congressman Schiff:

> Congressman Schiff: But let's remove the affirmative duty to disclose and the questions of the Senate, and let's just focus on the conduct that took place before he was on the Federal bench. Do you believe that conduct in and of itself would be a basis for impeachment? Is there ample precedent or any precedent that conduct that solely predates the Federal bench in and of itself is a sufficient basis to impeach?

> Professor Amar: His concealment of this – if he had told everyone about it and been confirmed anyway, then in effect there is a kind of res judicata in the Senate itself that, having been given the facts and fairly adjudicating whether they want this person to hold office.... He could have come forward, but he concealed it. And that undercuts his ability to be a judge.

(Dec. 15th Hearing at 35.) What Professor Amar described is the claim under Article IV relating to omission of disclosure, as opposed to the claim under Article II relating to the actual commission of the pre-federal acts. Moreover, like Professor Gerhardt, Professor Amar recognized that even an Article IV claim would be invalid if the allegations were known to the FBI or Senate. as they were in this case. Accordingly, both of the experts who focused on impeachment rejected the basis for Article II, just as the Senate has historically rejected such pre-office claims.

IV. The Post-Federal Conduct Alleged in Article II – Socializing and Networking – Involved No Dishonesty and Is Not an Impeachable Offense.

As discussed above, the only federal bench misconduct alleged in Article II is that Judge Porteous "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes's business. ... Accordingly, [he] has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office." (Article II.)

The House alleges that Judge Porteous allegedly "attend[ed] meals with the Marcottes and other judicial officers," "receive[ed] the benefit of those free meals," and "provided the opportunity for the Marcottes to show off their relationship with him" thus constituting behavior "utterly lacking in honesty and integrity." (House Report at 20, 4.) In fact, Judge Porteous conferred no judicial benefit upon his longtime friends, the Marcottes, for their occasional

appearances with and gifts to him. The only benefit he is even alleged to have conferred on the Marcottes as a federal judge is the benefit of socializing and networking. (*See* House Report at 20 (premising the discussion of Judge Porteous's federal-bench conduct on the statement that his conduct "did not involve taking judicial actions to benefit the Marcottes" and conceding that **"there is no evidence** that Judge Porteous specifically communicated to these judges that he sought or intended for the Marcottes to form corrupt relationships with them . . . .") (emphasis added).) They simply went to lunch together.

In Article II, therefore, Judge Porteous is being impeached because the House disapproves of his personal associations, a remarkably slippery slope for a new standard of impeachment. It is a unsettling small step from penalizing a judge for his social interactions to penalizing him for his politics or his religion, if such were to be distasteful to some Members of Congress. This is not a far-fetched idea. The Senate has, at least, entertained movements such as the "Impeach Earl Warren" campaign over de-segregation.

For centuries, the Senate has maintained clear lines on the limits of impeachable conduct. Allowing Article II to go forward would render all of the precedent meaningless by allowing a judge to be removed on the basis of his role in forming unpopular social relationships. What is striking about this is that the House does not cite any specific violation of judicial ethics rules in Jefferson Parish or any past removal of a judge for similar social events or "unsavory" friends. Thus, the House would have the Senate remove a federal judge for conduct that occurred decades ago which the forum state does not deem worthy of sanction.

The most damning federal conduct that the House Report can allege is that Judge Porteous merely "brought strength to the table" when accompanying Louis Marcotte in business settings, a fact that may well have been lost on Judge Porteous who simply believed he was

dining with friends and acquaintances. (House Report at 79.) The House does not, and could not, claim a direct violation of any federal ethical rule for Judge Porteous to accept a handful of lunches from the Marcottes who were personal friends and had no business before his federal court.

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

> Justice William Johnson, President Jefferson's first appointment to the Court, regularly engaged in lengthy correspondence with Jefferson in which Jefferson sought to influence the internal functioning of the Court. In many of these letters, Jefferson sought to convince Johnson to work to return the Court to the earlier

> practice of seriatim opinions rather than the single majority opinion pioneered by Jefferson's arch-rival, Chief Justice John Marshall....
>
> Justice Samuel Chase, appointed by President Washington in 1796, began his political career as a Republican but converted to the Federalist cause with such enthusiasm that while on the Court he actively and publicly campaigned for the presidency of John Adams. This and some celebrated episodes of intemperance on the bench sufficiently angered Congress that Chase was impeached and tried, but acquitted....
>
> Justice Joseph Bradley, who served on the Court from 1870 until 1892, was... criticized for hearing a petition for appointment of a receiver brought by an old friend acting as counsel for the petitioner. His choice of receiver was also criticized by some who alleged misfeasance in the sale of the debtor's properties....
>
> Justice Willis Van Devanter, a 1910 Taft appointee, delivered two opinions in cases involving former client the Union Pacific Railroad. Harding appointee Pierce Butler also delivered court opinions involving his former railroad client, the Great Northern Railroad....
>
> A perhaps even more suspect extracurricular activity of Justice Frankfurter recently attained considerable attention when his protégé and former law clerk Philip Elman revealed in an interview that he and Justice Frankfurter had numerous conversations regarding internal court discussions. Justice Frankfurter was, in essence, informing Elman, then an Assistant Solicitor General for civil rights cases, of the positions of the Justices regarding segregation, and advising Elman as to how best involve the Government in the litigation chapter of the civil rights movement of the 1940s and 1950s....
>
> Justice Abe Fortas's close 'kitchen cabinet' relationship with President Lyndon Johnson demonstrated that the problem of the advisor-Justice did not end with Justices Brandeis and Frankfurter. The weight of authority suggests that Justice Fortas was frequently advising the President on matters ranging from Vietnam War strategy to re-election planning. This seemingly was widely known in Washington and tolerated until Justice Fortas's financial dealings brought him under an unfavorable spotlight.

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

Here, the House is seeking a conviction of Judge Porteous for acts that Congress has previously recognized do not constitute impeachable offenses. *See Hastings v. Judicial*

Conference of the U.S., 593 F. Supp. 1371, 1382 (D.D.C. 1984) ("Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense."). To seek impeachment and conviction here is to return to the prior English standard that allowed impeachment for ill-defined "divers deceits."[22] *See* Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938); *see also* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 11 (1999). The guarantee of life tenure and judicial independence means nothing if removal can occur on the basis of poor judgment in social acquaintances or, in the instant case, a small number of lunches during federal service.

CONCLUSION

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

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

WHEREFORE, Judge Porteous respectfully requests that the Senate dismiss Article II in its entirety.

Respectfully submitted,

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P.J. Meitl
Daniel T. O'Connor
Amos Jones
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 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

Harold Damelin – harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

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

/s/ P.J. Meitl

Exhibit 1

MERCHANT COPY

BEEF CONNECTION
GRETNA LA
01
APPROVAL CODE
AUG 06, 97 860452
LM MARCOTTE
AMEX 98/07
SALE
ROC # 094636
TERMINAL # 50030354
FOOD AND BEVERAGE
BASE AMOUNT $252.03
TIP AMOUNT 35
TOTAL 28703
X

Cardholder acknowledges receipt of goods and/or services in the amount of the Total shown hereon and agrees to perform the obligations set forth in the Cardholder's agreement with the issuer.

HAMCO G2

NO-LONGER Here

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
42901	8/6	1445	DD	5

1	Fried Ship Spc	15.00
2	4 Lobster 42 43 43 45	173.00
3	2 Soup	6.00
4	Sm tos	3.00
5	Sante mush	3.50
6	Br. tomatoes	3.50
7	Cap cheesecake	3.50
8	Bread pud	3.50
9	tea HH	6.25
10	Ab 11	9.00
11	B+B 1	5.50
12		231.75
13	Tax	20.28
14		252.03
15		
16		

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
42901			

Beef Connection Steak House

501 Gretna Boulevard
(Corner Belle Chasse Hwy & Gretna Blvd.)
Gretna, LA 70053

For Reservations Call:
(504) 366-3275

HP Exhibit 372(a)

DUPLICATE COPY

Card

Prepared For
LORI M MARCOTTE

Account Number

Closing Date
August 20, 1997

Transactions Continued

Amount $

August 6, 1997 BEEF CONNECTION GRETNA LA FOOD AND BEVERAGE TIP $35.00 Reference: 000094636	287.03

Continued on reverse

MERCHANT COPY

U

BEEF CONNECTION
GRETNA LA

01
APPROVAL CODE
AUG 25, 97 478260

LM MARCOTTE

ANEX 98/07

SALE

ROC # 095127 TERMINAL # 50030354

FOOD AND BEVERAGE

BASE AMOUNT $297.43

TIP AMOUNT 55.00

TOTAL 352.43

X

Cardholder acknowledges receipt of goods and/or services in the amount of the Total shown hereon and agrees to perform the obligations set forth in the Cardholder's agreement with the issuer

GENERAL CREDIT FORM - ST. LOUIS 42625

HAMCO G 2

Connie

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
43776	8/25	TV	C	10

1	Tappet	45 50
2	1 Dom RE	18 00
3	1 Dom Filet	18 00
4	3 Dom Filet	54 00
5	Lob	40 00
6	Chicken	11 00
7	2 Dom RE	30 00
8	1 Dom VChop	15 00
9	Bow Tom	3 50
10	1 Dom Wop	3 50
11	B+B	5 50
12	Absoll	9 00
13	Tes HH Coke HHH	17 50
14	RB II	3 00
15		373 50
16		23 93

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
43776			297 93

Beef Connection Steak House

501 Gretna Boulevard
(Corner Belle Chasse Hwy & Gretna Blvd.)
Gretna, LA 70053

For Reservations Call:
(504) 366-3275

HP Exhibit 372(b)

DUPLICATE COPY

Prepared For
LORI M MARCOTTE

Account Number

Transactions Continued

Amount $

August 25, 1997 352.43
BEEF CONNECTION GRETNA LA
FOOD AND BEVERAGE
TIP $55.00
Reference: 000095127

enhanced
renience, use the
cial Purchase Account,
1-800-528-4800

Reference 412570019

Continued on next page

Change of Address
If correct on front
do not use

Name

Company Name

Street Address

City - State

Zip Code

Area Code and Home Phone Number

Area Code and Work Phone Number

CUSTOMER COPY

BEEF CONNECTION

01

APPROVAL CODE

NOV 19, 97 477782

LM MARCOTTE

AMEX 99/07

SALE

ROC # 097359 TERMINAL # 50030354

FOOD AND BEVERAGE

BASE AMOUNT $335.77

TIP AMOUNT 60

TOTAL 3957

X

Cardholder acknowledges receipt of goods and/or services in the amount of the total shown hereon and agrees to perform the obligations set forth in the Cardholder's agreement with the Issuer.

GENERAL CREDIT FORMS ST. LOUIS 63045

HAMCO G2

NORMA

1466

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
49431	11/19			90

1	2 BBQ	13.00
2	2 Cajun	13.00
3	2 Shrimp Cock	13.00
4	3 St Mus	19.50
5	5 St Field 2C 3A	36.00
6	Salmon (4)	13.00
7	Lobster	42.00
8	SRE (2)	18.00
9	Tissue PP Btn 2 cigars	21.00
10	Merlot XXX	20.00
11	Tea XXX	7.50
12	Almond	4.50
13	at 11	9.00
14	2 of 11 1100 +	3.75
15		30.75
16	2 of	20.02

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
49431			335.77

Beef Connection Steak House

501 Gretna Boulevard
(Corner Belle Chasse Hwy & Gretna Blvd.)
Gretna, LA 70053

For Reservations Call:
(504) 366-3275

HP Exhibit 372(c)

DUPLICATE COPY

Card

Customer Service
800-528-4800
(24 hours / 7 days)

rsonal Card Statement of Account

Prepared For	Closing Date	Account Number
LORI M MARCOTTE	December 20, 1997	

Previous Card Balance $	Card Payments/Credits $	New Card Charges $	New Card Balance $
2,427.84	2,427.84	9,749.67	9,749.67

Statement includes payments and charges received by December 20, 1997.
* Indicates posting date.

CustomExtras! Charge with 1-800-SEND-FTD by 1/31/98 to receive a valuable CustomExtras offer! To order flowers, plants and gifts dial 1-800-SEND-FTD (1-800-736-3383) today!

Your payment is due in full. Please pay by 01/05/98.

Please refer to page 8 for important information regarding your Card Account

Card Transactions for LORI M MARCOTTE
Card 3721-538576-93003

	Amount $
December 8, 1997*	-1,941.23
PAYMENT RECEIVED - THANK YOU	

November 19, 1997	395.77
BEEF CONNECTION GRETNA LA	
D AND BEVERAGE	
60.00	
ce: 000097359	

Continued on reverse

Please fold on this perforation below, detach and return with your payment

Payment Coupon

Account Number

Please Pay By: **January 5, 1998**

Total Amount Due **$9,749.67**

Please enter account number on all checks and correspondence. Payable in U.S. Dollars upon receipt with a check drawn on a bank in the U.S. or money order, processable through the U.S. banking system.

LORI M MARCOTTE
33 WILLOW DR
GRETNA LA 70053-4844

Check here if address or telephone number has changed. Note changes on reverse side.

Mail Payment to:

AMERICAN EXPRESS TRS
SUITE 0001
CHICAGO IL 60679-0001

2153857699 0097496700097496 79

HAMCO G 2

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
01082	8-5	TV	g	9

1		
2	4Sm Salmon 2C	46.00
3	FD.	3.00
4	SmTOSS	15.00
5	SmFilt	30.00
6	Shr Kabab	13.00
7	SmTuna	10.00
8	St Spin	3.50
9		120.50
10	ck # 01187	86.25
11		206.75
12		TAX 18.09
13		$ 224.84
14		
15		
16		

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
01082			

HAMCO G 2

GERRY

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSO
01187	8-5	TV	g	9

1	2Smush	13.0
2	3BBQShr	19.5
3	Calmari	6.5
4	2Shrcocktail	13.0
5	Coffa Tea	2.50
6	abs	9.0
7	Beef	4.5
8	Cab	8.0
9	Tea	6.25
10	Bmary	4.0
11		86.2
12		
13		
14		
15		
16		

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHE
01187			

3900 Williams Blvd
Kenner, LA 70065
504-466-4003

Beef Connection

MERCHANT COPY

BEEF CONNECTION
GRETNA LA
AUG 05, 98 HP 01 CODE 856554
LM MARCOTTE
AMEX 99/07
SALE
ROC # 104279 TERMINAL # 50030354
FOOD AND BEVERAGE
BASE AMOUNT $224.84
TIP AMOUNT 44
TOTAL 06884

Cardholder acknowledges receipt of goods and/or services in the amount of the Total Amount listed and agrees to perform the obligations set forth in the Cardholder's agreement with the issuer.

HP Exhibit 372(d)

DUPLICATE COPY

Cards

Prepared For
LORI M MARCOTTE

Account Number

Closing Date
August 19, 1998

Transactions Continued

Amount $

August 5, 1998		268.84
BEEF CONNECTION GRETNA LA		
FOOD AND BEVERAGE		
TIP $44.00		
Reference: 00010427B		

Continued on reverse

MERCHANT COPY

BEEF CONNECTION
GRETNA

01
APPROVAL CODE
FEB 01, 00 508263

LM. MARCOTTE

AMEX 02/07

SALE

ROC # 119911 TERMINAL # 50030354

FOOD AND BEVERAGE

BASE AMOUNT $278.94

TIP AMOUNT 50.00

TOTAL 328.94

X

Cardholder acknowledges receipt of goods and/or services in the amount of the Total shown hereon and agrees to perform the obligations set forth in the Cardholder's agreement with the issuer.

CD 8740 PRINTED IN USA 5/95

HAMCO G2

Connie

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
49840	2/1	T4	C	8

1	2 appt	4.50
2	Lott	2.90
3	Sm V Chop	5.40
4	2 Sm Filet	3.60
5	2 Shrimp	3.20
6	2 Soup	6.00
7	2 Salad	10.25
8		
9	3 Cup Cistail	7.50
10		
11	Geo HHH	7.50
12	Cistail	3.70
13	Geo HH	22.00
14		256.50
15		22.44
16		

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
49840			278.94

3900 Williams Blvd
Kenner, LA 70065
504-466-4003

501 Gretna Blvd
Gretna, LA 70053
504-366-3275

Beef Connection Steak House

HP Exhibit 373(c)

Mallard 456-1701

MARCOTTE NATIONAL, INC.

Monthly Planner for February 2000

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1 12:15 PM Lunch w/Portious @ Beef Connection Gov. Affairs Plantation Coffee House - Lori	2 10:00 AM Adm Photo Shoot Groundhog Day	3	4 3:00 PM BS-taxes	5
6	7 3:00 PM Gretna City Hall-Zoning Pre-Licensing Class-BR Barry Cable/Alarm	8 2:30 PM -2:30 PM Prosp Agents from Cleveland 2:30 PM BS-Dr Apt 3:00 PM City Hall Hearing	9	10 8:45 AM Louis-Dr appt-derm. 2:00 PM Sunbelt	11 Tina Frosch-Daughte Wedding (send gift)	12 11:00 AM BS-David's Bridal Lincoln's Birthday
13	14 5:30 PM City Hall Hearing Valentine's Day 711 S. Dupre PA Expires 707 S. Dupre PA Expires	15 11:45 AM Lunch w/Green & Sister & Brother @Copelan's Check to see if BIC will appoint Lori's NASD License	16 Louis, Norman & Steve - TX	17	18 11:30 AM Lunch w/Lori Green @ CH Cafe CHANGE VOICE MAILS OUT OF TOWN 1:00 Tracy	19 11:00 AM BS-Regan's
20 12:00 PM -6:00 PM President's Meeting 12:10 PM Noland arrives	21 7:00 AM -5:00 PM Registration 10:00 AM Stott's arrives 12:00 PM -5:00 PM Exhibit Hall Open PBUS Convention	22 8:00 AM -4:00 PM Exhibit Hall Open 7:00 PM -11:00 PM Cocktail Party & Award Dinner PBUS Convention	23 8:00 AM -4:00 PM Exhibit Hall Open 12:00 PM Lunch w/Underwriter & Brokers WILLIAMS (T) PBUS Convention	24 8:00 AM -12:00 PM Exhibit Hall Open 12:00 PM -2:00 PM President Luncheon/Graduation 4:25 PM Noland Shifts begins in morning PBUS Convention	25 Joleen Surgery (out for 6 weeks) Call Tracy PBUS Convention	26
27	28 3:40 PM BS-Dr. Kruger	29 Stott 1:00 Misc				

Updated on 2/15/2000

Adm Cal

DUPLICATE COPY

Cards

Prepared For
LORI M MARCOTTE

Account Number

Closing Date
February 19, 2000

sactions Continued

Amount $

ruary 1, 2000 EF CONNECTION GRETNA LA FOOD AND BEVERAGE TIP $50.00 Reference: 000119911	328.94

Continued on reverse

CRETIF 453

53689901

MEL 8000000050001

FN: 1

EXP.: 06 01
INVOICE: 552117
TIME: 15:14
AUTH NO: 066848

BASE 538.86
TIP 96.99
TOTAL $635.85

NORMAN BOWLEY

X Norman Bowley

I AGREE TO PAY THE TOTAL AMOUNT ACCORDING TO CARD ISSUER AGREEMENT (MERCHANT AGREEMENT IF CREDIT VOUCHER)

HAMCO G 2

CONNIE 14

CHECK NO.	DATE	TABLE NO.	SERVER	NO. PERSONS
09020	1/7	PR	C	16

1	1 double G Ren	15.00
2	1 Chip	21.00
3	[illegible]	23.00
4	[illegible]	13.00
5	Lol	65.00
6	1 [illegible]	11.00
7	2 [illegible]	30.00
8	[illegible]	147.00
9	appt	91.50
10	[illegible]	4.00
11	2 Veg	8.00
12	Market ////	19.00
13	Absolt	11.00
14	[illegible] ////	21.00
15	P Water	2.00
16	4 Cy + 2 Dessl	14.00

CHECK NO.	DATE	NO. PERSONS	AMOUNT OF CHECK
09020			495.50
			43.3[illegible]
			2[illegible]

3900 Williams Blvd
Kenner, LA 70065
504-466-4003

501 Gretna Blvd
Gretna, LA 70053
504-366-3275

Beef Connection Steak House

HP Exhibit 373(d)

November 5 - 11, 2000

Weekly Planner

Sunday 11/5	
Monday 11/6	11:00 AM Gegenheimer Golf Tournament Louis call Lawson & Cox Skip Hand Football Bash
Tuesday 11/7	12:00 PM Giacobbe & Porteous Lunch @ Beef Conn Election Day Gov. Affairs Plantation Coffee House - Lori
Wednesday 11/8	12:00 PM Lunch w/Nobbles & Judges @Beef Conn Winhorst nobbles ✓ Cascio ✓ Cascio's dad ✓ guidry ✓ Porteous Bodenheimer NO Chehardy - NO Lee green - NO Hand yes Rubber - NO (Sandra) Kyle - NO Licana Steve
Thursday 11/9	L, L, & N CE 8:30 Dr. Norman Lori & Norman - get 2 cert (4 hrs/ea) 12:00 Dr. Louis (Angelina) Tina ~~Lmm~~ doctor Klein
Friday 11/10	10:00 AM George - CPA 2:30 PM Norman Doctor Appt
Saturday 11/11	Veterans Day

FILE
SECTION: Misc
FILE NAME: adm cal

Printed by Calendar Creator for Windows on 11/6/2000

HIBERNIA
Where service matters.

ACCT. NUMBER:			
CREDIT LIMIT	40,000.00	CASH ADVANCE BALANCE	.00
NEW BALANCE	11,991.61	MINIMUM PAYMENT DUE	360.00
AVAILABLE CREDIT	28,008.39	PAYMENT DUE DATE	12-30-00

CORPORATE ACCOUNT ACTIVITY

BAIL BONDS UNLIMITED INC — TOTAL CORPORATE ACTIVITY $9,742.19

Post Date	Trans Date	Reference Number	Transaction Description	Amount
11-29	11-29	74270530334010000120014	PAYMENT RECEIVED - THANK YOU	9,742.19 PY

INDIVIDUAL CARDHOLDER ACTIVITY

NORMAN BOWLEY

CREDITS	PURCHASES	CASH ADV	TOTAL ACTIVITY
$0.00	$2,369.33	$0.00	$2,369.33

Post Date	Trans Date	Reference Number	Transaction Description	Amount
11-06	11-07	24610440312072001310244	OAK HARBOR GOLF CLUB BANNOCKBURN IL	37.00
11-10	11-08	24751970314074016011172	BEEF CONNECTION STK HOUS GRETNA LA	136.65
11-17	11-16	24492790321119001000928	CHEVYS FRESH MEX HARVEY LA	43.96
11-22	11-20	24418000328325194461605	SPLASH OF ST BERNARD CHALMETTE LA	18.35
11-24	11-21	24298100327116054292014	SHELL NO.21738610340 NEW ORLEANS LA	17.01
11-24	11-21	24897390327354427800204	TEXACO INC 44382270081 NATCHITOCHES LA	23.10
11-24	11-21	24229700327025400260080	COMFORT SUITES MONROE LA 107114 ARRIVAL: 11-20-00	73.13
11-24	11-21	24229700327025400260088	COMFORT SUITES MONROE LA 107115 ARRIVAL: 11-20-00	73.13
11-24	11-21	24229700327025400260106	COMFORT SUITES MONROE LA 107116 ARRIVAL: 11-20-00	73.13
11-24	11-20	24897390327463944810628	OUTBACK #1951 W. MONROE LA	73.95
11-24	11-21	24897390328481697480217	MANSUR'S RESTAURANT BATON ROUGE LA	131.82
11-27	11-24	24326840303938014100179	CHINA DOLL HARVEY LA	31.85
11-28	11-27	24246510333605424983003	ENTERPRISE RENTACAR GRETNA LA 0250482	531.64
11-28	11-27	24635000333032005500214	KIM SON RESTAURANT GRETNA LA	101.52
12-01	11-28	24897390335353535800130	TEXACO INC 44398772636 CHALMETTE LA	16.62
12-04	11-30	24364050336182005796158	EXXON POS 91 53930277 COVINGTON LA	19.00
12-04	11-28	24418000336336114819508	CASINO MAGIC - BOSSIER CI BOSSIER CITY LA	61.07

CREDITS	PURCHASES	CASH ADV	TOTAL ACTIVITY
$0.00	$7,551.40	$0.00	$7,551.40

Post Date	Trans Date	Reference Number	Transaction Description	Amount
11-06	11-03	24110200310000309021672	ITC/EXPERIOR ASSESMENTS 800-745-2926 MN	74.00
11-10	11-08	24110200314000313012381	ITC/EXPERIOR ASSESMENTS 800-745-2926 MN	74.00
11-13	11-10	24810430317072000485423	BEST WESTERN HOTELS DONAL DONALDSONVILL LA 8493 ARRIVAL: 10-19-00	1,295.04
11-16	11-15	24610430328072000234291	COMFORT INNS ALEXANDRIA ALEXANDRIA LA 8493 ARRIVAL: 11-12-00	133.28
11-20	11-17	24492790324118000101410	CHEVYS FRESH MEX HARVEY LA	28.08
11-20	11-18	24610430324072000014809	HOLIDAY INNS-WESTBANK GRETNA LA 8493 ARRIVAL: 11-17-00	89.71
11-24	11-22	24455010327032861292062	LYNN'S HALLMARK GRETNA LA	175.69
12-01	11-30	24326840335200059758027	INTERACTIVE INPO SYS I 303-595-0888 CO	7.58
12-01	11-29	24110200315000334011532	ITC/EXPERIOR ASSESMENTS 800-745-2926 MN	74.00
12-01	11-30	24445000336271115368463	FASTSIGNS #1 METAIRIE LA	249.04
12-04	12-01	24326840337318014403964	MONAHAN BROTHERS INC 5045248248 LA	654.05
12-04	12-02	24001750337115846310157	DBT ONLINE INC 561-882-5860 FL	4,486.00

Continued on next page

Exhibit 2

77A-HQ-
CDT:cdt

New Orleans Division
at Gretna, Louisiana

REFERENCE

The following investigation was conducted by Special Agent s on 8/1/94.

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

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

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

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

Exhibit 3

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

77A-HQ- F

Continuation of FD-302 of NO T-6, On 8/8/94, Page 3

E

NO T-6 further advised that he/she had heard that DIANE BOURG, in the Clerk's office, had told people that PORTEOUS was signing the bonds in blank. (NO T-6 advised that he/she believed this practice was illegal). NO T-6 also heard that BOURG was reprimanded for signing the bonds with just a judge's signature without verifying the property.

NO T-6 also advised that he/she had heard of another case where PORTEOUS was paid to reduce a bond. NO T-6 advised that he/she heard that PORTEOUS had been given $1,500 to reduce a bond in a matter which he/she believed involved a TRACY IRELAND who had been arrested for theft. According to the person with whom NO T-6 spoke, PORTEOUS reduced the bond from $500,000 cash to $50,000 property in return for the payment of $1,500. NO T-6 further commented that he/she has heard that Judge PORTEOUS works with certain individuals in writing bonds, specifically Bondsman ADAM BARNETT, Attorney RALPH BARNETT (Adam's father), PAUL BOUDOUSQUE, and other bonding people such as LOUIS and LORI MARCOTTE. Apparently LOUIS MARCOTTE has told people that they "kick back" money to Judge PORTEOUS for reducing the bonds. They also frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks. NO T-6 has also heard from various court personnel that DIANE BOURG is still signing the bonds that the judges give to her, even though they are not properly filled out.

NO T-6 advised that he/she had also heard that PORTEOUS had transferred a case from another division to his (PORTEOUS') to help

E

When the case was reassigned to PORTEOUS, he (PORTEOUS) gave the individual probation. NO T-6 advised that he/she had not heard whether PORTEOUS had ever taken any money for cases and he/she advised that he/she did not think he had but that he did frequently sign bonds ahead of time for bondsmen.

Exhibit 4

8/19/94

NOTE TO DOJ:

RE: GABRIEL THOMAS PORTEOUS, JR.
BACKGROUND INVESTIGATION
PRESIDENTIAL APPOINTMENT WITH SENATE CONFIRMATION

The background investigation on Mr. Gabriel Thomas Porteous was opened on June 24, 1994. Mr. Porteous is currently a judge in Gretna, Louisiana. Mr. Porteous is being considered for a Presidential appointment as a United States District Court Judge for the Eastern District of Louisiana, a position which requires Senate confirmation. Partial investigations were furnished to your office on July 29, 1994, and August 8, 1994.

An individual who requested total confidentiality, characterized as NO T-6, advised that he/she has heard that the candidate was once paid $10,000 to reduce a bond for an individual named Keith Kline. T-6 advised that an unknown female approached a bail bondsman named Lewis Marcotte to arrange for Kline's immediate release. Marcotte allegedly contacted a lawyer named Phillip Boudousque, who subsequently approached the candidate to get a bond reduction for Kline. T-6 advised that Boudousque delivered $10,000 to the candidate from the unknown female to secure the bond reduction. T-6 further advised that he/she heard that the candidate was paid $1500 to reduce the bond of an individual named Tracy Ireland. T-6 also stated that Lewis Marcotte has told people that the candidate receives "kick backs" for reducing bonds.

T-6 also advised that he/she heard that an individual named Jolene Acy had smoked marijuana with the candidate and had also been at a party on a yacht allegedly owned by the candidate where cocaine and marijuana was used.

Several individuals were interviewed to include Boudousque, Marcotte, and Acy. All denied the allegations put forth by T-6 and favorably recommended him.

T-2 was recontacted and could provide no examples of how the candidate lives beyond his means.

The candidate was reinterviewed and denied all the allegations put forth by T-6.

The background investigation is complete.

Exhibit 5

\ (Rev. 01/25/91)

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
COMMUNICATION MESSAGE FORM

^PAGE 2 UNCLAS

CANDIDATE INDIRECTLY RECEIVED $10,000 FROM KLINE FOR REDUCING HIS BOND, BUT THAT KLINE HAD TO GET HIS LAWYER TO GET THE MONEY BACK

E

E SHOULD BE ASKED: A) WHAT IS THE SIGNIFICANCE OF E

E AND WAS IT A RESULT OF ANYTHING THE CANDIDATE DID OR AS A RESULT OF THE ALLEGED $10,000 PAYMENT TO THE CANDIDATE?; B) HOW DID E HEAR ABOUT THE $10,000 PAYMENT TO THE CANDIDATE? DID E TELL E ?; AND C) WHY DID E

E

NEW ORLEANS IS REQUESTED TO CONDUCT THE INTERVIEW OF E AND SUREP RESULTS TO FBIHQ, ROOM 4383, ATTN: PSS S

BT

////

Exhibit 6

302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/10/94

NO T-6, who requested that his/her identity be protected from anyone outside the FBI, was contacted regarding his/her knowledge of the candidate.

NO T-6 advised that he/she had heard from an individual whom he/she declined to identify but described as reliable that THOMAS PORTEOUS was paid $10,000 to reduce a bond. NO T-6 advised that this unnamed individual told him that when KEITH KLINE was arrested by the Jefferson Parish Sheriff's Office (JPSO) for a cocaine-related charge, KLINE's girlfriend, whose name NO T-6 could not remember, had approached LOUIS MARCOTTE at MARCOTTE's bail bond office on Derbigny Street in Gretna to arrange bail for KLINE.

NO T-6 heard that this unknown female wanted MARCOTTE to get KLINE out of jail immediately. MARCOTTE telephoned a lawyer named PHILLIP J. BOUDOUSQUE, Gretna, Louisiana. BOUDOUSQUE came over to the office and talked to MARCOTTE with the unknown female. NO T-6 advised that during part of the conversation, BOUDOUSQUE told KLINE's girlfriend and MARCOTTE that he would approach Judge THOMAS PORTEOUS and attempt to get a bond reduction for KLINE.

The female left and came back later that evening with a large amount of cash in a shoe box. NO T-6 heard that MARCOTTE told KLINE's girlfriend that it would take $12,500.00 to get KLINE out of jail. He (MARCOTTE) advised that $10,000.00 of this would go to Judge PORTEOUS for the bond reduction and the other $2,500.00 would go directly for the bond. He (MARCOTTE) stated that BOUDOUSQUE would write up the $10,000.00 as attorney's fees in order to protect the judge.

NO T-6 advised that he/she had heard from E
E

ACY has repeated to an individual who advised NO T-6

Investigation on 8/8/94 at E Louisiana File # 77A-HQ- F

by SA S :rsq Date dictated 8/10/94

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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 DISMISS ARTICLE III OF THE HOUSE OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

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Dated: July 21, 2010

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

ARGUMENT 2

I. Even If All of the Actions Set Out in Article III Occurred as Alleged, that Conduct Does Not Constitute an Impeachable Offense 2

A. The Misconduct Alleged in Article III is Common in Chapter 13 Bankruptcy Filings and Does Not Normally Warrant Either Civil or Criminal Penalties 2

B. Judge Porteous's Bankruptcy and Alleged Misconduct 5

1. Use of Incorrect Names and a Post Office Box Address 7

2. Omission of Certain, Small Assets 9

3. Omission of Certain, Minor Pre-Petition Payments 12

4. Non-Disclosure of Gambling Losses and Debts 13

5. Allegations of Incurring New Debt in Contravention of Bankruptcy Court Order 14

II. Compared with Prior Impeachments, Article III's Allegations of Private, Minor Bankruptcy Misconduct Do Not Justify Removal 19

CONCLUSION 23

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, and respectfully requests that the Senate dismiss Article III of the Articles of Impeachment for failure to state an impeachable offense. In support, Judge Porteous states as follows.

INTRODUCTION AND SUMMARY

Article III alleges improprieties and errors in connection with Judge Porteous's personal bankruptcy proceeding. That misconduct – even if it occurred exactly as alleged – does not constitute an impeachable offense. Placed in the context of the full facts and real-world bankruptcy practice, Judge Porteous's conduct did not materially affect any creditor and did not warrant so much as a reprimand from the bankruptcy trustee or the bankruptcy court. While Judge Porteous made errors, his conduct constitutes no more than common problems frequently found in personal bankruptcy cases, which rarely merit formal action, even at the bankruptcy court level, let alone elevation to constitutional impeachment. If conduct of this sort were to rise to the level of a high crime or high misdemeanor for impeachment, countless similar errors in filings by public officials could be used as grounds for removal.

The Department of Justice conducted an extensive investigation into the conduct alleged in Article III, and ultimately declined to pursue any criminal charges against Judge Porteous. Indeed, the Justice Department specifically declined to prosecute Judge Porteous because of its concern that it would be unable to prove "materiality" and "intent," as well as to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters." (*See* Exhibit 1 hereto.) Given that decision, as well as the bankruptcy court's decision not even to criticize Judge Porteous, who faithfully repaid his creditors as ordered by that court, Article III is shockingly out of step with past definitions of impeachable conduct. The bankruptcy trustee in

Judge Porteous's case was well aware of the allegations against Judge Porteous, having met and corresponded with the FBI on several occasions. He determined that the facts alleged in Article III provided no grounds either to modify or reject Judge Porteous's bankruptcy discharge – let alone sanction him. The bankruptcy court agreed. Article III thus invites the Senate, in effect, to take a nonjudicial appeal from the order discharging Judge Porteous in bankruptcy, and overrule the bankruptcy court by imposing the ultimate sanction of impeachment – for conduct that the bankruptcy court and bankruptcy trustee found to be of little concern.

Judge Porteous is not seeking to have the Senate condone inaccuracies in bankruptcy filings. However, such errors occur frequently and, while he oversees the work of bankruptcy judges, Judge Porteous is not personally an expert in that area. The errors and inaccuracies in his bankruptcy were addressed appropriately at the bankruptcy court level as part of the bankruptcy process. Bankruptcy courts and trustees regularly address such issues in the management their own dockets and are uniquely qualified to judge whether such conduct is sanctionable. Perfection never has been, nor should it be, the standard by which bankruptcy filings are judged. Judge Porteous's bankruptcy conduct should not be held to such a ridiculously high standard. Article III should be dismissed.

ARGUMENT

I. Even If All of the Actions Set Out in Article III Occurred as Alleged, that Conduct Does Not Constitute an Impeachable Offense

A. The Misconduct Alleged in Article III is Common in Chapter 13 Bankruptcy Filings and Does Not Normally Warrant Either Civil or Criminal Penalties

All of the misconduct alleged in Article III revolves around the bankruptcy case that Judge Porteous and his late wife filed in 2001. (*See* 111 Cong. Rec. S1645 (Mar. 17, 2010), exhibiting the House's Articles of Impeachment against Judge Porteous (hereinafter the "Articles" or "Articles of Impeachment").) The Porteouses, exercising their rights as private

citizens,[1] sought bankruptcy protection as a result of an untenable financial situation stemming from years of poor financial planning, record-keeping, and discipline. As happens with so many Americans, Judge Porteous's expenses, including those associated with raising and educating his four children, simply outstripped his income. This situation was exacerbated by Judge Porteous's (and his late wife's) penchant for gambling. Ultimately, after trying unsuccessfully to reorganize their debt and finances informally, Judge and Mrs. Porteous sought shelter in the bankruptcy process. In so doing, Judge Porteous joined the nearly 1.5 million American debtors who in 2001 sought such protection, and an opportunity for a fresh start.[2]

In their review of the perceived shortcomings in Judge Porteous's bankruptcy filing, the Fifth Circuit and the House took an overly simplistic view of the process involved in filling out bankruptcy schedules and seeking bankruptcy protection. As a result, each made a mountain out of the proverbial mole hill. Bankruptcy judges throughout the country have long recognized that bankruptcy schedules prepared and filed by or on behalf of consumer debtors are rife with problems.[3] Additionally, bankruptcy commentators have expressly recognized that completed bankruptcy forms often contain errors.[4] In fact, shortly before Judge Porteous and his wife filed their bankruptcy case, the Honorable Steven W. Rhodes, U.S. Bankruptcy Judge for the Eastern

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

2 *See* Bankruptcy statistics for calendar year 2001 maintained by the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2001/1201_f2.xls (showing that in 2001, 1,031,493 debtors filed for Chapter 7 bankruptcy protection and 419,750 debtors filed for Chapter 13 protection).

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

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

District of Michigan, undertook a review of the bankruptcy schedules filed in 200 randomly selected consumer cases pending in his court. Judge Rhodes's analysis revealed errors in **99%** (198 of 200) of the schedules reviewed. *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653, 678 (1999).

What all these bankruptcy judges, scholars, and experts have recognized is that preparing bankruptcy schedules is an inherently difficult process, where even experts in the field routinely make mistakes. Nevertheless, the Fifth Circuit and the House viewed the preparation of bankruptcy schedules by Judge Porteous and his late wife as a black-and-white exercise, instead of the complex field of grey that it is in reality. When one considers the complexity of the bankruptcy schedules and the stress that debtors are under as they prepare such schedules, it is easy to understand why errors occur, even when the debtors are represented by counsel. It is equally easy to understand why bankruptcy courts and federal prosecutors regularly decline to prosecute such errors. Were this not the case, and if bankruptcy courts and federal prosecutors adopted the view taken by the Fifth Circuit and the House in this case, virtually every consumer bankruptcy filing would be followed shortly thereafter by a criminal prosecution.

Following past precedent, the House framed Article III in terms of a criminal offense, specifically 18 U.S.C. § 152, which makes concealment of assets and false oaths and claims bankruptcy crimes. Key elements for each of these crimes, for which the House has failed to account, are the requirements that the debtor act knowingly and fraudulently and that the misconduct be material. As discussed in detail below, the House cannot establish any of these requirements with regard to Judge Porteous.

The only appropriate sanction for the alleged improprieties in Judge Porteous's bankruptcy should stem from the Bankruptcy Code itself, and not from impeachment and

removal under the Constitution. As the House is well aware, both the Federal Bureau of Investigation and the Department of Justice investigated Judge Porteous's bankruptcy filings. Numerous interviews were convened, including with William Greendyke, the U.S. Bankruptcy Judge who presided over Judge Porteous's bankruptcy case, and S.J. Beaulieu, the Chapter 13 trustee who oversaw that bankruptcy. In addition, extensive testimony was taken in connection with the Fifth Circuit's investigation into Judge Porteous. Despite this intense scrutiny, Judge Porteous has neither been indicted nor otherwise charged with a bankruptcy crime. Indeed, the Criminal Division of the U.S. Department of Justice advised – more than three years ago – that "it will not seek criminal charges against Judge Porteous." (*See* Letter from J. Keeney to E. Jones dated May 18, 2007, labeled SC00767-88, and attached as Exhibit 1, at 1.) Among the reasons cited by the Justice Department in support of its decision not to prosecute Judge Porteous for bankruptcy misconduct are "concerns about the materiality of some of Judge Porteous's provably false statements," "the special difficulties of proving *mens rea* and intent to deceive beyond a reasonable doubt in a case of this nature," and "the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters." (*Id.*; emphasis added.)

Simply put, the House's allegations of misconduct by Judge Porteous in connection with his personal bankruptcy filing are exceedingly common and do not warrant civil or criminal penalty, much less the ultimate consequence of conviction in an impeachment trial and removal from office.

B. Judge Porteous's Bankruptcy and Alleged Misconduct

Early in the summer of 2000, Judge Porteous sought out a referral for a consumer bankruptcy attorney to assist him and his late wife with their financial difficulties. Judge

Porteous was referred to Claude Lightfoot, a respected and experienced bankruptcy practioner in the New Orleans area. (*See* H.R. Rep. No. 111-427 (2010), Report from the House Judiciary Committee concerning the Impeachment of Judge Porteous (the "House Report"), at 96.) Between August 2000 and mid-March 2001, Judge Porteous and Mr. Lightfoot worked together extensively to address the Porteouses' financial issues. Although Judge Porteous, like other District Court judges, supervises the work of bankruptcy judges in his judicial district, he and his wife had little to no personal experience with bankruptcy and were reliant on their counsel to provide them with counseling and advice related to their financial situation.[5] Initially, Judge Porteous and his wife provided Mr. Lightfoot with copies of their credit card statements, invoices, and other bills. (*Id.*) Judge Porteous also provided Mr. Lightfoot with a copy of his pay stub, which detailed his income. (*Id.*) Finally, Judge Porteous filled out a set of bankruptcy worksheets provided to him by Mr. Lightfoot. (*Id.*)

Using the information provided by the Porteouses, Mr. Lightfoot attempted to negotiate an out-of-court restructuring agreement between the Porteouses and their creditors. (*Id.* at 96-97.) Ultimately, these negotiations were unsuccessful and the Porteouses decided to file a joint voluntary petition for relief under Chapter 13 of the Bankruptcy Code. (*Id.* at 97.)

In Article III, the House has alleged five instances or categories of bankruptcy misconduct – none of which is sufficiently material or egregious to merit impeachment. Indeed, under relevant bankruptcy law and practice, these allegations rise only to the level of common

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[5] While the House may protest this point and argue that Judge Porteous, as a federal judge responsible for reviewing bankruptcy court decisions, had significant bankruptcy experience, the reality is that Judge Porteous had little to no practical bankruptcy experience, only occasionally reviewed bankruptcy court rulings, and depended heavily upon his counsel, Mr. Lightfoot, to guide him through the complex restructuring and Chapter 13 bankruptcy process.

mistakes, do not constitute criminal or impeachable acts, and are normally dealt with exclusively by the bankruptcy court – as they were in Judge Porteous's case.

1. Use of Incorrect Names and a Post Office Box Address

Prior to filing for bankruptcy protection – on the advice of his bankruptcy counsel – Judge Porteous opened a post office box for himself and his wife. Mr. Lightfoot then used this new post office box address and the information previously provided to him to put together the Porteouses' bankruptcy petition, schedules, and statement of financial affairs. In preparing those documents, Mr. Lightfoot recommended the use of use fictitious names for Judge Porteous and his wife, so as to avoid or limit press coverage of the filing. (House Report at 100, noting that, before the Fifth Circuit, Mr. Lightfoot testified that the suggestion to file the Porteouses' bankruptcy petition under false names was his (Mr. Lightfoot's) idea.) While Judge Porteous knew the names listed on his bankruptcy petition were incorrect, he relied on his attorney's advice that such action was permissible and justifiable given the Porteouses' intent to amend the petition shortly after filing to insure that all noticed creditors received only accurate information concerning the Porteouses' identities. True to this intent, less than two weeks after filing their bankruptcy petition, the Porteouses filed an amended petition correcting their names and listing their residential address. (*Id.* at 101.) As a result, all notices provided to creditors accurately named the Porteouses as the debtors. The Porteouses' creditors were never provided with inaccurate information regarding Judge Porteous and his late wife's names or address.

As noted above, Judge Porteous had little to no experience with bankruptcy at the time he retained Mr. Lightfoot. Accordingly, Judge Porteous relied heavily on the advice of Mr. Lightfoot in matters relating to his bankruptcy filing. Mr. Lightfoot advised Judge Porteous that there was nothing wrong with filing a petition with a fictitious name, so long as the error was corrected in time to ensure creditors received proper notice of the bankruptcy filing. Moreover,

Judge Porteous never had any intention of utilizing a fictitious name and a post office box to deceive his creditors. Instead, Judge Porteous simply, and in hindsight foolishly, sought to minimize the media attention and embarrassment to his family due to his bankruptcy filing. The case authority in the Fifth Circuit is clear: a debtor is entitled to rely on the advice of his counsel, and a conviction for false oath cannot be founded on a debtor's following the advice of counsel. *Hibernia Nat'l Bank v. Perez*, 124 B.R. 704 (E.D. La. 1991), *aff'd*, 954 F.2d 1026 (5th Cir. 1992).

Moreover, the Chapter 13 bankruptcy trustee overseeing the Porteouses' bankruptcy case (Mr. S.J. Beaulieu) was specifically informed of the Porteouses' use of incorrect names on their initial petition and elected not to take any action. (*See* Letter from M. Adoue to W. Horner dated April 1, 2004, labeled JC200268, and attached as Exhibit 2.) In January 2004, while the Porteouses' bankruptcy case was pending and prior to their receipt of a discharge, agents with the FBI met with Mr. Beaulieu concerning the Porteouses' bankruptcy filing. (*Id.* at 1.) According to a letter sent by Mr. Beaulieu's attorney following that meeting, the FBI advised Mr. Beaulieu that (1) they were conducting an investigation into the Porteouses' bankruptcy and (2) the Porteouses had used incorrect names on their original bankruptcy petition. (*Id.*) Though specifically empowered to investigate and address such issues, Mr. Beaulieu, through his attorney, explained that he did not intend to take any action with regard to the Porteouses' temporary use of incorrect names. (*Id.*) Asked again about this issue during the Fifth Circuit's investigation, Mr. Beaulieu stated that, since the Porteouses amended their petition quickly and prior to the meeting of creditors, all unsecured creditors received notice of the true identities of the debtors. (*See* Memorandum from L. Finder to R. Woods dated July 29, 2007, labeled

JC200251-53, and attached as Exhibit 3, at 2.) Accordingly, Mr. Beaulieu decided to take no action because he viewed the situation as one of "no harm, no foul." (*Id.*)

2. Omission of Certain, Small Assets

Judge Porteous's bankruptcy petition and associated schedules disclosed assets totaling more than $263,000, and included all of his significant assets such as his home, financial accounts, and personal property. The House alleges that Judge Porteous failed to disclose a tax refund of $4,143.72, less than $1,000 in his Bank One account,[6] several hundred dollars in a money market checking account, and $173.99 of income per month. (House Report at 101-05.) As discussed herein, these omissions were inadvertent, clearly not done with an intent to defraud, and immaterial.

Consumer bankruptcy petitions are rarely perfect. In fact, those individuals that keep perfect records rarely file for bankruptcy protection. Judge Porteous and his late wife were no exception. They scheduled the vast majority of their debt and liabilities save for four items identified by the House. Had all of these disclosures been made, creditors would not have received materially more on account of their claims.

Tax refund

Judge Porteous filed his tax return on March 23, 2001. He claimed a refund, but it had not been received on the date of filing his bankruptcy petition. Indeed, the Internal Revenue Service had not yet processed or approved the return at the time of his bankruptcy filing. Judge Porteous received his tax refund on April 13, 2001, several weeks after filing for bankruptcy and

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[6] The House is imprecise concerning the amount of the allegedly undisclosed funds, stating in the House Report that, "the opening balance in Judge Porteous's Bank One account for the time period of March 23, 2001 to April 23, 2001 was $559.07, and the closing balance for the same time period was $5,493.31." (House Report at 103.) The Porteouses' petition date was March 28, 2001. (*Id.* at 99.)

more than two months prior to confirmation of his proposed Chapter 13 plan on June 28, 2001. Judge Porteous did not believe that the tax refund was an asset of his Chapter 13 case because, on the date of filing for bankruptcy protection, only the return had been filed; the refund had not yet been received. That return may have been rejected by the IRS. Moreover, as Judge Porteous was operating on a cash basis and the cash had not been received, it is unclear whether the pending request for a tax refund represented an asset as of the date of his filing. Finally, after consultation with his counsel, Judge Porteous believed that disclosure was unnecessary – a conclusion with which the Chapter 13 trustee (Mr. Beaulieu) agreed.[7]

Account balances

Judge Porteous filed his bankruptcy schedules using what he believed to be his and his wife's current bank balance. He did this by reviewing his wife's checkbook (as she wrote many of the family checks), taking into account checks that had already been written but which had not yet cleared, and discussing the issue with his wife. Unfortunately, he did not accurately reconcile the true balance of the bank account with his wife's checkbook. While Judge Porteous's Bank One bank account balance may have exceeded the amount reported on the petition date, this was not the result of intentional misconduct, but rather, poor record-keeping and miscommunications with his wife.

Judge Porteous's bankruptcy schedules also inadvertently omitted his Fidelity money market checking account. That omission appears to have been the result of a miscommunication between Judge Porteous and his counsel, as he recalls including the Fidelity account within the

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[7] During a July 29, 2007 interview with the Fifth Circuit's investigators, Mr. Beaulieu recalled conferring with William Heitkamp, the Chapter 13 trustee for Judge Greendyke (the bankruptcy judge presiding over the Porteouses' bankruptcy), concerning the disclosure of tax returns. (Exhibit 3, at 2.) Mr. Beaulieu stated that Mr. Heitkamp had told him that the practice in Texas (including before Judge Greendyke) was not to notify or provide the court with tax refunds.

list of financial accounts supplied to Mr. Lightfoot. Judge Porteous denies, and there is no evidence to the contrary, that this account was intentionally omitted from his bankruptcy filing. Moreover, while the account should have been included, its omission was immaterial. In fact, on March 28, 2001, the day that the Porteouses filed their bankruptcy petition, the Fidelity checking account had a **total balance of $283.42**. (*See* Fidelity money market account statement dated April 20, 2001, labeled SC00611, and attached as Exhibit 4; *see also* House Report at 104 n.42.)

Understated income

Judge Porteous's bankruptcy counsel, Mr. Lightfoot, prepared the Porteouses' bankruptcy schedules. In disclosing the Porteouses' income, Mr. Lightfoot inadvertently used a stale pay stub for Judge Porteous. That pay stub was attached to the Porteouses' bankruptcy filing, and thus openly available for inspection by the bankruptcy judge, the Chapter 13 trustee, and all creditors. (*See* Exhibit 1 in the Fifth Circuit proceedings, labeled SC00108-09.) Using this stale pay stub was an innocent mistake by counsel. It does not evidence an intent by Judge Porteous to deceive his creditors. Absent proof of such improper intent, impeachment is clearly not warranted. In fact, the only likely repercussion from such an error would be for Judge Porteous's Chapter 13 repayment plan to be amended to add additional payments, or, at worst, denial of his discharge. As it happened, however, the FBI brought this issue to the Chapter 13 trustee's attention in early 2004, before the Porteouses received a discharge in their bankruptcy case, and the trustee elected not to take any action with regard to the understated income. (Exhibit 2, at 1.)

Notwithstanding the alleged omissions, Judge Porteous made each payment due under his Chapter 13 repayment plan and received a discharge. Moreover, his plan provided for a higher percentage recovery to Chapter 13 creditors than typical Chapter 13 plans in the Eastern District of Louisiana in 2001.

The lack of materiality in any failure of disclosure by Judge Porteous is definitively established by the letter written by the Chapter 13 trustee's counsel to the FBI. (Exhibit 2.) After meeting with the Bureau and being advised of certain "potential bankruptcy improprieties" involving misspelled names, undisclosed income, income tax refunds, the use of credit cards, transfers of property, and lifestyle activities, the Chapter 13 trustee's lawyer stated that the undisclosed income "would not substantially increase the percentage paid to unsecured creditors," and explained, therefore, that the trustee did not intend to take further action. (*Id.*) Given the Chapter 13 trustee's position as monitor and interested party in this case, his decision to take no action should end any further inquiry.

3. Omission of Certain, Minor Pre-Petition Payments

The House alleges that Judge Porteous made payments to creditors prior to his bankruptcy case. (House Report at 106-07.) Every debtor makes pre-petition payments, and Judge Porteous is no exception. The simple fact is that there is nothing inherently wrong, evil, or sinister about pre-petition payments. *See In re Huber Contracting, Ltd.*, 347 B.R. 205, 215 (Bankr. W.D. Tex. 2006) (citations omitted) (noting that numerous courts have long recognized that there is nothing inherently wrong with "preferring" a particular creditor, so long as that preference is not made with fraudulent intent). The reason pre-petition payments are important is that, in certain circumstances, the Chapter 13 trustee is given avoidance powers under Section 549 of the Bankruptcy Code to retrieve such payments. Given the small size of the alleged undisclosed pre-petition payments in this case, however, it is highly unlikely that the trustee would have pursued those payments -- given that the costs of collection would have greatly exceeded any payments returned to the bankruptcy estate. Moreover, there is absolutely no evidence to suggest Judge Porteous's failure to disclose these payments was anything other than

poor record-keeping. Certainly, there are no facts to support intentional nondisclosure, deceit, or fraudulent intent.

The three pre-petition payments allegedly made by Judge Porteous are as follows (House Report at 103, 106-07):

- $1,500.00 to the Treasure Chest on March 27, 2001;
- $1,088.42 to Fleet on March 23, 2001; and
- $2,000.00 to Bank One, as a checking account deposit, on March 27, 2001.[8]

None of these payments are sufficiently material to justify a Chapter 13 trustee bringing a cause of action to seek their recovery. The policy for pursuing pre-petition payments is to prevent creditors from taking advantage of debtors while they are insolvent and to promote equality in the treatment of unsecured creditors. It is beyond reason to think that the Chapter 13 trustee in the Porteouses' bankruptcy would have pursued such transfers, as there would have been no economic benefit to the creditors – since the costs of collection would have far outstripped the recovery. As a result, the alleged nondisclosure of pre-petition payments is immaterial.

4. Non-Disclosure of Gambling Losses and Debts

The House alleges that Judge Porteous failed to disclose gambling losses. (House Report at 107-08.) While the calculations in the House Report are suspect on their face,[9] it should be noted that most if not all of Judge Porteous's pre-bankruptcy gambling was done using credit

[8] This deposit into his Bank One account on March 27, 2001, was intended to ensure that the account contained sufficient funds to cover a marker that Judge Porteous had taken out on February 27, 2001, and which came due 30 days later (on March 27, 2001). While the timing of this repayment, one day before he ultimately filed his bankruptcy petition, can be made to seem sinister, the evidence will show that Judge Porteous had not yet made a final decision on whether to file his Chapter 13 at the time this deposit was made.

[9] These figures were "based on a review of each casino's records." (House Report at 108 n.510.) However, as FBI Agent Horner testified before the Fifth Circuit, casino records are "very confusing" and subject to "certain nuances [at] each casino." (*See* Testimony of W. Horner before the Fifth Circuit, transcript p. 296.)

card advances. Thus, the creditors with an interest in recovering money for such advances were on clear notice that gambling debt had been incurred. In fact, the evidence of such gambling was included in the very credit card statements that Judge Porteous's creditors created and issued to him monthly. This allegation again does not warrant impeachment. It fails to demonstrate anything other than poor record-keeping, and is utterly lacking in any factual support for intentional nondisclosure.

5. Allegations of Incurring New Debt in Contravention of Bankruptcy Court Order

The House has alleged that Judge Porteous committed bankruptcy misconduct by "incurring new debts while [his bankruptcy] case was pending, in violation of the bankruptcy court's order." (Article III, no. (5).) This allegation is exceedingly vague and non-specific. Indeed, to understand what conduct the House is alleging to be improper, it is necessary to refer to the House Report.[10] In that Report, the House asserts that Judge Porteous incurred post-petition debt during three distinct time periods following his bankruptcy filing: (i) March 28, 2001, through May 9, 2001; (ii) May 10, 2001, through June 28, 2001; and (iii) June 29, 2001, through July 22, 2004. (House Report at 108-15.) The House implies that Judge Porteous

[10] This is itself improper and unconstitutional. The Constitution provides that the House of Representatives "shall have the sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5. Under the House's own rules, "a majority vote is necessary" to adopt articles of impeachment. *See* Wm. Holmes Brown & Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, 108th Congress, 1st Sess. (2003), Chapter 27 – Impeachment, § 8 Consideration in the House; Voting (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_practice&docid=hp-27.pdf). By omitting its specific allegations from the Articles voted upon by the House, and instead including that information in the House Report, the House has attempted to circumvent this constitutional requirement. This, the Senate should not allow. In addition to violating the Constitution, burying the true allegations in the House Report, rather than including them in the Articles of Impeachment, deprives the accused of knowing with certainty what charges have been leveled against him. To remedy this defect, the Senate should bar the House from presenting evidence of alleged misconduct that is not specifically included within the Article of Impeachment properly voted upon, and passed, by the House.

violated federal bankruptcy law by incurring debt during the first two time periods, and that Judge Porteous knowingly violated the bankruptcy court order confirming his repayment plan by incurring debt during the third time period. The House's allegations and analysis are overly formalistic and, when analyzed critically, unavailing.

With regard to the first two time periods, it is not at all clear that Judge Porteous's actions constituted the incurrence of debt. Even if they did, however, such actions did not violate either the Bankruptcy Code or any applicable bankruptcy order. With regard to the third time period, it is unclear whether Judge Porteous was aware of the bankruptcy court's prohibition on the incurrence of new debt. What is clear, however, is that Judge Porteous's actions during the third time period constitute, at most, minor mistakes or errors – for which impeachment and removal from office is not warranted.

First Time Period – Initial Filing to Creditors Meeting

The first time period discussed by the House runs from the Porteouses' initial bankruptcy filing, on March 28, 2001, to the date of Judge Porteous's creditors meeting, on May 9, 2001. (House Report at 108.) During this period, the House Report asserts that Judge Porteous requested additional credit from, and took out a series of markers at, casinos. The House acknowledges, however, that "there was no official court order during this time period prohibiting Judge Porteous from incurring new debt" and that the bankruptcy trustee had not "instructed Judge Porteous that he may not incur new debt...." (*Id.* at 108 n.515.) Nevertheless, the House questions Judge Porteous's good faith in seeking bankruptcy protection and insinuates that he was somehow gaming the system.

Rhetoric aside, there is simply nothing improper about Judge Porteous's conduct during this first time period. As the House concedes, there was no order during this time frame

instructing Judge Porteous not to incur new debt. Moreover, the House has mischaracterized the act of taking out markers as the incurrence of debt. It is not. Under Louisiana law, markers are not considered debt. They are instead considered checks. *See TeleRecovery of Louisiana, Inc. v. Gaulon*, 738 So. 2d 662, 664-66 (La. Ct. App. 1999) (examining the features and attributes of casino markers and concluding that markers constitute checks under Louisiana law). This is the same understanding that Judge Porteous had with regard to markers – that they are checks (which are used to "buy" chips from the casino, and which can be cashed at any time by the casino via electronic money transfer), not debt.

Second Time Period – Creditors Meeting to Confirmation

The second time period defined by the House runs from Judge Porteous's creditors meeting, on May 10, 2001, until the entry of Judge Greendyke's order confirming the Porteouses' proposed Chapter 13 repayment plan, on June 28, 2001. (House Report at 109-11.) The *only* distinction between the first time period and the second is that at the May 9, 2001 creditors meeting Judge Porteous received a pamphlet containing general bankruptcy information and had a short discussion with the Chapter 13 trustee. In that discussion, the trustee told Judge Porteous that "[a]ny charge cards that you may have you have [*sic*] you cannot use any longer. So basically you on [*sic*] a cash basis now." (*See* Transcript of creditors meeting, labeled SC00595-98.) The House alleges that Judge Porteous violated these instructions by, over the course of more than five weeks, taking out four markers, totaling only $2,000, **all but $100 of which was repaid on the same day that it was taken out**.

Here again, there is nothing improper about Judge Porteous's conduct during the second time period. There was no bankruptcy order in place at the time. And, as discussed above, markers are considered checks under Louisiana law, not debt. *TeleRecovery*, 738 S.2d at 664-66.

Moreover, as the FBI agents testified before the Fifth Circuit, casino records regarding markers are "very confusing" and subject to "certain nuances [at] each casino," thus creating some definitional confusion concerning markers. (*See* Testimony of W. Horner before the Fifth Circuit, transcript p. 296.) Even if markers did constitute debt, however, Judge Porteous's actions in taking them out did not violate the Bankruptcy Code notwithstanding the admonition in the pamphlet provided by the Chapter 13 trustee to the contrary. *See In re Jemison*, No. 07-40761, 2007 WL 2669222, at *4 (Bankr. N.D. Ala. Sept. 6, 2007) ("There are no restrictions in the code prohibiting a chapter 13 debtor from incurring ordinary consumer debt after the commencement of the case and before the debtor is granted a discharge.").

Third Time Period – Confirmation to Discharge

The third time period framed by the House runs from the entry of the confirmation order, on June 28, 2001, until final discharge in the Porteouses' bankruptcy case, on July 22, 2004. (House Report at 111-15.)

On June 28, 2001, Judge Greendyke held a hearing concerning confirmation of the Porteouses' proposed Chapter 13 repayment plan. According to Judge Greendyke's testimony before the Fifth Circuit, on typical confirmation days, he considered between 120 and 150 proposed Chapter 13 plans for confirmation. (*See* Testimony of W. Greendyke before the Fifth Circuit, transcript p. 387.) Judge Greendyke further testified that he never met or spoke with Judge Porteous. (*Id.* at 380.)

Following that hearing, Judge Greendyke signed an order confirming the Porteouses' Chapter 13 repayment plan on June 28, 2001, which was entered on July 2, 2001. (*See* Order introduced before the Fifth Circuit ("Confirmation Order"), labeled SC00050-52.) The Confirmation Order provided that: "The debtor(s) shall not incur additional debt during the term

of this Plan except upon written approval of the Trustee. Failure to obtain such approval may cause the claim for such debt to be unallowable and non-dischargeable." (*Id.* ¶ 4.) This particular provision of the Confirmation Order was not mandated by, and did not enact or enforce any particular provision of the Bankruptcy Code.

The House Report charges that Judge Porteous violated Judge Greendyke's order by taking out additional markers at casinos and by obtaining a new credit card with a $200 limit without the trustee's permission. As set forth above, neither Louisiana law nor Judge Porteous understood markers to constitute debt. *TeleRecovery*, 738 S.2d at 664-66. Even if markers had violated that order, the violation would have been minor and should have been dealt with in the bankruptcy context, with contempt serving as the maximum punishment. Moreover, the Confirmation Order itself stated what consequences may flow from its violation, namely that "the claim for such [new] debt [would] be unallowable and non-dischargeable." (Confirmation Order, ¶ 4.)

The House Report further alleges that Judge Porteous applied for and received a new Capital One credit card. This new card provided an extremely limited credit line of $200 (which was later increased to $400 and then $600). While this card does constitute new credit, and its use incurred new debt, it was necessary for Judge Porteous to function in today's society, in which a credit card is frequently required (for such things as buying an airline ticket, renting a car, and making purchases over the internet). Admittedly, Judge Porteous should have asked for the Chapter 13 trustee's permission prior to obtaining this new card. His failure to do was a mistake. It is a gross injustice, however, to contend that the punishment for that mistake should be impeachment and removal from office. It should be instead be limited to the non-dischargeability specifically set out in the Confirmation Order.

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

In the history of the Republic, no federal judicial officer has been impeached and convicted for purely private conduct that does not constitute an actual abuse of constitutional power. Article III, however, seeks to deviate from this precedent and do just that. The allegations set out in Article III are novel (as well as grossly insufficient to warrant removal) in that they all relate to Judge Porteous's purely private conduct in connection with this personal bankruptcy filing. There is no allegation in Article III that Judge Porteous actually abused the power entrusted to him as a federal judge in connection with his bankruptcy. Moreover, the Justice Department specifically investigated Judge Porteous's conduct in connection with that bankruptcy and formally declined to bring any criminal charges. (Exhibit 1.) Accordingly, Article III – even if all its allegation were true – should not constitute an impeachable offense for which Judge Porteous can be removed from office.

Since the ratification of the Constitution, only fifteen federal judicial officers have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. In every case resulting in conviction, the House has alleged, and the Senate has found, that the former judge actually abused the power entrusted to him as a federal judge. Specifically:[11]

- In 1804, the Senate convicted Judge John Pickering for extreme misconduct on the bench, including rendering judgment after refusing to hear relevant evidence, disregarding and attempting to evade federal law, refusing to permit an appeal, and appearing drunk on the bench. (*See generally* 13 Annals of Cong. 319-368 (1852).)
- In 1862, the Senate convicted Judge West Humphreys for conduct amounting to treason and incitement to revolt and rebellion, all of which was inimical to his

[11] The history, context, and outcomes of prior impeachment proceedings are further discussed in the Motions to Dismiss Articles I and II that Judge Porteous filed concurrently with this Motion. Judge Porteous incorporates those discussions herein by reference.

position and authority as a U.S. federal judicial officer. During the Civil War, Humphreys joined the Tennessee secession and, without retiring from his U.S. federal judgeship, served as a District Judge in the Confederate States of America. (*See generally* Cong. Globe, 37th Cong., 2d Sess. 1062-2953 (1862).)

- In 1913, the Senate convicted Judge Robert Archbald for bribery and significant misconduct relating to cases pending before him, including using his position as a judge to induce litigants to allow him to participate in profitable financial deals and hearing cases in which he had a financial interest. (*See generally* 62 Cong. Rec. S1105-1678 (1913).)

- In 1936, the Senate convicted Judge Halsted Ritter for lacking the fitness to hold judicial office on the basis that he, among other things, abused the power of his office, engaged in kickback schemes stemming from his misuse of his judicial authority, and evaded the federal tax laws by not reporting the money that he received from such schemes. (*See generally* 74 Cong. Rec. S1-684 (1936).)

- In 1986, the Senate convicted Judge Harry Claiborne for tax evasion. (*See generally* 99 Cong. Rec. S2-31 (1986).) The Senate's action to remove Claiborne from office followed his federal criminal trial, in which a jury found him guilty of falsifying his income tax returns by failing to report as income bribes that he received while a federal judge.

- In 1989, the Senate convicted Judge Alcee Hastings for conspiracy to solicit a bribe in connection with a case before him and perjury before the grand jury investigating allegations of his judicial misconduct. (*See generally* 101 Cong. Rec. S1-77 (1989).)

- Also in 1989, the Senate convicted Judge Walter Nixon for perjury stemming from false statements that he made to the grand jury investigating bribery allegations charging that he accepted a gratuity in exchange for attempting to influence a state judicial proceeding. (*See generally* 101 Cong. Rec. S10,673 (1989).)

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

Of the bases for past Senate impeachment convictions, tax evasion (charged by the House against Judges Ritter and Claiborne) is the most analogous to the bankruptcy misconduct alleged

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

The House impeached Halsted Ritter in 1936 on the basis of seven articles. The first six such articles alleged various acts of misconduct in connection with Judge Ritter's actions on the bench, including kickbacks,[12] practicing law while a judge, exhibiting favoritism in connection with cases before him, and tax evasion. With regard to tax evasion, the House alleged that Ritter filed two tax returns that improperly omitted income that he received in connection with his judicial misconduct (*i.e.*, bribes or other gratuities). The seventh article was a catch-all, alleging that Ritter's various acts of misconduct rendered him unfit to serve as a federal judge. Following trial, the Senate acquitted Ritter on each of the first six articles – including the two articles that sought his removal on the basis of tax evasion. The Senate then turned, however, to the seventh, catch-all article and voted to convict.

The Ritter impeachment precedent is instructive in how the Senate deals with articles of impeachment directed at private financial conduct. First, the Senate acquitted Ritter on both articles of impeachment that alleged solely personal conduct unrelated to his official position: tax evasion. Those articles omitted any reference to Ritter's abuse of his judicial authority and alleged instead simply that he received income that he failed to report. This result significantly

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

undercuts the House's novel assertion in Article III that purely private, off-the-bench conduct in connection with a personal bankruptcy filing (or, by analogy, a personal tax return) can be the proper basis for an impeachment conviction. Indeed, in the first instance where the Senate considered removing a judicial officer for private conduct not specifically alleged to relate to an actual abuse of official power, the Senate rejected the theory and voted to acquit.

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

The Claiborne impeachment is similarly instructive. In that case, both the House and Senate's impeachment proceedings followed Claiborne's federal conviction for tax fraud. Indeed, the Claiborne articles of impeachment specifically alleged that the "facts [relating to tax fraud] set forth in [Claiborne Articles I and II] were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada." S. Hrg. 99-

819, pt. 1, at 7-8 (1986). In addition to the fact that his criminal conduct had already been conclusively determined by a federal jury, the Claiborne impeachment presented the unique circumstance that Claiborne had refused to resign his judgeship, was collecting his federal judicial salary while in prison, and intended to return to the federal bench after competing his two-year criminal sentence. These circumstances differ significantly from the Article III allegations against Judge Porteous, who has been neither criminally charged nor convicted of any misconduct in connection with his personal bankruptcy. Quite to the contrary, after conducting an extensive investigation, the Justice Department specifically declined to bring any criminal charges against Judge Porteous. (Exhibit 1.) Thus, the Senate's action in the Claiborne impeachment, which effectively ratified his prior criminal conviction and was necessary to prevent a convicted felon from retaking the bench, does not support the House's attempt in Article III to remove Judge Porteous from office on the basis of allegations of private bankruptcy misconduct that even the Justice Department concluded did not warrant criminal prosecution.

CONCLUSION

The Senate has never before countenanced the use of the impeachment mechanism to police the purely private conduct of federal judges, and it should not start now. In essence, Article III seeks to castigate and remove Judge Porteous for minor mistakes made in connection with his personal bankruptcy filing. As there is no allegation of actual abuse of official power,[13] discipline for such conduct should be meted out exclusively by the bankruptcy court and, if appropriate, the judicial disciplinary process. Such minor misconduct, however, should not be

[13] Judge Porteous never sought any special treatment or preference in connection with his bankruptcy case – a fact which the House concedes by omitting any such allegation in Article III. Indeed, S.J. Beaulieu, the Chapter 13 bankruptcy trustee who oversaw Judge Porteous's bankruptcy proceeding, told the Fifth Circuit Court of Appeals' investigators that the "only preferential treatment" that Judge Porteous received was the scheduling of his creditors meeting in the afternoon, rather than in the morning. (Exhibit 3.)

the subject of a Senate impeachment trial. Such a lowering of the standard for impeachment would allow judges and civil officers to be removed for a wide array of inaccurate financial statements – allowing a party in power to mine the records of federal officials to seek their removal.

The Senate clearly should not try, let alone remove, judges for conduct that even the bankruptcy courts treat as, at best, *de minimis*. Indeed, to remove a judge for acting on the advice of counsel in some of these matters would be absurdly out of step with the language and intent of the impeachment clauses. The Senate should dismiss Article III and reaffirm its long-standing position that conviction in impeachment trials is appropriate only where the subject judge has committed truly egregious acts while in federal service.[14]

The alleged errors and omissions in Judge Porteous's bankruptcy that the House points to as justification for his removal from office are, in reality, merely minor mistakes that occur in the vast majority of personal bankruptcy filings. While regrettable, such conduct is simply not a valid basis for the conviction and removal of a federal judge. The Constitution does not contemplate that impeachment will used as a mechanism to police the purely private conduct of federal judges. Instead, impeachment is reserved for only the most serious offenses, namely "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. Since Article III fails to allege conduct that meets this exacting standard, it should be dismissed.

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[14] Moreover, given the Constitution's mandate that judges be removed only for "Treason, Bribery, or other High Crimes and Misdemeanors," it is not at all clear that the Senate has the constitutional authority to remove federal judges for purely private, minor misconduct. U.S. CONST. art. II, § 4.

Respectfully submitted,

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United States District Court Judge
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Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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/s/ Daniel T. O'Connor

Exhibit 1

SC EXHIBIT - 00034

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

May 18, 2007

The Honorable Edith H. Jones
Chief Judge
United States Court of Appeals for the Fifth Circuit
515 Rusk Avenue, Room 12505
Houston, Texas 77002-2655

Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr.

Your Honor:

The United States Department of Justice respectfully submits this complaint referring allegations of judicial misconduct concerning the Honorable G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, pursuant to 28 U.S.C. §§ 351-64 and the Rules Governing Complaints of Judicial Misconduct or Disability (amended July 15, 2003).[1]

For the past several years, the Federal Bureau of Investigation ("FBI") and a grand jury empanelled in the Eastern District of Louisiana investigated whether Judge Porteous and other individuals bribed or conspired to bribe a public official in violation of 18 U.S.C. §§ 201 and 371, committed or conspired to commit honest services mail- or wire-fraud in violation of 18 U.S.C. §§ 371, 1341, 1343, and 1346, submitted false statements to federal agencies and banks in violation of 18 U.S.C. §§ 1001 and 1014, and filed false declarations, concealed assets, and acted in criminal contempt of court during his personal bankruptcy action in violation of 18 U.S.C. §§ 152 and 401.

The Department has determined that it will not seek criminal charges against Judge Porteous. Although the investigation developed evidence that might warrant charging Judge Porteous with violations of criminal law relating to judicial corruption, many of those incidents took place in the 1990s and would be precluded by the relevant statutes of limitations. In reaching its decision not to bring other available charges that are not time barred, the Department weighed the government's heavy burden of proof in a criminal trial, and the obligation to carry that burden to a unanimous jury; concerns about the materiality of some of Judge Porteous's provably false statements; the special difficulties of proving mens rea and intent to deceive beyond a reasonable doubt in a case of this nature; and the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters. The Department also

[1] This complaint contains information obtained by the grand jury. The district court has authorized disclosure of matters occurring before the grand jury pursuant to Fed. R. Crim. P. 6(e)(3)(E)(I) solely for use in this complaint and any resulting judicial proceedings.

HP Exhibit 4

gave careful consideration -- as it must -- to the availability of alternative remedies for Judge Porteous's history of misconduct while on the bench, including impeachment and judicial sanctions administered pursuant to 28 U.S.C. §§ 351-64.

Despite the Department's decision not to charge Judge Porteous with violations of federal criminal law, the investigation has uncovered evidence of pervasive misconduct committed by Judge Porteous. The Department also is aware that Judge Porteous and his medical examiners have concluded that he is mentally and psychologically unfit to serve as a federal judge, and that his incompetency is permanent. Collectively, the evidence indicates that Judge Porteous may have violated federal and state criminal laws, controlling canons of judicial conduct, rules of professional responsibility, and conducted himself in a manner antithetical to the constitutional standard of good behavior required of all federal judges. Further, it has come to the Department's attention that Judge Porteous is scheduled to return to the federal bench in June 2007, at which time he may seek to preside over matters involving the Department. The Department accordingly refers this evidence to Your Honor for possible disciplinary proceedings and, if warranted, certification of the allegations to Congress for impeachment.

BACKGROUND

On October 11, 1994, G. Thomas Porteous, Jr., was confirmed by the United States Senate as a United States District Court Judge for the Eastern District of Louisiana. Before his elevation to the federal bench, he served as a judge on the 24th Judicial District Court of the State of Louisiana ("24th JDC") for ten years, from 1984 to 1994.

The New Orleans Division of the FBI conducted an investigation into allegations of judicial corruption in the 24th JDC. That investigation resulted in the convictions of fourteen defendants, including several 24th JDC judges, the owners of a bail bonding business, and other state court litigants and officials. During the investigation, the FBI was informed that Judge Porteous had in the past accepted, and as a federal judge continued to accept things of value, including payments and trips, from local attorneys, allegedly in exchange for favorable rulings. The FBI also was informed that Judge Porteous maintained an improper relationship with Louis and Lori Marcotte, the owners of a bail bonding business, who allegedly provided Judge Porteous as well as other state judges and employees various things of value in exchange for access and assistance on bond-related matters.

In March 2001, Judge Porteous and his wife, Carmella Porteous, filed for bankruptcy under Chapter 13. Gabriel and Carmella Porteous signed and filed a declaration that their bankruptcy schedules and statement of financial affairs were true to the best of their knowledge, information, and belief. Subsequently, the bankruptcy court confirmed a repayment plan based on the information the Porteouses submitted to the court. The bankruptcy judge issued an order providing for repayment to the creditors over a 36-month period and prohibiting the Porteouses from accruing further debt during the bankruptcy. The repayment plan was satisfied and the bankruptcy discharged in July 2004.

EVIDENCE OF MISCONDUCT

I. Evidence that Judge Porteous Violated the Order of the Bankruptcy Court

Judge Porteous and his wife Carmella Porteous filed for bankruptcy on March 28, 2001. The Porteouses' financial records show that they sought protection in bankruptcy in large part because of their substantial gambling activities. For example, between June 1995 and July 2000, while Judge Porteous served on the federal bench, over $66,000 in gaming charges appear on Judge Porteous's credit card statements. Along with those credit card charges, between January 1996 and May 2000 Judge Porteous wrote checks or made cash withdrawals at casinos for an additional $27,739.

Judge William Greendyke, sitting by designation on the Bankruptcy Court for the Eastern District of Louisiana, issued an Order confirming the bankruptcy repayment plan on June 28, 2001. Among other things, Judge Greendyke ordered that "[t]he debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee. Failure to obtain such approval may cause the claim for such debt to be unallowable and non-dischargeable."

Judge Porteous violated this order on multiple occasions. Among other debts, he obtained gambling markers and loans from casinos during the pendency of the bankruptcy proceeding.[2] Judge Porteous obtained the following short-term debts from casinos in the aggregate amount of $31,900 in violation of the court's order:

- on August 20 and 21, 2001, Porteous borrowed $8,000 from Treasure Chest Casino in Kenner, Louisiana;
- on September 28, 2001, Porteous borrowed $2,000 from Harrah's Casino in New Orleans, Louisiana;
- on October 13, 2001, Porteous borrowed $1,000 from Treasure Chest Casino in Kenner, Louisiana;
- on October 17 and 18, 2001, Porteous borrowed $5,900 from Treasure Chest Casino in Kenner, Louisiana;
- on October 31, 2001, Porteous borrowed $3,000 from Beau Rivage Casino in Biloxi, Mississippi;
- on November 27, 2001, Porteous borrowed $2,000 from Treasure Chest Casino in Kenner, Louisiana;

[2] A "marker" is a form of credit extended by a casino that enables a customer to borrow money while authorizing the casino to draw any unpaid balance after a fixed period of time from the customer's bank account. Typically, markers are deposited after a few days, but Judge Porteous obtained an agreement from at least one casino that he would be afforded thirty days to repay his markers before the casino would deposit them.

- on December 11, 2001, Porteous borrowed $2,000 from Treasure Chest Casino in Kenner, Louisiana;
- on December 20, 2001, Porteous borrowed $1,000 from Harrah's Casino in New Orleans, Louisiana;
- on February 12, 2002, Porteous borrowed $1,000 from Grand Casino in Gulfport, Mississippi;
- on April 1, 2002, Porteous borrowed $2,500 from Treasure Chest Casino in Kenner, Louisiana;
- on May 26, 2002, Porteous borrowed $1,000 from Grand Casino, Gulfport, Mississippi; and
- on July 4 and 5, 2002, Porteous borrowed $2,500 from Grand Casino, Gulfport, Mississippi.

In addition, the evidence shows that Judge Porteous violated the order prohibiting new debt on several other occasions. On July 4, 2002, Judge Porteous applied successfully to increase his credit limit at Grand Casino Gulfport from $2,000 to $2,500. Judge Porteous and his wife accrued new debt on a credit card in violation of the order, including $734.31 in new charges between May 16 and June 18, 2001; $277.74 in new charges between June 15 and July 18, 2001; and $321.32 between July 16 and August 17, 2001.[3] Further, Judge Porteous and his wife obtained new, low-limited credit cards during the course of the bankruptcy without obtaining trustee approval, also in violation of the order. On several occasions, Judge Porteous signed the checks paying off the debts on credit cards that were obtained in his wife's name.

The evidence indicates that Judge Porteous intended to violate the order of the bankruptcy court. First, Judge Porteous is a federal judge who issues similar orders, and unquestionably expects that they will be obeyed. Claude C. Lightfoot, his bankruptcy attorney, testified that both he and the bankruptcy judge told Judge Porteous that he could not obtain new debt, that the requirement was well known to Judge Porteous, and that it was very clear to Judge Porteous that he would need approval to obtain new debt.[4] During a May 9, 2001 creditors meeting, Judge Porteous was further admonished by the trustee that he could not obtain new debt. The trustee also provided Judge Porteous with a written statement that reiterated the restriction on obtaining debt during bankruptcy, including credit card debt. Finally, Judge Porteous's actions in the bankruptcy show that he knew about the order's prohibition, and violated it willfully: not only

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[3] The Porteouses retained this credit card during the bankruptcy by failing to report on the bankruptcy application that they had paid off the debt on that card immediately before filing, as set forth below.

[4] The district court overseeing this grand jury investigation ruled that the attorney-client and work product privileges did not bar Lightfoot from testifying or producing records about his representation of Judge Porteous, both because the privilege did not apply to much of the requested information and also because the government satisfied its burden of showing that the crime-fraud exception defeated the claim of privilege.

did several of the violations occur soon after the confirmation order was issued, but he complied with the no-debt provision of the order in other instances that he knew were likely to come to the attention of the trustee. Specifically, the Porteouses requested permission from the bankruptcy trustee to refinance their home, which the trustee granted on December 20, 2002, and to obtain two new car leases, which the trustee granted on January 2, 2003. That Judge Porteous knew to request permission for other debts during the pendency of the bankruptcy makes clear that his failure to request permission for gambling and credit card debts was intentional and willful.

II. Evidence that Judge Porteous Filed False Pleadings and Concealed Assets in Bankruptcy

Judge Porteous included numerous false statements in bankruptcy pleadings signed under penalty of perjury and submitted to the court -- statements that closed avenues of inquiry and undermined the administration of the bankruptcy by, among other things, concealing assets and income that potentially could have been made available to creditors, but were not.

A. False Initial Petition

The evidence indicates that Judge Porteous intentionally filed his initial bankruptcy petition using a false name to protect himself from public embarrassment. The docket and various documents from the bankruptcy of Gabriel Thomas Porteous, Jr., and Carmella Porteous, case number 01-12363 in the Eastern District of Louisiana, indicate that a petition was filed on March 28, 2001, listing the debtors as "G.T. Ortous" and "C.A. Ortous" and their "street address" as "P.O. Box 1723, Harvey, LA 70059-1723." The social security numbers listed correspond to Gabriel Thomas Porteous, Jr., and Carmella Porteous. The petition was signed by Gabriel and Carmella Porteous in two places, once each directly over the printed name "Ortous." Those signatures were made under penalty of perjury.

Bankruptcy records also indicate that an amended petition was filed in the same case number on April 9, 2001, providing the debtors' names "Gabriel T. Porteous, Jr.," and "Carmella A. Porteous" and the street address "4801 Neyrey Dr., Metairie, LA 70002." United States Postal Service records include a PS Form 1093 Post Office Box assignment for P.O. Box 1723 in Harvey, Louisiana, which indicates that Gabriel T. Porteous, Jr., rented that box on March 20, 2001, just days before filing for bankruptcy.

The Porteouses' bankruptcy attorney testified that he and Judge Porteous specifically devised this scheme to sign under penalty of perjury an initial petition using a fabricated name and newly-acquired post office box address. The attorney testified that their purpose in falsifying the initial filing was to avoid publicity and humiliation by preventing Porteous's name from being listed in the local newspaper among other bankruptcies filed that week.

B. Concealed Assets and Income

The investigation also obtained evidence that Judge Porteous concealed assets and income during his bankruptcy proceeding. The Chapter 13 Schedules and Plan were signed by Gabriel and Carmella Porteous and Claude Lightfoot and were filed on April 9, 2001. The Porteouses signed a declaration filed with the Schedules indicating that, under penalty of perjury,

the Schedules were true to the best of their knowledge, information, and belief. Judge Porteous also stated under oath in a hearing before the bankruptcy trustee on May 9, 2001, that the materials submitted were true to the best of his knowledge. However, the bankruptcy schedules and other Porteous financial records indicate that the Porteouses concealed from the bankruptcy court several assets and sources of income, including those described below.

1. Concealed Tax Refund – In response to question 17 of Schedule B, filed April 9, 2001, which asks for "other liquidated debts owing debtor including tax refunds," Judge Porteous stated that there were "None." For question 20 of Schedule B, which asks for "other contingent and unliquidated claims of every nature, including tax refunds," Judge Porteous likewise responded, "None." However, records provided by Bank One for accounts of Gabriel and Carmella Porteous indicated that a $4,143.72 tax refund was deposited approximately one week later, on April 13, 2001. In an interview, the bankruptcy trustee indicated that the Porteouses did not notify him about their calendar year 2000 tax refund and did not turn the refund over to him even though they were required to do so. Their attorney, Claude Lightfoot, testified that the Porteouses never told him they were expecting a refund for calendar year 2000 when he went over each line of their schedules with them before signing and filing them.

2. Understated Bank Account Balance – In response to question 2 of Schedule B, which asks for "checking, savings, or other financial accounts, . . . or shares in banks, savings and loan, thrift, building and loan, and homestead associations," the Porteouses listed "Bank One Checking Account No. 002379554" with a current value of $100. However, the Porteouses' Bank One statement for that account, covering the period March 23 to April 23, 2001, indicates that the balance in that account on March 28, 2001, the date the bankruptcy petition was filed, was more than $1,800. The balance on April 9, 2001, the date the schedules were filed, was more than $3,000. Another bank account, which had a balance of more than $280 at the time, was not included in the bankruptcy filings at all. Judge Porteous's bankruptcy attorney testified that the only account Judge Porteous told him about was the account listed in the schedules, and that the $100 figure for that account came from Judge Porteous. By providing counsel with false and incomplete information, Porteous prevented his lawyer from rendering considered advice on what amounts to include, and by failing to disclose the full amount of assets in his bank account, Judge Porteous obstructed the trustee's task of accurately providing a full accounting of the Porteouses' financial condition to the bankruptcy court and interested creditors.

3. Carmella Porteous's Employment – Schedule I requires debtors to list, among other items, current income, occupation, and name of employer for the individual debtors. On Schedule I, the Porteouses listed the employer and take-home pay for Judge Porteous, but provided no employer name or income for Carmella Porteous. However, the Porteouses' bank records indicate that Carmella Porteous worked sporadically for several established employers both before and after the bankruptcy petition was filed. For instance, in the year 2000, she earned at least $864 from Adecco Employment Services and $327 from New Orleans Metropolitan Convention and Visitors, and in 2001, she earned $3,109.50 from R&M Glynn, Inc., and $915 from New Orleans Metropolitan Convention and Visitors. None of this income was indicated on the bankruptcy petition or schedules, nor was it subsequently brought to the attention of the trustee or the court.

C. Concealed Preferred Creditors

The bankruptcy schedules and other Porteous financial records also indicate that the Porteouses apparently concealed from the bankruptcy trustee and creditors the existence of several additional creditors who were paid in full immediately before the bankruptcy was filed.

Gabriel and Carmella Porteous signed under penalty of perjury their Statement of Financial Affairs on April 9, 2001. Question 3 of the Statement stated, "List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case." The Porteouses answered, "Normal installments." That statement was false, as they failed to list full repayments made to Fleet Credit Card Services and Grand Casino Gulfport shortly before they declared bankruptcy. These creditors therefore appear to be secretly preferred creditors, preferences that allowed the Porteouses to retain a credit card and protect their line of credit with a casino during the pendency of their bankruptcy repayment plan.

1. Fleet Credit Card – Credit card records of Carmella Porteous from Fleet Credit Card Services obtained pursuant to a grand jury subpoena indicate that Carmella Porteous held Fleet credit card account # 5447195123210658 prior to the filing of the Porteouses' bankruptcy on March 28, 2001. The records further indicate that the balance on that account, $1,088.41, was paid in full with a March 23, 2001 check from Judge Porteous's secretary, Rhonda Danos. His secretary testified that she made that payment at Judge Porteous's direction. Accordingly, Fleet Credit Card Services was fully paid off, in contrast to the creditors included in the bankruptcy, and the Porteouses retained the Fleet credit card for their own use, all without any disclosure to the bankruptcy trustee, judge, or creditors. Indeed, the Porteouses subsequently used this credit card in violation of the bankruptcy court's order prohibiting them from accruing new debt.

2. Grand Casino Markers – Records obtained from Grand Casino Gulfport pursuant to a grand jury subpoena indicated that Gabriel Porteous obtained two $1,000 markers from the casino on February 27, 2001. According to casino and bank records and interviews, Grand Casino Gulfport attempted to deposit the markers, which Judge Porteous had not repaid, in March 2001, but was unsuccessful due to a change in the ownership of Judge Porteous's bank. Casino records further show that Porteous contacted the casino and provided the new bank information before filing his Statement of Financial Affairs. On April 4, 2001, the markers were successfully deposited. Grand Casino Gulfport was therefore fully paid off, in contrast to the creditors included in the bankruptcy, all without any notification to the bankruptcy trustee, judge, or creditors. In addition, as noted above, Judge Porteous subsequently raised his credit limit with Grand Casino Gulfport during the pendency of his bankruptcy.

D. Undisclosed Gambling Losses

On the Statement of Financial Affairs, Question 8 states, "List all losses from fire, theft other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case." The Porteouses checked the box for "None." However, analyses of casino records indicated that Judge Porteous's gambling losses exceeded $12,700 during the preceding year, or at least $5,700 in net losses. According to the trustee, had

he known about the Porteouses' gambling losses he may have scrutinized more carefully the income and expense figures reported by the Porteouses in their filings.

E. Impact of False Statements and Concealed Assets in Bankruptcy

Judge Porteous, in the series of false statements set out above, subverted the bankruptcy court's ability to properly administer his bankruptcy. His use of a false name and his concealment of his gambling losses in the year preceding his bankruptcy prevented the public from learning about the nature of his public bankruptcy and prevented the trustee, court, and creditors from learning a relevant aspect of his financial condition. His false statements about expected tax refunds, bank accounts, his wife's income, and the existence of preferred creditors all concealed from the court income or assets that could have been distributed to creditors in the bankruptcy or been used to calculate the Porteouses' obligations in the event their assets were to be liquidated. The Porteouses filed a Chapter 13 bankruptcy, in which payments to creditors are based on prospective income. Carmella Porteous's income would have been directly relevant to the calculation of income available to repay creditors. Moreover, in order to determine a fair recovery for creditors under Chapter 13, courts compare the amount that a debtor would pay under Chapter 13 with the amount they would pay were the debtor's assets liquidated. The creditors must fare at least as well in Chapter 13 as they would if the assets were liquidated under Chapter 7. Accordingly, depending on how they were treated by the trustee and bankruptcy judge, concealed assets such as the Porteouses' expected tax refund, money in bank accounts, and money paid to preferred creditors (which the court could order repaid and distributed among all creditors) could have affected the comparative liquidation value of his estate, the amount of the monthly payments the Porteouses were required to make, or the percentage of debt the Porteouses were ultimately obligated to repay.

Even if the value of the hidden assets would not ultimately have affected the amount recovered by any individual creditors, Judge Porteous's false statements nonetheless undermined the bankruptcy process generally. "Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." In re Yonikus, 974 F.2d 901, 904 (7th Cir. 1992). This is because allowing debtors "the discretion to not report exempt or worthless property usurps the role of the trustee, creditors, and the court by denying them the opportunity to review the factual and legal basis of debtors' claims." In re Bailey, 147 B.R. 157, 163 (Bankr. N.D. Ill. 1992). Judge Porteous's concealment of assets and his filing of a false petition, schedules, and his statement of financial affairs precluded other interested parties from asserting their rights and enjoying a full and fair hearing on any claims they may have made against the estate.[5]

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[5] Despite the evidence recited above, the Department ultimately concluded that it would not seek to charge Judge Porteous with violations of federal criminal law under 18 U.S.C. § 152(1) and (3) (concealed assets and false statements in bankruptcy) and 18 U.S.C. § 401(3) (criminal contempt of court). Several factors informed that decision, including the burdens of proving beyond a reasonable doubt to a unanimous jury the materiality of Judge Porteous's misconduct in the bankruptcy proceeding. The burdens on the government in a criminal prosecution, however, do not apply in judicial misconduct or impeachment proceedings. An

III. Evidence that Judge Porteous Submitted Additional False and Misleading Statements

The investigation obtained evidence that numerous signed documents filed prior to or contemporaneously with the initiation of bankruptcy on which Judge Porteous had a duty to be truthful -- including government financial disclosure reports, a casino credit application, and a bank loan renewal application -- also contained false or misleading information.

Porteous's financial disclosure report for calendar year 2000, filed with the Administrative Office in May 2001 just over a month after he filed for bankruptcy, failed to list numerous credit accounts he was obligated to disclose, including most of those listed on his bankruptcy documents. Further, on that disclosure report Judge Porteous indicated liabilities of $15,000 or less on each of two credit cards, while Schedule F to his bankruptcy filings from the same time period reflects that Judge Porteous in fact owed approximately $196,000 in unsecured debt, most of it credit card debt. Judge Porteous also failed to disclose on his annual financial disclosure forms the travel, cash, and gifts he received while a federal judge from attorneys and others with matters before him, as discussed further below. In addition, Judge Porteous reported "0" indebtedness on an April 30, 2001, credit application filed with Harrah's casino just weeks after he noted in his petition to the bankruptcy court that he had incurred $196,000 in unsecured debt.

The investigation also uncovered evidence that Judge Porteous intended to mislead Region's Bank about his financial condition in order to ensure that a $5,000 single-payment loan scheduled to become due shortly before the bankruptcy would be extended and, thus, discharged among other unsecured debts in the bankruptcy. In response to a grand jury subpoena, Claude Lightfoot, the Porteouses' bankruptcy attorney, produced a letter from him to the Porteouses dated December 21, 2000, which discussed additional letters he had sent to all but one of the unsecured creditors that later were included in the bankruptcy. Lightfoot stated, "I enclose a copy of the letters and one copy of the attachments I included with each that I have sent to all of the unsecured creditors, with the exception of Regions Bank which we wanted to exclude, proposing the workout of the debts to each . . . ." (emphasis added). These "workout" letters proposed a 21% payment of the debts the Porteouses owed to each of 13 unsecured creditors "[i]n an effort to provide all of my clients' unsecured creditors with immediate payment now and to avoid the necessity of a Chapter 7 bankruptcy filing." (emphasis added). Region's Bank, to whom the Porteouses owed $5,000 on an unsecured "single payment" loan scheduled to come due January 13, 2001, was not sent a workout letter, nor was the $5,000 Regions loan amount included in the schedule of debts provided in the workout letters to other creditors. Another document Lightfoot produced was a list of the Porteouses' creditors and debts that had been prepared by Judge Porteous and his wife, and which Lightfoot used, along with other worksheets, during his efforts to reduce the Porteouses' debts short of bankruptcy as well as in preparing the bankruptcy petition and schedules. That list includes an entry in what has been identified as Judge Porteous's handwriting that states, "Regions Bank $5000 unsecured loan due 1/13/01."

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impeachable offense is any misconduct that damages the State and the operations of governmental institutions; it is not limited to criminal misconduct.

On January 16, 2001 -- shortly after the workout letters were sent to the unsecured creditors -- Judge Porteous signed an application with Region's Bank to renew his loan and extend the date of repayment on the loan six months. On the application Judge Porteous certified that he was not "in the process of filing bankruptcy" and signed under the acknowledgment that there had been "no material adverse change" in his financial condition "as disclosed in my most recent financial statement to lender." (The relevant loan applications with Region's Bank submitted in January and July 2000 included financial statements, but neither of those statements appears to have been completed.) The loan renewal was approved, and the repayment date was extended to July 17, 2001. The Porteouses then filed their initial voluntary petition for bankruptcy approximately two months later, on March 28, 2001, and the loan from Region's Bank was discharged in the bankruptcy.

The December 21, 2000, letter from their attorney to the Porteouses establishes that Judge Porteous's decision not to disclose his actual financial condition and impending bankruptcy to Region's Bank in the loan renewal application was intentional. Indeed, the letter states that the Porteouses and their attorney decided not to send the workout letter to Region's Bank in particular. As a result, Judge Porteous was able to obtain an extension under the false pretense that his financial condition had not materially worsened and that he was not on the brink of bankruptcy, and was able to include the Region's Bank loan in the bankruptcy even though it was originally set to mature before he filed.

IV. Evidence that Judge Porteous Solicited and Accepted Things of Value from Attorneys and Litigants with Matters Before Him

Among the attorneys identified by FBI sources as the group most closely linked to the corruption allegations surrounding Judge Porteous were Donald Gardner, Robert Creely, Leonard Levenson, and Warren Forstall. Each of those attorneys was interviewed or compelled to testify before the grand jury about their financial dealings with the Judge. The evidence obtained from those witnesses shows that Judge Porteous accepted cash, expensive meals, travel, and other benefits from them, gifts that the Judge failed to disclose to the Administrative Office on his annual financial disclosure reports or to litigants and opposing counsel in cases in which those attorneys were engaged. The Department also has obtained evidence that Judge Porteous received unreimbursed travel and sport hunting trips from litigants with matters before him in federal court, also without disclosing his apparent conflicts to interested parties and counsel.

A. Cash Payments from Attorneys

Robert Creely and Jacob Amato, who represented clients with matters before Judge Porteous in state and federal court, testified that Judge Porteous solicited and accepted cash payments from them while he was a state and federal judge. According to their testimony, none of the payments occurred after 1999.

Robert Creely is a lawyer in New Orleans, Louisiana. He met Judge Porteous in high school, and practiced at the same firm as Judge Porteous for a year after law school. Creely then left the firm with another local attorney, Jacob Amato. Creely and Amato practiced together in

the law firm of Creely & Amato for 29 years. Creely describes himself as a very close personal friend of Judge Porteous, as does Amato.

Creely testified that, beginning in the late 1980s and early 1990s, while Judge Porteous was a state court judge, he began to solicit cash payments from Creely. Creely and Amato had matters before Judge Porteous in state court at that time. Creely testified that he and Amato would each take draws for half the amount from their joint law firm account. Creely would give that money to Judge Porteous in cash. Creely indicated that Judge Porteous would always ask for the money to pay urgent, unforeseen expenses related to his family. However, Creely stated that Judge Porteous drank and gambled excessively, and Creely was concerned he was paying for the Judge's extravagant lifestyle. Creely testified that, as a result, he eventually told Judge Porteous he could not continue to give him money.

After Creely decided to cut off further payments to Judge Porteous, the Judge began to designate Creely as the curator on executory interests in mortgaged property in actions over which he presided as a state court judge. Creely testified that he received approximately $175 from the state court system for each curatorship, and that those cases required very little time or effort on his part. In return, Judge Porteous asked Creely for the money he was paid by the court. Creely testified that he paid Judge Porteous in cash the amount he received, minus his minimal costs, which usually involved simply sending a letter and posting public notice of the pending executory actions. Although PACER records indicate Judge Porteous appointed Creely as the representative for an absent party in at least one forfeiture action in federal court -- that is, United States v. Ratcliff, Civ. No. 95-00224 (filed Jan. 19, 1995) -- Creely testified that the kick-back scheme he described came to an end when Judge Porteous moved from state to federal court in 1994. Jacob Amato also testified about the curatorships and stated that he was aware that Judge Porteous asked Creely for money and explicitly tied those payments to the many cases in which the Judge appointed Creely as a curator.

Creely testified that, in May 1999, Judge Porteous once more asked his law partner, Jacob Amato, for a payment of $2,000, this time to help defray the cost of a wedding for one of his children. This request was made while Amato was counsel on the Liljeberg matter, a multi-million dollar civil action pending before Judge Porteous in federal court, described further below. Jacob Amato also testified about that request for money from Judge Porteous. Amato gave Porteous the money he asked for in cash, again splitting the payment with Creely through personal draw-downs from their law firm account. Creely testified that Judge Porteous has not solicited, and he has not given him, any additional cash since the May 1999 payment of $2,000. Creely testified that Judge Porteous instructed him to give the cash to his secretary, Rhonda Danos, who would pick it up from his office. Creely says he put the money in a sealed envelope and gave it to Danos. Danos testified that she does not recall receiving an envelop with cash in it, although she stated that she did pick up items from time to time for the Judge from Creely's office.

Jacob Amato corroborated Creely's claims that they made cash payments to Judge Porteous both while he was a state and a federal judge. Between them, Creely and Amato represented parties in four actions over which Judge Porteous presided on the federal bench

according to the PACER electronic court records system.[6] Creely testified that in total they may have given Judge Porteous as much as $10,000 over time.

Donald Gardner is also an attorney in New Orleans, Louisiana and a close personal friend of Judge Porteous. Although Gardner testified he does not gamble often, he stated that on occasions when he was at casinos with Judge Porteous, the Judge would ask for money to gamble, and he would give it to him. Gardner testified Judge Porteous would request amounts in the range of $100 to $200. He also testified that he provided Judge Porteous approximately $200 to purchase a gift for his wife. Gardner also paid $300 to a contractor on behalf of Judge Porteous. Gardner testified that his payments to or on behalf of Judge Porteous occurred prior to him taking the federal bench. According to Gardner, he estimated that over the course of their friendship he did not give Judge Porteous more than $3,000 in total. Although the FBI developed sources who believed that Gardner regularly paid Judge Porteous, the investigation was ultimately unable to disprove his testimony about the extent of his cash payments to Judge Porteous.

In addition to cash payments to Judge Porteous, several attorneys testified that they gave money to his secretary, Rhonda Danos, to help support Judge Porteous's son during his externship in Washington, D.C., while Judge Porteous was a federal judge. Leonard Levenson is another local attorney who has been friends with Judge Porteous since the early 1980s. Levenson testified that, although he never gave cash directly to Judge Porteous, he may have contributed a few hundred dollars to Rhonda Danos to be used for Judge Porteous's son's externship. Don Gardner also testified that he gave a couple hundred dollars for the externship.[7]

B. Travel, Meals, and Hunting and Fishing Trips from Lawyers and Litigants

The investigation of the FBI into alleged judicial corruption also led to the discovery of evidence that, on a regular basis, Judge Porteous accepted gifts of travel, expensive meals, drinks, and hunting and fishing trips from attorneys and businesses with matters before him both in state and federal court, and that Judge Porteous failed to disclose his receipt of those benefits to interested counsel and litigants and, for all but two hunting trips, in his financial disclosure reports to the Administrative Office.

Several attorneys who were compelled to testify admitted that they paid for travel for Judge Porteous. In May 1999, Judge Porteous and several others traveled to Las Vegas, Nevada for his son's bachelor party. Credit card records and Caesar's Hotel records indicate that Robert

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[6] See In re. Liljeberg Enters. Inc., Civ. No. 93-01794 (filed June 01, 1993); United States v. Ratcliff, Civ. No. 95-00224 (filed Jan. 19, 1995); Buck v. Candy Fleet Corp., Civ. No. 97-01593 (filed May 16, 1997); and Union Planters Bank, N.A. v. Gavel, Civ. No. 02-01224 (filed Apr. 24, 2002).

[7] Gardner also testified that he, like Creely, was designated by Judge Porteous as a curator in numerous state cases then pending before the Judge. He claimed, however, that the Judge never asked for money in connection with those appointments.

Creely paid $421.90 with his credit card for Porteous's room from May 20 to May 23, 1999. Judge Porteous's credit card records indicate that he took out more than $5,000 on his credit cards at Caesar's Hotel during the trip. Caesar's Hotel records estimate that Judge Porteous lost $1,200 gambling over the course of his stay. Judge Porteous's bank records indicate that he deposited $5,000 into his money market account days after he returned from the trip. The source of that money is unknown. Don Gardner, the New Orleans attorney representing the opposing party in the Liljeberg cases that were then pending before Judge Porteous, also attended the May 1999 Las Vegas bachelor party trip.

In grand jury testimony and an interview with the FBI, Robert Creely admitted that he attended the bachelor party trip, but did not recall paying for Judge Porteous's room. He said that he and two other non lawyers present on the trip also split the bill for an expensive steak dinner for many of the people in attendance, including Judge Porteous. He claimed that he did not give Judge Porteous any money during or immediately following that trip.

Robert Creely also testified that he has taken Judge Porteous on many fishing trips over the years, including while Judge Porteous was a federal judge, and on two or perhaps three hunting trips while Porteous was on the state bench. Creely valued the hunting trips at the time at around $1,500 per person plus airfare, all of which he covered on Judge Porteous's behalf. Judge Porteous never covered any of the costs related to the hunting or fishing trips.

Warren Forstall, Jr. is a lawyer who practices in New Orleans, Louisiana. He and Judge Porteous have been friends for about 20 years. Forstall testified that in September 1999, at Judge Porteous's invitation, Forstall purchased tickets for both of them to San Francisco to attend an attorney conference together. They later cancelled the trip, and Forstall did not know what became of the ticket he purchased for Judge Porteous. Credit card and travel agency records for Forstall show that he paid $238 with his credit card for the airline tickets for Judge Porteous to San Francisco on September 18, 1999, with a return flight from Reno-Tahoe to New Orleans on September 22, 1999, along with an accompanying ticket for himself. Travel records indicate that Judge Porteous traded his California plane ticket for a ticket to Las Vegas in October 1999. Judge Porteous failed to disclose his acceptance of an airline ticket from Forstall on his financial disclosure forms or in any litigation in which Forstall had an interest.[8]

In an interview with the FBI, Leonard Levenson stated that he has paid for hunting trips with Judge Porteous both while the Judge was on the state and federal bench. In October 1999, Levenson and his wife accompanied Judge Porteous to Las Vegas, Nevada. Porteous obtained his airfare for that trip by trading in the unused ticket to San Francisco that he previously had obtained from Warren Forstall. Judge Porteous's secretary, Rhonda Danos, paid for the

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[8] The Court's PACER records indicate that Forstall's firm represented parties in at least six federal actions before Judge Porteous. See Everage v. Fisher, Civ. No. 98-00451 (filed Feb. 11, 1998); McAfee v. Ayers, Civ. No. 98-01415 (filed May 12, 1998); Ford v. United States Postal Serv., Civ. No. 98-02170 (filed July 24, 1998); Wingate v. Brock, Civ. No. 98-03290 (filed Nov. 6, 1998); Coleman v. United States Postal Serv., Civ. No. 99-02017 (filed June 30, 1999); and Minnifield v. Drug Trans. Inc, Civ. No. 02-02516 (filed Aug. 13, 2002).

Levensons' airfare, and was reimbursed by them in November 1999. Levenson has been counsel in at least eleven matters over which Porteous presided in federal court.[9] It does not appear that Judge Porteous provided notice to any party of his acceptance of gifts and benefits from Levenson.

According to evidence obtained from attorneys who were interviewed or testified before the grand jury, Judge Porteous also made it his regular practice to receive gifts of meals and drinks at expensive restaurants from lawyers with matters before him while he was a judge in both state and federal court. Robert Creely, Jacob Amato, Leonard Levenson, Donald Gardner, and Warren Forstall all admitted that they frequently bought meals for Judge Porteous that he did not reimburse. Creely testified that Judge Porteous always expected that the lawyers would pick up the tab, and that the Judge would never offer to pay. Ronald Bodenheimer, a former 24th JDC judge who agreed to be interviewed and testify after pleading guilty to honest services fraud in connection with the investigation of judicial corruption in the 24th JDC, stated that when he was elected to the state bench, Judge Porteous told him that since he was a judge he would never again need to pay for his own lunch. Each of the attorneys who routinely bought meals for Judge Porteous had matters before him both in state and federal court. Judge Porteous apparently never disclosed to any litigant or counsel his receipt of benefits from these lawyers, nor did he disclose any meals valued over $100 in any financial disclosure report filed with the Administrative Office.[10]

The FBI and other investigative agencies also have obtained evidence that, on at least three occasions, Judge Porteous accepted free travel and hunting trips from the Rowan Company and Diamond Offshore. Rowan and Diamond are each frequently named as defendants in maritime actions brought in the Eastern District of Louisiana and, on many occasions, in actions assigned to Judge Porteous. The hunting trips included free air transportation by private plane from New Orleans, Louisiana to Falfurrias, Texas, and sport hunting on property owned or

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[9] See In re. Liljeberg Enters. Inc., Civ. No. 93-01794 (filed June 01, 1993); In re. Owen McManus, Civ. No. 95-01615 (filed May 23, 1995); Alliance General Ins. Co. v. Louisiana Sheriff's Auto. Risk Prog., Civ. No. 96-00961 (filed Mar. 15, 1996); First Natl Bank v. Evans, Civ. No. 96-01006 (filed Mar. 20, 1996); Joseph v. Sears Roebuck & Co., Civ. No. 97-00192 (filed Jan. 21, 1997); Siddiqui Group Enters., Inc. v. Shell Oil Co., Civ. No. 98-00606 (filed Feb. 26, 1998); Liberty Mutual Fire Ins. v. Rayannack, Civ. No. 00-01209 (filed Apr. 19, 2000); Holmes v. Consolidated Cos., Inc., Civ. No. 00-01447 (filed May 17, 2000); Loehn v. Hardin, Civ. No. 02-00257 (filed Jan. 30, 2002); Salatich v. America Online Inc., Civ. No. 03-02943 (filed Oct. 21, 2003); and Morales v. Trippe, Civ. No. 04-02483 (filed Aug. 31, 2004).

[10] For example, although it is difficult to reconstruct the record with certainty, Amato's financial records and testimony indicate that he may have spent at least $1,500 in 1999 and $2,250 in 2000 for dining and beverage expenses at restaurants at which he entertained Judge Porteous. Judge Porteous was required to report to the Administrative Office gifts of food and drink valued at more than $100 on his annual financial disclosure reports. However, Judge Porteous has never reported the receipt of any gift from Amato or any other attorney with matters before him.

controlled by Rowan near the Mariposa Ranch in Falfurrias. The government has also obtained evidence that Judge Porteous traveled from the Falfurrias camp by private plane to a similar hunting camp near San Antonio, Texas owned or controlled by Diamond. Further evidence indicates that, on at least one of the trips paid for by Rowan, Judge Porteous was accompanied on the trip by litigation counsel for Rowan.[11]

Judge Porteous disclosed two of these hunting trips in financial disclosure reports filed with the Administrative Office. On his report for calendar year 2004, filed May 12, 2005, in response to Part V, "Gifts," Judge Porteous reported that he received a hunting trip from Rowan Company, for which he reported a fair market value of $1,000. On his report for calendar year 2005, filed July 24, 2006, in response to Part V, "Gifts," Judge Porteous reported that he received a hunting trip from Diamond Offshore, which he also valued at $1,000. Judge Porteous has yet to file his financial disclosure report for calendar year 2006. Judge Porteous's reports appear to understate the fair market value of the hunting trips. Evidence indicates that the cost to operate the private plane used to transport Judge Porteous to Falfurrias, Texas itself was approximately $1,000 an hour. According to commercial sports hunting locations in the same area, the fee for merely observing a hunt is approximately $200 a day in addition to the cost of the full hunting package for the other hunt participants, while the fee to participate in a Whitetail Buck hunt, which evidence shows was the subject of at least one of the hunting trips, would cost approximately $3,000 to $3,500 per participant. Together, the evidence suggests the total fair market value for each hunting trip would have been in excess of the $1,000 reported by Judge Porteous.

In addition to apparently understating the fair market value of his trips on financial disclosure reports submitted to the Administrative Office, Judge Porteous apparently failed to disclose his receipt of the trips to counsel and parties adverse to Rowan and Diamond in the actions over which he presided. The Court's PACER electronic records system indicates that, since the late 1980s, the Rowan Companies, Inc. and its related companies have been parties in more than a hundred cases filed in the Eastern District of Louisiana. Judge Porteous has presided over at least six such actions.[12] Of those cases, Hanna was an open matter during all of 2004, and therefore was pending when Judge Porteous received a hunting trip from Rowan. About one week after returning from his January 2006 trip with Rowan, he was assigned to preside over the Thomas matter. Despite his obligation to do so, Judge Porteous apparently failed to disclose the benefits he received from Rowan to counsel and the opposing parties in each of those cases.

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[11] There is evidence that one other federal district judge attended at least one of the hunting trips Rowan sponsored.

[12] See Lucas v. Tetra Technologies, Civ. No. 96-03501 (filed Oct. 28, 1996); Grubb v. Rowan Companies, Inc., Civ. No. 00-01075 (filed Apr. 10, 2000); Hoffman v. Rowan Companies, Inc., Civ. No. 01-01285 (filed Apr. 27, 2001); Hanna v. Rowan Company, Inc., Civ. No. 03-03285 (filed Nov. 21, 2003); Thomas v. Rowan Companies, Inc., Civ. No. 06-00166 (filed Jan. 13, 2006); and Cooley v. Crescent Drilling & Production, Inc., Civ. No. 06-01427 (filed Mar. 20, 2006).

Likewise, Diamond and its related companies were frequent litigants in the Eastern District of Louisiana, also parties in more than a hundred actions filed since the early 1990s. According to the PACER system, Judge Porteous presided over seven matters in which Diamond was a party.[13] Of those seven, Johnson was pending for part of, and Jones during all of 2005, the year in which Diamond provided Judge Porteous one of the trips according to Judge Porteous's financial disclosure report. The docket in each case does not reflect that Judge Porteous provided notice to the parties or counsel of the trip he received from Diamond.

C. Effect of Judge Porteous's Misconduct on the Administration of Justice

Judge Porteous's apparent misconduct has had a derogatory effect on the administration of justice in the Eastern District of Louisiana. That impact can be illustrated by the effect his conflicts had specifically on the litigation surrounding the Chapter 11 bankruptcy filing of Liljeberg Enterprises, Inc., and the cloud of suspicion those undisclosed conflicts raised about the validity of Judge Porteous's rulings in that matter. See In re Liljeberg Enterprises, Inc., Civ. Nos. 93-1794, 93-4249, 95-2922, and 94-3993. The bankruptcy action was commenced in 1993, and the matter was transferred and consolidated with related cases before Judge Porteous on January 16, 1996. On September 19, 1996, after Judge Porteous's assignment to the litigation and just weeks before the complex matter was scheduled to be tried to the bench, Liljeberg Enterprises moved to substitute Jacob Amato and Leonard Levenson as counsel of record. Judge Porteous signed the order granting the substitution on September 23, 1996. Amato handled the representation of Liljeberg on behalf of the Creely & Amato law firm. Levenson testified that he was told when he was hired by Liljeberg that he was being retained for strategy and assistance during the trial of the matter. However, based on recent public statements made by his client, Levenson now believes that his apparent close relationship with Judge Porteous influenced his client to hire him. Jacob Amato testified that he also believed his connection to Judge Porteous played a role in his client's decision to engage him.

One of several parties adverse to Liljeberg in these actions was LifeMark Hospitals, Inc. After Amato and Levenson were retained by Liljeberg, Lifemark in turn sought to associate a long-time friend of Porteous, Donald Gardner.

Gardner testified that he did not have experience handling federal litigation matters, and that Lifemark had competent local counsel. Gardner stated that the reason he was asked to associate himself on the case was his known relationship with Judge Porteous. LifeMark's counsel, Joseph Mole, testified that he hired Gardner because his client believed it was necessary to "level the playing field" following the retention by Liljeberg of Amato and Levenson – whose close connections to Judge Porteous were also well known among local attorneys. Indeed, prior

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[13] See Pierce v. Diamond Offshore, Civ. No. 98-01661 (filed June 4, 1998); Gonzalez v. Diamond Offshore, Civ. No. 99-00815 (filed Mar. 11, 1999); Sylve v. Oceaneering Int'l, Inc., Civ. No. 99-00841 (filed Mar. 15, 1999); Dillon v. Diamond Offshore, Civ. No. 99-02026 (filed June 30, 1999); Farrar v. Diamond Offshore Co., Civ. No. 03-00782 (filed Mar. 19, 2003); Johnson v. Diamond Offshore, Civ. No. 03-02505 (filed Sept. 4, 2003); and Jones v. Diamond Offshore, Civ. No. 04-00922 (filed Mar. 31, 2004).

to hiring Gardner, counsel for LifeMark filed a motion seeking Judge Porteous's recusal because of the appearance of partiality created by the close personal relationship among Porteous, Amato, Creely, and Levenson. LifeMark's counsel testified that he was not aware that Porteous had received cash payments from Amato or his partner Creely, and trips and other benefits from Amato, Creely, and Levenson. He testified that, had he known about those dealings, he would certainly have included that information in his motion to recuse. Judge Porteous denied the motion. In his opinion, Judge Porteous failed to disclose his solicitation and acceptance of cash, travel, and other things of value from Amato, Creely, and Levenson. Counsel for LifeMark filed a mandamus action with the Fifth Circuit, but the Circuit denied LifeMark's requested relief as well -- also without being informed of Judge Porteous's financial dealings with Liljeberg's counsel. Amato testified that his and his partner's gifts of cash and other benefits to Judge Porteous were never disclosed in the litigation, and admitted that they "probably" would have been a basis for recusal. As noted, three years later, while Liljeberg was still pending before him, Judge Porteous again solicited and received $2,000 in cash from Creely and Amato, which Porteous also failed to disclose to the counsel or litigants in the Liljeberg action, as well as the Administrative Office.

The written fee agreement between Gardner and LifeMark provided that Gardner would be paid a $100,000 flat fee for associating himself on the case. The agreement included a provision that, if the case was transferred to another judge, Gardner's engagement would end, but he would be paid an additional $100,000 severance. The fee agreement also contained a sliding-scale of additional fees contingent on various measures of LifeMark's success at trial. According to LifeMark's lead counsel, Joseph Mole, he included that contingent fee component to create an incentive for Gardner to deal honestly with LifeMark and not collude with Amato and Levenson. Mole saw Gardner as part of a circle of friends surrounding Judge Porteous, a circle that included opposing counsel Amato and Levenson. When asked whether Gardner was expected to give any part of his fee to Judge Porteous, both Gardner and Mole testified that he was not. Both also testified that Gardner informed LifeMark up front that he would not be able to influence Judge Porteous to do anything unethical or improper.

Mole testified that Gardner was retained solely because of his close relationship with Judge Porteous, and that his only active role in the case was to attend the bench trial. Gardner testified that he offered advice on how he thought Judge Porteous might react to LifeMark's evidence and strategies, but that counsel for LifeMark disregarded most of that advice. When questioned about the perceived need to pay $100,000 -- and potentially many hundreds of thousands more -- to an attorney who had no relevant federal experience but who was a friend of the Judge so that he would file an appearance and observe the bench trial, Mole testified that he thought his client was a victim of a broken system.

The non-jury trial before Judge Porteous commenced June 16, 1997 and continued with breaks over several weeks until July 23, 1997. Following the bench trial, Judge Porteous failed to rule for nearly three years. During the time that Judge Porteous's judgment was pending, the evidence reflects, as recounted above, that Judge Porteous asked for and received cash payments

from Creely and Amato, and was the beneficiary of numerous meals, trips, and other gifts from Creely, Amato, Levenson, and Gardner.[14]

On April 26, 2000, Judge Porteous ruled in favor of Amato and Levenson's client, Liljeberg Enterprises, Inc., on most of the important contested issues.[15] Porteous's ruling in favor of Liljeberg was partially reversed by the Fifth Circuit in an unusually critical opinion. Regarding Porteous's finding that LifeMark had breached a fiduciary duty it owed to Liljeberg by, among other things, failing to reinscribe a collateral mortgage and mitigate harms caused by not doing so, the Circuit excoriated Judge Porteous:

> . . . The extraordinary duty the district court imposed upon LifeMark . . . is inexplicable. . . .
>
> . . . The right of LifeMark to unilaterally release any part of the property from the mortgage is wholly at odds with the district court's discovery of a "duty" to reinscribe the collateral mortgage. . . .
>
> . . . [Judge Porteous's theory that LifeMark consequently owed a duty to mitigate] is a mere chimera, existing nowhere in Louisiana law. It was apparently constructed out of whole cloth.

In re Liljeberg Enters., Inc., 304 F.3d 410, 428-29 (5th Cir. 2002). Similarly, in finding that Judge Porteous clearly erred in his ruling that the judicial sale of the hospital must be overturned in favor of Amato and Levenson's client, Liljeberg, the Court censured the unsupported conclusions drawn by the Judge:

> . . . the district court's findings of a "conspiracy" to wrest control of the hospital and medical office building from St. Jude and Liljeberg Enterprises border on the absurd. . . .
>
> The district court's "conspiracy theory" conclusion is based, in part, on the view that Liljeberg Enterprises's or St. Jude's losses were caused by Lifemark. . . .

---

[14] On May 28, 1999, Judge Porteous granted summary judgment in favor of Levenson's client in Alliance Gen. Ins. Co. v. Louisiana Sherriff's Auto. Risk Prog., Civ. No. 96-00961.

[15] According to American Express credit card records, Amato paid$130 at Commander's Palace -- a fine dining restaurant in New Orleans -- on April 25, 2000, the day on which Judge Porteous signed his long-pending judgment in favor of Amato's client. The judgement was filed on the docket on April 26, 2000. Amato has informed the government that Rhonda Danos, Porteous's secretary, was present with him at Commander's Palace on April 25, 2000, and that he paid that bill. Danos testified that the pending judgment was not discussed during the April 25, 2000 rendevous at Commander's Palace, that she never received any cash or bribe from Amato, and that the timing of her meeting with Amato at Commander's Palace on the day the judgment was signed was a coincidence.

> These findings turn on the remarkable but largely implicit conclusion . . . that, under Louisiana law, a second mortgagee . . . cannot initiate foreclosure proceedings. The district court and Liljeberg Enterprises offer no statutory or case law support for this proposition, for the simple reason that this is not the law.

Id. at 431.

V. Evidence that Judge Porteous Accepted Things of Value from Bail Bonds Unlimited and Louis and Lori Marcotte in Exchange for Access and Assistance

Louis and Lori Marcotte operated Bail Bonds Unlimited, a bail bonds company with business before the 24th JDC. As a result of the FBI investigation into corruption in the 24th JDC, both Louis and Lori Marcotte pleaded guilty to bribing Louisiana state judges in addition to other offenses. In interviews following their guilty pleas, the Marcottes said they paid for expensive meals, trips, and other benefits for Judge Porteous in exchange for favorable treatment when he was a state judge in the early 1990's, and that they continued to pay for meals while he was a federal judge. The Marcottes estimated the cost of weekly Friday lunches they provided for Judge Porteous and his staff and other invitees at about $500 each. They also stated that they paid for innumerable additional meals and drinks at expensive restaurants that cost hundreds of dollars each. In addition, the Marcottes said they paid for numerous car repairs for Judge Porteous and his family, paid for a fence to be built for him, gave parking privileges to Porteous's son at their office near the courthouse, and provided business to his son's legal courier service.

Other witnesses confirm that Louis Marcotte did numerous favors for and gave many gifts to Judge Porteous while he was a state court judge. Former Marcotte employees say that Marcotte paid for car repairs for Judge Porteous and a fence for Judge Porteous' house. Other witnesses report that Marcotte paid for many meals for Judge Porteous and at least one trip to Las Vegas, Nevada for Judge Porteous. Additional sources report, and the FBI in one instance observed, that Louis Marcotte continued to take Judge Porteous out for meals when he was a federal judge.

In 1992, the Marcottes invited Judge Porteous to Las Vegas with them, but he was unable to attend. Several months later, around August 1992, Rhonda Danos called the Marcottes to inform them that Judge Porteous "was ready to go" to Las Vegas with them. The Marcottes and two local attorneys paid to take Judge Porteous and another state judge to Las Vegas. Danos booked the trip on her credit card and then sought reimbursement from Louis Marcotte. The Marcottes stated that the arrangement was designed to disguise the fact that they and other lawyers were paying for the trip. They also stated that they invited the other attorneys and judge to provide cover for Judge Porteous.

In July 1999, the Professional Bail Agents of America paid $206.80 for lodging for Judge Porteous at their conference at the Beau Rivage in Biloxi, Mississippi. Judge Porteous spoke at the conference. Judge Porteous did not report this payment on his financial disclosure form (there is no minimum value for required reporting of travel reimbursements). The charge for Porteous's lodging was paid by the PBAA out of its "master account." In turn, the Marcottes

made a $7,000 contribution to cover expenses on that master account. The Marcottes also provided the PBAA with a list of people whose charges should be credited against the Marcotte's credit card. That list included Porteous's secretary, Rhonda Danos.

The Marcottes asserted that they also paid for Porteous's secretary to go to Las Vegas, Nevada for many years with them when they were attending annual bail bonding conventions there. This began in 1992 and continued through the first few years Judge Porteous was a federal judge. The Marcottes have provided the FBI with pictures that show the Judge's secretary in their company in Las Vegas. They claimed that they covered all of Danos's costs during the trips. For several years, the Marcottes also provided Danos and Judge Porteous with five to ten tickets each year to an annual police fund-raising party, valued at $100 per ticket. The expenses borne by the Marcottes on behalf of the Judge's secretary tend to corroborate their claim that they provided gifts to Judge Porteous in exchange for access. The Marcottes explained that Danos was the gatekeeper for access to Judge Porteous, and that it was therefore essential to their purpose that they kept Danos happy by plying her with gifts as well.

According to the Marcottes, in exchange for their generosity with Judge Porteous and Danos, while Judge Porteous was a state court judge he gave the Marcottes immediate access to him on bonding whenever they needed him. The Marcottes say he granted most of their requests. Louis Marcotte told the FBI that Judge Porteous was more likely to grant a problematic request after a lunch or a car repair. Judge Porteous also made introductions for the Marcottes to other state judges and lent his support by vouching to other judges that Louis Marcotte was a good person to deal with on bond issues. He also spoke to other state judges about the benefits to the court system of split bonds, a practice that was extremely beneficial to the business of Bail Bonds Unlimited. Following his own agreement to plead guilty to honest services fraud and to cooperate with the government, former 24th JDC judge Ronald Bodenheimer corroborated much of what the Marcottes told the FBI concerning the assistance Judge Porteous provided around the courthouse for their business interests in the 24th JDC.

In addition to making himself accessible and assisting the Marcottes on bonding matters, at Louis Marcotte's request Judge Porteous expunged the felony convictions of two Marcotte employees shortly before Judge Porteous left the state bench in 1994. This permitted the employees to work for the Marcottes in the bail bonding business, which otherwise was prohibited under Louisiana law. It appears that Judge Porteous decision to expunge the convictions was contrary to law. Nonetheless, Porteous claimed in an interview with the New Orleans Metropolitan Crime Commission that an Assistant District Attorney was present during the hearing and failed to object on the record. Even if true, there is no indication that the Assistant District Attorney was aware that Porteous was the recipient of a stream of things of value from the Marcottes, all of which the Marcottes claim they provided with the specific intent to influence Judge Porteous.

Although the Marcottes have made many allegations of improprieties involving Judge Porteous, they have pleaded guilty to charges of extensive fraudulent conduct. They also admit that they never obtained an explicit agreement with Judge Porteous that he would grant bond requests in exchange for favors. They claim instead that the agreement was implicit in the

relationship, and that the Judge knew very well why they lavished him and his long-time secretary with food, drinks, trips, favors, and other things of value.

VI. Further Circumstantial Evidence that Judge Porteous Engaged in Corrupt Activities

The investigation has uncovered large amounts of unexplained cash being deposited in Judge Porteous's accounts. Financial records reveal that Judge Porteous deposited more than $57,000 in cash into his checking account between 1998 and 2000. Additional records received from Fidelity Homestead Association show that five separate deposits of currency totaling approximately $20,000 were also made into the Judge's money market account from 1998 to early 2000. This account was not reported on Judge Porteous's bankruptcy petition. In addition, one of the deposits, made two days after Judge Porteous returned from his Las Vegas trip, was in the amount of $5,000, roughly the amount he withdrew over the "bachelor party" weekend, despite casino records that estimated a $1,200 loss during that trip.

In addition, the investigation has revealed that Judge Porteous's secretary, Rhonda Danos, paid for many of his expenses from her own bank account. While Judge Porteous did write checks to her, the FBI was not able to establish that he fully reimbursed her. In 1999 and 2000, for example, Danos paid $41,621.15 for credit card bills and other expenses for Judge Porteous; during the same period, she received $32,554.51 in checks from him. Over the same two year period, Danos also made $60,027.80 in cash deposits, a greater sum than her payroll and other sources of income for the same period. Focusing on year 1999 in particular, her financial records indicate that she may have received as much as thirty to forty thousand dollars in unexplained deposits. In addition, in her testimony about her 1999 financial activities, Danos could not account for nearly ten thousand dollars in excess of her admitted sources of income that year, even giving her the benefit of dubious, post-hoc explanations for some sources of funds. Together, these facts evidence that Danos -- on whom Judge Porteous relied for payment of many of his own expenses -- received additional, unexplained cash during the period that the judgement in Liljeberg was pending. Indeed, the Marcottes stated in interviews with the FBI that Danos was used specifically to disguise their payments in connection with the 1992 trip to Las Vegas for Judge Porteous.

VII. Evidence that Judge Porteous Is Incompetent to Serve

During the course of this investigation the Department has learned that Judge Porteous has obtained the reports of medical examiners concluding that he is incompetent to render decisions as a federal judge because of permanent mental and psychological impairments. In correspondence with Your Honor, Judge Porteous stated that he believes he no longer can meet the responsibilities that fall to him as a judge, and that the reports of a psychologist and psychiatrist confirm that every day he sits on the bench is a disservice to his fellow judges, to the parties who appear before him, and to the people of this country who put their trust in the judiciary. This mental impairment follows a history of alcoholism and reckless gambling, demonstrated in financial records and attested to by witnesses with whom he has had personal relationships. Therefore, in addition to the many allegations of judicial misconduct recited above, Judge Porteous's self-professed inability to render competent and fair decisions as a federal judge and the chronicle of his reckless and dishonorable personal behavior while on the

federal bench also serve as a basis for possible disciplinary action by the Court or referral to Congress for impeachment.

CONCLUSION

As noted earlier, issues of statute of limitations, the materiality of the alleged false statements, the government's twin burdens of proof and unanimity at trial, and the availability of alternative remedies persuaded the Department that criminal prosecution was not warranted. The results of the FBI's investigation into allegations of misconduct concerning Judge Porteous, however, raise serious doubts about his suitability for office under the constitutional standard of good behavior on which that service is contingent. The instances of Judge Porteous's dishonesty in his own sworn statements and court filings, his decade-long course of conduct in soliciting and accepting a stream of payments and gifts from litigants and lawyers with matters before him, and his repeated failures to disclose those dealings to interested parties and the Court all render him unfit as an Article III judge. Based on the evidence of pervasive misconduct described herein, the Department respectfully submits this complaint for any further action Your Honor may deem warranted.

Sincerely,

John C. Keeney

John C. Keeney
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice

Exhibit 2

S. J. Beaulieu, Jr.
CHAPTER 13 TRUSTEE

433 Metairie Road, Suite 307
Metairie, Louisiana 70005
(504) 831-1313

April 1, 2004

Federal Bureau of Investigation
Attn: Wayne Horner
2901 Leon C. Simon Dr.
New Orleans, LA 70126

In re: In Re Gabriel T. Porteous, Jr & Carmella A. Porteous
Case No.: 01-12363

Dear Mr. Horner:

I am Staff Attorney for S. J. Beaulieu, Jr., Chapter 13 Trustee. This letter is to respond to a conversation of Mr. Beaulieu with one of the FBI agents earlier this month.

In January, 2004, at the request of the FBI, Mr. Beaulieu met with you and several other agents. Prior to that meeting, the FBI refused to divulge why the meeting was needed or what would be discussed at the meeting. During the meeting, it was disclosed that Mr. Beaulieu was being interviewed with respect to an ongoing investigation into the captioned Chapter 13 case and debtors' activities regarding same. Also, during the meeting, the agents discussed some allegations concerning potential bankruptcy improprieties involving debtors related to: filing the original petition with their name misspelled, undisclosed income, income tax refunds, the use of credit cards, transfers of property, and lifestyle activities that might not be consistent with the debtors' schedule "J" disclosures.

In the conversation this month, the FBI agent advised Mr. Beaulieu that he should pursue further investigation into debtors' activities in this case. However, the only allegation that the Trustee has evidence of relates to debtor's FICA tax withholding which should have stopped after the FICA withholding limits were met. The additional income to debtor was not taken into account in evaluating debtors' disposable income to fund the Chapter 13 plan over three (3) years. In Mr. Beaulieu's opinion, extending the plan at this late date to recoup the difference in disposable income would not substantially increase the percentage paid to unsecured creditors.

Regarding the other allegations, the FBI has refused to provide the Trustee with any evidence of improprieties by debtors. Since Mr. Beaulieu has no evidence to support the suspicions expressed by the FBI agents, he does not intend to take further action related to these allegations.

I am enclosing a copy of the Final Account prepared in this case. The case is currently set for a Final Account hearing on May 18, 2004, at 8:40 a.m. You may file an objection to the

Federal Bureau of Investigation
Attn: Wayne Horner
April 1, 2004
Page 2

Trustee's Final Account or you may provide Mr. Beaulieu with evidence of wrongdoing and same will be investigated.

If further information is required, please feel free to contact me at your convenience.

With kindest regards, I am

Sincerely,

Michael F. Adoue
Staff Attorney (Ext. 222.)

Enclosure

cc: R. Michael Bolen
United States Trustee, Region 5

Exhibit 3

haynes*boone*

MEMORANDUM

To: File
Ron Woods

From: Larry Finder

Date: July 29, 2007

Subject: Interview of S. J. Beaulieu, Jr.

Privileged and Confidential
Attorney-Client Communication

On July 25, 2007, S. J. Beaulieu was interviewed by Ron Woods and Larry Finder in a conference room within the Fifth Circuit Court of Appeals.

Mr. Beaulieu ("the witness") confirmed that he is a Chapter 13 Trustee in the New Orleans area. He met Judge Porteous one time early in the Chapter 13 (the 341 hearing), and did not know him prior to then. A 341 hearing is the first meeting of creditors, but often no creditors are present. The witness said the only preferential treatment he provided to Porteous was to hold his 341 meeting on the docket from morning to afternoon to reduce the chances of Porteous being seen by bankruptcy lawyers. The witness added that had any creditors appeared for the morning 341 hearing, the hearing would not have been held to the afternoon.

Mr. Woods provided the witness a copy of the recorded transcript from the 371 hearing, and the witness reviewed it, saying it appeared to be accurate. The witness explained that a typical 341 hearing takes between three and five minutes. The witness is acquainted with attorney Claude Lightfoot, and considers him one of the top filers for Chapter 7 and 13 cases. He added that Mr. Lightfoot is also a Chapter 7 Trustee.

Mr. Woods provided the witness with a copy of the booklet that the witness sends out to new Chapter 13 debtors. The witness said he used to hand it to debtors, but now he mails each debtor a copy [NOTE: the witness's docket is in excess of 3,000 cases]. The witness affirmed that according to the booklet, a debtor is warned against incurring additional debt post-petition. Use of additional credit cards would by a type of debt that is prohibited. Furthermore, twenty days following the 341 hearing, a confirmation hearing is held. Thereafter, the Bankruptcy Court enters an order of confirmation of the plan. That order also provides that the debtor should not take on more debt.

Mr. Woods then shifted the discussion to the FBI 302 of the witness's interview, dated January 22, 2004. The witness was afforded approximately 15 minutes to review the seven page 302.

Tax return (302 p. 3, Π 2, 3). The witness took issue with Π 2, saying he thought he recalled conferring with William Heitkamp, Chapter 13 Trustee for then Bankruptcy Judge William Greendyke, to determine if tax refunds must be reported and/or turned over to the Court. The witness said it was his recollection that Mr. Heitkamp stated that in Texas the practice is not to notify or provide the court with the tax refund. [CHECK THIS OUT WITH BILL HEITKAMP]. Mr. Woods asked the witness whether he would have wanted to know that Porteous had filed for a tax refund of $4,143.72 just five days before filing for bankruptcy. The witness replied that such knowledge could have affected his analysis of the funds available for creditors in a Chapter 7 versus a Chapter 13.

Gaming and Markers. (302 p. 7, Π 1). The witness considers a casino marker to be a debt. Mr. Woods asked whether the witness was aware that Porteous took out $31,900 in markers during the period from 2001 – 2002. The witness replied in the negative.

Carmella Porteous income. (302 p. 7, Π 3). Had the witness later learned about Mrs. Porteous' unreported income, he believes he would have recommended a conversion to a Chapter 7, rather than a dismissal of the Chapter 13. A conversion to Ch. 13 would have benefited the creditors better than an outright dismissal of the Ch. 13.

The witness agreed that the remainder of the 302 was generally accurate.

Pay stub. Mr. Woods discussed the pay stub Porteous provided to the witness as proof of income, alerting the witness that the stub was pre-FICA and over a year prior to the bankruptcy. The witness replied that he was at error for neither asking about nor catching the FICA adjustment. The witness agreed that if there was also a COLA bump in 2001 (which could have accounted for the greater monthly income than that reflected by the year-old pay stub Porteous provided), that fact should have been disclosed to the Trustee. The witness agreed that a current pay stub, disclosing greater income (from COLA or other source) should have been used and disclosed to him.

False names. Mr. Woods asked the witness about the false names provided by Porteous on the original petition, and whether the witness felt he had any responsibilities in light of the false statement. The witness replied that had he known of this deliberate falsehood, he would have reported it to the U.S. Trustee. Having said that, the witness added that the amended petition (with false names) had been filed prior to the 341 hearing, meaning that the unsecured creditors all received notice of the actual identities of the debtors. In other words, no harm, no foul.

Gambling losses. Mr. Woods asked the witness about the effect of Porteous' gambling losses, as follows: $12,800 I gross losses; gross wins of $5,312; net loss of almost $7,500 – and how that fact would have affected the witness's handling of the Porteous bankruptcy had it been made known to him. The witness replied that the gambling loss would not have affected his

judgment in any way. He explained that many, if not most, of the debtors that come before him have gambling problems. The income and expenses analysis is viewed by the witness in the aggregate, and if some expenses are understated while others are overstated, it all averages out.

Preferred payments. Mr. Woods advised the witness about a $1,088 credit card payment to Fleet on March 23, 2001, by Rhonda Danos in payment of Mrs. Porteous' bill – days prior to the filing of the Porteous bankruptcy – and asked the witness about the effect of this transaction. The witness stated that the payment created debt without court approval, but that this was not a preferred payment in his opinion because the petition had not yet been filed. On the other hand, continued use of the use of the credit card should have been disallowed as it created new debt post-petition. [NOTE: ask Bill Heitkamp for his opinion].

The witness stated that earlier in his career, he was a Chief Deputy Clerk in the Bankruptcy Court. He held that job for approximately 12 years. Prior to that, he was a deputy clerk in the U.S. District Clerk's Office working in the financial section, and when the Bankruptcy Courts were created, he was one of the few people with a financial background to be able to move over to the new position.

Mr. Woods reminded the witness of the date of the hearing, and promised to try to give the witness a short window of time to attend the hearing.

Exhibit 4

SC EXHIBIT - 00028

Fidelity
HOMESTEAD ASSOCIATION
222 BARONNE STREET
NEW ORLEANS, LOUISIANA 70112

5 PAGE 1

[redacted] 4/20/2001
MONEY MARKET FUNDS
TAX ID NUMBER [redacted]

* * * MONEY MARKET * * *
* * * STATEMENT * * *

MR G T PORTEOUS JR OR
MRS G T PORTEOUS JR
4801 NEYREY DR
METAIRIE LA 70002-1426

CCOUNT NUMBER [redacted] STATEMENT PERIOD 3/21/2001 THRU 4/20/2001

DEMAND DEPOSIT SUMMARY

VERAGE BALANCE		PREVIOUS BALANCE	623.94
320.29	1 CREDITS, INCLUDING	1 DEPOSITS, TOTALING	200.00
INIMUM BALANCE	6 DEBITS, INCLUDING	5 CHECKS, TOTALING	734.28
89.66 ON 4/12		NEW BALANCE	89.66
EAR TO DATE:		INTEREST EARNED	0.00
EARNINGS.....	10.37	ANNUAL PERCENTAGE YIELD EARNED	0.00%
SERVICE CHARGE	0.00	SERVICE CHARGE	0.00

TRANSACTIONS

DATE	DESCRIPTION		AMOUNT	BALANCE
	BEGINNING BALANCE			623.94
3/22	CHECK NUMBER	579	36.79-	587.15
3/26	CHECK NUMBER	580	179.00-	408.15
3/28	PREAUTHORIZED WITHDRAWAL STATE FARM RO 22 INSURANCE		84.73-	323.42
3/28	CHECK NUMBER	581	40.00-	283.42
4/04	DEPOSIT TO DEMAND ACCOUNT		200.00	483.42
4/04	CHECK NUMBER	620	64.76-	418.66
4/12	CHECK NUMBER	582	329.00-	89.66

CHECK SUMMARY

HECK	AMOUNT	CHECK	AMOUNT	CHECK	AMOUNT	CHECK	AMOUNT
579	36.79	581	40.00	582	329.00	****620	64.76
580	179.00						

THE FOLLOWING INTEREST RATES WERE IN EFFECT FOR THE DATES INDICATED:

START	END
3/15/1999	CURRENT

RATE	APY	MIN. BAL.
2.750	2.79	1,000.00
3.920	4.00	15,000.00

SC00611

HP Exhibit 143

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 DISMISS ARTICLE IV OF THE HOUSE OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

Daniel C. Schwartz
P.J. Meitl
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Ian Barlow
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Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL BACKGROUND ON ARTICLE IV 4

ARGUMENT 6

I. A Federal Judge Cannot Be Impeached Based on His Subjective View That Prior Associations Were Not Relevant to His Confirmation. 6

II. Given the Nature of the Alleged False Statements, the House Cannot Prove that They Were Demonstrably False 12

III. Congress Has Never Instituted Impeachment Proceedings Against Individuals For Failing to Disclose Information 15

IV. Prior to His Confirmation, the Senate Was Aware of Many of the Alleged Facts the House Claims Judge Porteous Failed to Disclose. 21

CERTIFICATE OF SERVICE 1

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, and files this Motion for Dismissal of Article IV of the Articles of Impeachment because it states improper grounds for impeachment.

INTRODUCTION

Article IV alleges that Judge Porteous "knowingly made material false statements about his past" by failing to state affirmatively that he (1) received a portion of curatorship fees given to the law firm Amato & Creely while a state judge (as alleged in Article I of the Articles of Impeachment); and (2) accepted "things of value" while benefiting the Marcotte bail bonds company while a state judge (as alleged in Article II of the Articles of Impeachment). Additionally, Article IV alleges that Judge Porteous should be removed from office because he failed to state affirmatively that he suspected that Louis Marcotte may have given misleading statements to the FBI in a conversation in which Judge Porteous was not a party.

Article IV alleges that Judge Porteous omitted information in response to general questions asking him whether he could identify any matters that: (1) "could cause an embarrassment" to him or President Clinton if publicly known; (2) could be used to "influence, pressure, coerce," "blackmail," or "compromise" him; (3) would "impact negatively on his character, reputation, judgment, or discretion;" or (4) would unfavorably "affect his nomination" as a federal judge. (111 Cong. Rec. S1645 (Mar. 17, 2010.), hereinafter "Article IV.") Article IV concludes by arguing that Judge Porteous's failure to disclose this information deprived the Senate and the public of information that would have had a material impact on his confirmation. (*Id.*)

Article IV is nothing more than the House's effort to employ a belt-and-suspenders strategy, reasoning that if they cannot convince the Senate that the pre-federal conduct alleged in Articles I and II provides valid grounds for impeachment, they surely can persuade the Senate that Judge Porteous's omission of these alleged offenses during the nomination process is, on its own, an impeachable offense.[1] The House's effort in Article IV to force the Senate to reconsider the same allegations raised elsewhere in the Articles of Impeachment in a different context demonstrates the House's own uncertainty of the viability of the charges in Articles I and II.[2]

Impeachment standards were designed to create objective and clear lines of what conduct would require removal of a federal judge. The standards raised in Article IV are purely subjective and provide no means by which judges can gauge whether their conduct is proper or could become the subject of an impeachment. In the criminal context, such charges have been found to be unconstitutionally vague. Article IV is nothing more than a statement by the House that, in the House's view, Judge Porteous *should* have been embarrassed by the facts alleged in Articles I and II.

If Judge Porteous were convicted on the basis of Article IV, the Senate would be asserting the right to remove a judge because it believes that a judge should have viewed an

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[1] This is for good reason – the first two Articles are legally deficient. Article I (the Honest Services Article) is defective after the Supreme Court's ruling in *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010) and fails to identify any misconduct other than an *appearance* of impropriety – an allegation not rising to the level of an impeachable offense. (*See* Motion to Dismiss Article I, being filed concurrently herewith.) Article II (the Pre-Federal Article) seeks to reverse Senate precedent by broadly and dangerously expanding the list of impeachable offenses to include alleged misconduct that occurred prior to an accused entering an impeachable office. (*See* Motion to Dismiss Article II, being filed concurrently herewith.)

[2] For an example of the House attempt to reach, through Article IV, what they doubt they can reach through Articles I and II, see the last charges in Article IV which allege that "[a]s Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." (Article IV.) This exact language is also used in Article II.

uncharged and unproven allegation to be "embarrassing" – and it would make such an act of omission the constitutional equivalent to treason.[3] While full disclosure is to be encouraged, there is a long list of prominent government office holders who have failed to disclose information that someone else may have considered to be embarrassing or unfavorable. None of them has ever been sanctioned, let alone impeached, in the past.[4] Imposing the sanction of removal from office for failing to disclose information that someone else later considers to be embarrassing would set a standard of conduct for office holders that is both impossible to adhere to and a goldmine for partisan mischief. Such a hopelessly vague standard would gut the well-crafted language of the impeachment clauses and directly contradict the intent of the Framers in limiting removal to a showing of "high crimes and misdemeanors." (U.S. CONST. art II, § 4.) Moreover, such a move would directly subject millions of federal employees to the impeachment process through their simple failure to fully catalog all embarrassing moments in their lives during their own background checks.

Finally, the premise of Article IV is factually and logically flawed. The alleged false statements cannot – given the nature of the allegations – be readily proven by the House. Moreover, much of the information that the House alleges that Judge Porteous failed to disclose was made available to the Senate by the FBI and other sources, in connection with Judge Porteous's confirmation. Thus, Article IV's claim that the Senate was "deprived" of this information is incorrect.

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[3] As the Senate is aware, the Constitution enumerates the following offenses as being impeachable – "treason, bribery, or other high crimes and misdemeanors." (U.S. CONST. art. II, § 4.)

[4] In addition, counsel for Judge Porteous is unable to locate any decisions upholding a false-statement prosecution predicated on the amorphous request for disclosure of "embarrassing" information.

Article IV suggests that Judge Porteous concealed facts that the House readily admits took place in the open – lunches at high-profile restaurants, trips with other judges and lawyers, and the assignment of curatorships through official Court activities.[5] If Judge Porteous believed these alleged activities were inherently corrupt, embarrassing, or would have subjected him to some type of improper pressure, he would have seemingly concealed these activities.[6] Instead, the fact that Judge Porteous specifically took no action to conceal these alleged activities suggest that, if they occurred, he did not find them embarrassing or that which might negatively impact his character and reputation.

FACTUAL BACKGROUND ON ARTICLE IV

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

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

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5 The House is likely to admit that these alleged activities took place in the open but that Judge Porteous concealed the fact that (1) he received money from Amato & Creely in the same time frame as the assignment of the curatorships, and (2) he took official actions on behalf of the Marcottes in the same time frame as the receipt of things of personal value. The House has not alleged in the Articles of Impeachment, however, that the alleged receipt of things of value from Amato & Creely or the Marcottes are related on any type of quid pro quo basis to Judge Porteous's official actions. As such, the House should not be allowed to backend their way into a bribery or kickback allegation after specifically choosing not to pursue one through the Articles.

6 Judge Porteous admits that this specific argument is not a sufficient reason to warrant dismissal of the Article. Nonetheless, the fact that the factual underpinnings of the Article are illogical is evidence of the overall weakness of the Article.

> question and signed the form under the warning that a false statement was punishable by law.
>
> (2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.
>
> (3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees," Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination." Judge Porteous signed that questionnaire by swearing that "the information provided in this statement is, to the best of my knowledge, true and accurate." (*Id.*)

The House argues that these statements were, in fact, false because Judge Porteous was well aware of and should have responded to the questions above in the affirmative in light of the following information:

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

(*See id.*) The Senate argues that Judge Porteous's failure to disclose these facts "deprived the United States Senate and the public of information that would have had a material impact on his confirmation." (*Id.*)

Judge Porteous is not accused of hiding much of this information, which was publicly known, but of not finding it "embarrassing" or the potential subject of coercion. He has publicly acknowledged his friendship with these individuals, and the curatorships he granted to Creely &

Amato – and a number of other lawyers in Jefferson Parish – were also in the public record. Moreover, these basic allegations were not only raised in his background investigation but also were inquired into in two known FBI investigations, including the Wrinkled Robe investigation that resulted in the conviction of two Jefferson Parish judges.[7] Judge Porteous was never indicted for any unlawful conduct or subject to bar charges in Louisiana.

The alleged Marcotte conversation with the FBI (which the House claims Porteous knew of and knew to be false), referenced in Article IV, took place after Judge Porteous filled out his SF-86 form, supplemental SF-86 form, and Senate questionnaire, and after he spoke with agents in his first background check. Judge Porteous signed his SF-86 on April 27, 1994.[8] He signed a supplemental SF-86 on April 27, 1994. He completed his initial interview with the FBI on July 8, 1994. It was not until August 1, 1994, however, that Louis Marcotte was interviewed by the FBI, and he allegedly claimed he told Judge Porteous that he had given him a "clean bill of health" shortly after the FBI Interview.[9] Thus, Judge Porteous has been impeached for withholding information about an alleged conversation that had not even occurred when he filled out the forms referenced in Article IV.

ARGUMENT

I. A Federal Judge Cannot Be Impeached Based on His Subjective View That Prior Associations Were Not Relevant to His Confirmation.

The impeachment standard resulted after multiple drafts and focused debate by the Framers, who specifically sought to avoid ambiguous standards for removal of a president or a

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7 In addition to Wrinkled Robe, Metropolitan Crime Commission records indicate that the FBI looked into the allegations with the Marcottes for possible Hobbs Act violations. (*See* October 25, 1994 Intelligence Report, attached as Exhibit 1.)

8 Reference to the initial SF-86 is not included in Article IV.

9 Judge Porteous was re-interviewed by the FBI on August 18, 1994. However, there is no record of his being asked about the Marcottes during this re-interview.

judge. They were reacting to the English standard by which the Parliament could impeach individuals for such vague terms as "divers deceits."[10] *See* Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938); *see also* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 11 (1999). The Framers first crafted the impeachment standard to allow removal for "malpractice or neglect of duty." RAOUL BERGER, IMPEACHMENT, THE CONSTITUTIONAL PROBLEMS, Harvard Univ. Press, 78 (1973). The Committee of Detail, however, narrowed the standard to "treason, bribery, or corruption." *Id.* Ultimately, "corruption" was considered too ambiguous a term and was dropped by the Committee of Eleven. *Id.* George Mason then suggested that the term "maladministration" be added, but James Madison objected that such a term was dangerously vague. *Id.* Madison remarked that "so vague a term [as maladministration] will be the equivalent to a tenure during the pleasure of the Senate," whereupon Mason substituted "high crimes and misdemeanors." *Id.*

Article IV would return the Senate to the unpredictability of the English standard of "divers deceits." It invites this and future Senates to remove a judge based on whether the Senate believes a specific judge should have believed a fact to be embarrassing to the President or to himself. If an allegation based on someone else's concept of embarrassment would support impeachment, the specificity of "treason," "bribery," and "high crimes and misdemeanors" would be lost. Any judge could be accused of divers deceits in failing to list every possible allegation that might be raised even when he did not consider them relevant to the confirmation.

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

Courts have rejected as the basis for criminal prosecutions the type of vague, untethered allegations that make up Article IV. For example, in *United States v. Kerik*, Bernard Kerik, the former New York City Police Commissioner and nominee for Secretary of the Department of Homeland Security, was charged in a fifteen count indictment, which included allegations that Kerik lied to the White House when he sought membership in the Academe & Policy Research Senior Advisory Committee to the White House Office of Homeland Security, among other positions.[11] *See* 615 F. Supp. 2d 256 (S.D.N.Y. 2009). The questions to which Kerik allegedly provided false answers to included:

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

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

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

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

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

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

> this Court agrees that the term "embarrassing" is not fundamentally ambiguous *per se*. For example, a question about "embarrassing educational history" or "embarrassing business dealings" would not be fundamentally ambiguous because it provides the answerer with clarity about the specific information sought by his examiner.

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

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

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

The questions posed by Article IV as the basis for Judge Porteous's allegedly false answers or omissions are largely identical to the "fundamentally ambiguous" questions posed to Kerik, which the court in that case found so troubling.

In order to refute the Southern District of New York's decision in *Kerik*, the House may point to *United States v. Cisneros*, 26 F. Supp. 2d 24 (D.D.C. 1998), which predates *Kerik*. In that case, Henry Cisneros, the former Secretary of Housing and Urban Development, was indicted for making false statements to federal officials in connection with his nomination to the cabinet post. *Id.* at 24. When Cisneros was asked whether there was "anything" in his "personal life that could be used by someone to coerce or blackmail" him and whether there was anything "that could cause an embarrassment to [him] or to the President if publicly known," Cisneros replied that "that there was no basis upon which he would be subject to coercion or blackmail." *Id.* at 32. At that time, Cisneros was allegedly making payments to his former mistress in order to ensure her public silence about the extramarital affair and his previous payments to her. *Id.*

Cisneros moved to dismiss the claims related to the alleged false statements on the ground that the question in SF-86 was vague because it did not define the terms "coerce," "blackmail," or "embarrassment." *Id.* at 40. Judge Stanley Sporkin of the United States District Court for the District of Columbia found that "[t]he meaning of Cisneros' statements is a matter that is within the province of a jury to determine." *Id.* at 42.

The *Kerik* court distinguished the statements at issue in *Kerik* with those present in *Cisneros*. The *Kerik* court noted that "this issue must be done on a case-by-case basis" but stated that:

> [t]he Cisneros court spent the overwhelming bulk of its analysis on the terms "coerce" and "blackmail," and rightly so given the facts of that case. However, the false statement charges against Kerik are cloaked only in terms of "embarrassment," and, absent any further clarifying context, those questions are impermissible as a matter of law.

615 F. Supp. 2d at 274 n.24. Ultimately, in September 1999, Cisneros negotiated a plea agreement, under which he pleaded guilty to a misdemeanor count of lying to the FBI, and he

was fined $10,000. The jury was never asked to consider whether the questions posed to Cisneros were deficient due to vagueness. Cisneros did not receive jail time or probation. The House never began impeachment proceedings against Cisneros. Notably, Cisneros was pardoned by President Bill Clinton in January 2001. Judge Porteous was also asked about items that might be used to coerce or blackmail him but the facts of his case are far different than that of Cisneros. Cisneros was allegedly making payments to a secret lover for the purpose of keeping her quiet – the epitome of a case ripe for blackmail. In the instant matter, it is unclear who would have attempted to blackmail or coerce Judge Porteous and for what reason. Many of the alleged acts of misconduct occurred in the open, as opposed to the private confines of a hotel room, as in Cisneros.

Thus, not only is Article IV based on a highly subjective test of what constitutes embarrassing or noteworthy facts, but also it relies on language that the federal courts have rejected as unconstitutionally vague. While this is not a criminal proceeding, the standard for removal must be sufficiently clear to give adequate notice to federal judges of what conduct would justify removal. Judges should not be removed from office on the basis of vague charges that they, as judges, would find an inadequate basis on which to convict a person standing before them at the bar. The Framers made it both procedurally and substantively difficult to remove a federal judge – specifically rejecting vague terms and standards for impeachment. Absent such bright-line standards, Federal judges would be left at the mercy of the shifting views and allegiances of Congress. No judiciary can long remain independent when its members can be removed based on such subjective and politicized claims.

II. Given the Nature of the Alleged False Statements, the House Cannot Prove that They Were Demonstrably False.

Furthermore, the false statements that Article IV alleges Judge Porteous made in connection with his nomination to the federal bench, given their vague, ambiguous, and nebulous nature, are incapable of being proven false by the House. As such, Article IV should be dismissed.[12]

Both the Supplemental SF-86 and the Senate Questionnaire pose very specific questions. (*See* Supplemental SF-86, attached as Exhibit 2, asking "Please list all of your interests in real property"; *see also* Senate Questionnaire, attached as Exhibit 3 asking "Were all of your taxes current as of the date of your nomination?"). There is no allegation in Article IV that Judge Porteous answered any of these questions incorrectly or incompletely. Instead, Article IV is based on the most generally worded and subjective questions in either document.

On his Supplemental SF-86, Judge Porteous was asked whether there was anything in his personal life that could cause embarrassment to him or President Clinton.[13] (*See* Supplemental SF-86, attached as Exhibit 2.) This vague question necessarily asks for Judge Porteous's subjective opinion and speculation regarding the meaning and application of the term "embarrassment" or what causes any particular individual to feel "self-conscious or ill at ease." *See* The American Heritage Dictionary (4th ed. 2001). The Senate has every right to ask about

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[12] Such a dismissal would also help ameliorate the fact that Judge Porteous has been limited to just a five-day evidentiary hearing – a fraction of the time afforded prior nominees like ex-Judge Alcee Hastings. If this proceeding is to be conducted in such an abbreviated fashion, it would be highly beneficial to eliminate one or more Articles that are facially invalid. Judge Porteous recognizes that, in the past, certain Motions to Dismiss were not resolved until after the evidentiary hearings. It is unclear if that is the Senate's intention in this proceeding.

[13] During his background check, Judge Porteous was also allegedly asked whether he was concealing any activity or conduct that would impact negatively on his character and reputation. This question is analogous to inquiries regarding whether he would be embarrassed if certain information were disclosed. (*See* FBI Interview of Judge Porteous, dated July 6, 1994, bates labeled PORT000000291-96, attached as Exhibit 4.)

criminal or unethical acts, as well as to inquire generally about other items of interest that the subject may find or believe to be embarrassing to himself or to others. But if a nominee is asked for his subjective view of what might prove embarrassing to the nominee himself or to the President or which could be used exert influence over the nominee, the Senate should be prepared to accept the nominee's own view of what may be embarrassing to him or others. The Senate should not remove a judge holding a lifetime appointment merely because the Senate disagrees with the nominee's own interpretation of such open-ended and subjective questioning.

As the *Kerik* court noted, this question is "fundamentally ambiguous" as there is no act that is definitively "embarrassing" – embarrassment is a subjective belief that differs from person to person. As such, there is no proof that the House has produced or can elicit that will show that Judge Porteous had the opinion or belief at the time of his confirmation that any given act would be embarrassing to him or to President Clinton.

Judge Porteous was also asked, on his Supplemental SF-86, whether there was anything in his personal life that could be used by someone to coerce or blackmail him. (*See* Supplemental SF-86, attached as Exhibit 2.) Similarly, during his background check, an FBI agent reported that Judge "Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or . . . would impact negatively on [his] judgment, or discretion"[14] (collectively, these activities will be referred to generally as "influence"). (*See* FBI Interview of Judge Porteous, dated July 6, 1994, bates labeled PORT000000291-96, attached as Exhibit 4.) Notably, neither question qualifies the inquiry by including "attempts" by a third-party to influence Judge Porteous. Instead they require Judge

[14] This allegation is not even based on a transcript or a document signed by Judge Porteous. Instead, it is a summary of an oral conversation between an FBI agent and Judge Porteous, rendering it even more susceptible to ambiguity or imprecision.

Porteous to have known or believed that he would, in fact, be influenced if a third-party knew and used such information. Judge Porteous responded to both questions by not identifying any activity or conduct. Therefore, for the House to be successful in proving that these responses were actually false, it would have not only to prove the underlying allegations (contained in Article I and II), but also to show that Judge Porteous held the belief that his own actions, judgments, or rulings would be influenced. There is no basis in the House's evidence to substantiate such allegations.

Finally, Judge Porteous was asked, on the Senate Judiciary Committee's "Questionnaire for Judicial Nominees" to "advise the Committee of any unfavorable information that may affect your nomination." (Senate Questionnaire, attached as Exhibit 3.) Judge Porteous responded with a qualified answer, stating "To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination." *Id.* Contrary to the House's apparent view of what he *should* have believed, Judge Porteous simply did not view his past associations with his former partners or with the Marcottes to be unfavorable. He openly dined with the Marcottes and was open about his friendship with Amato & Creely both as a state and federal judge. (*See e.g.*, Transcript of Hearing regarding Lifemark Hospital's Motion to Recuse, where Judge Porteous stated in open Court, "Let me also make one statement for the record if anyone wants to decide whether I am a friend with Mr. Amato [], I will put that to rest, for the answer is affirmative, yes" attached as Exhibit 5.) He was never charged with, and has not been accused of, any illegal act before or after his confirmation. Indeed, the FBI was aware of the basic allegations raised years later by the House and did not deem them to raise material problems for the confirmation. Like the questions regarding "embarrassment," this query asks for Judge

Porteous's subjective belief regarding the impact any certain information may have on his own nomination.

Asking a nominee what information "may affect" a nomination is maddeningly vague. While it may generate information not otherwise disclosed, it leaves it in the hands of the nominee to determine what may or may not affect that person's nomination. Such a question runs the gamut of potential political and legal issues. As explained by the Kerik court, "[w]here a question is so vague as to be fundamentally ambiguous, . . . it cannot be the predicate of a false statement, regardless of the answer given." 615 F. Supp. 2d at 271.

Article IV is an open invitation to the Senate to substitute its collective judgment for Judge Porteous's evaluation of what he found to be embarrassing or inappropriate. It invites the Senate to aspire to levels of insight of which no ordinary person is capable. No trial of impeachment should hinge on such pure speculation.

III. Congress Has Never Instituted Impeachment Proceedings Against Individuals For Failing to Disclose Information.

As discussed in other motions being filed concurrently herewith, Congress has applied the meaning of "high crimes and misdemeanors" by voting to impeach judges only when their alleged conduct has included abuses of constitutionally entrusted powers. No one has ever been convicted by the United States Senate in an impeachment for failing to disclose facts during the nomination process. There have been numerous occasions where previously undisclosed information, potentially embarrassing to a federal civil officer (including Supreme Court Justices, federal judges, and cabinet secretaries), has been discovered after confirmation, but for which no impeachment proceedings were instituted:

- In 1937, President Roosevelt nominated Hugo Black for an opening on the United States Supreme Court. *See* Howard Ball, *Hugo L. Black: Cold Steel Warrior*, Oxford Oxfordshire: Oxford University Press 5 (1996). During the confirmation hearings,

rumors swirled regarding Black's prior membership in the Ku Klux Klan. *Id.* at 94-95. Senator William E. Borah, Republican of Idaho, made the only statement in Black's behalf on the Klan question. "There has never been at any time one iota of evidence that Senator Black was a member of the Klan," Borah told his colleagues. He said that Black, in private discussion before the nomination, had stated that he was not a member of the Klan. No one, Borah said, had suggested any source from which evidence might be obtained. For himself, the Idaho senator said he would vote against any man whom he knew to be a member of a secret organization of the nature of the Klan. After six hours of debate, the Senate voted 63-16 to confirm Black. *See* Ball at 94. The next month, the Pittsburgh Post-Gazette investigated Black's KKK past and definitively revealed Black's involvement in the Klan. *Id.* at 96. Vacationing senators were tracked down and asked whether they would have voted for Black if they had known of his former membership. Some said they had been "misled"; others passed it off as a "tempest in a teapot." Weeks later, Black addressed the nation by radio, admitting that "I did join the Klan." The Congress never instituted impeachment proceedings against Justice Black, who continued to serve on the Court for the next thirty-four years.

- Prior to his appointment to the Supreme Court, Chief Justice William H. Rehnquist purchased properties in Arizona and Vermont which contained discriminatory deed restrictions. *See* Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, N.Y. TIMES, Aug. 1, 1986. The restriction on the Vermont property prohibited the sale or lease of the property to "members of the Hebrew race." *Id.* The Arizona property contained a restrictive covenant barring sale to "any person not of the White or Caucasian race." *Id.* This was not discovered until he was already a member of the Supreme Court. *Id.* The Chief Justice was called to testify before the Senate Judiciary Committee and stated that he would get rid of the covenants. *Id.* Chief Justice Rehnquist was never impeached. *See* Chief Justice Rehnquist has Died, http://www.cnn.com/2005/LAW/09/03/rehnquist.obit/index.html (last visited July 18, 2010).

- In March 2010, it was discovered that Attorney General Eric H. Holder, Jr. had failed to disclose during his confirmation hearings his work on several briefs, including one on behalf of enemy combatant Jose Padilla,. *See* David Davenport, *Hard Questions for Holder*, WASH. TIMES, Mar. 19, 2010. Holder characterized this as an oversight. *Id.* Holder has not been impeached. *See* Office of the Attorney General, http://www.justice.gov/ag/ (last visited July 18, 2010).

- Andrew Cuomo was the Secretary of Housing and Urban Development under President Clinton. *See* Sam Dealey & James Ring Adams, *Banking on Andy Cuomo: HUD Secretary and Rising Democratic Star Andrew Cuomo Wants to Go Places – Assuming He Can Leave Some Baggage Behind*, THE AMERICAN SPECTATOR, Jan. 1999. Cuomo neglected to list a suit brought by a savings and loan association and settled only two months before his confirmation hearing, in response to a question on the Senate Banking, Housing, and Urban Affairs Committee Statement for Completion by Presidential Nominees. *Id.* The question read: "Give the full details of any civil or criminal proceeding in which you were a defendant, or any inquiry or investigation by a

Federal, State or local agency in which you were the subject of an inquiry or investigation." *Id.* In the suit, federal banking regulators had investigated Cuomo and fellow investors for possible change-in-control violations. *Id.* Cuomo was confirmed (*id.*) and was never impeached. *See* Andrew Cuomo, http://www.andrewcuomo.com (last visited July 18, 2010).

- Gerald Carmen was the head of the General Services Administration under President Reagan. *See* Gregory Gordon, *GSA Head Says He Forgot to Mention Loan*, UNITED PRESS INTERNATIONAL, Jul. 16, 1982. Carmen did not include a $425,000 federal loan in stating his finances to a Senate committee before he was confirmed. *Id.* William Roth, Chairman of the Senate Governmental Affairs Committee, demanded an explanation from Carmen, who claimed it was an oversight. *Id.* Carmen was never impeached, and served as Administrator until 1984, when President Reagan appointed him U.S. Permanent Representative to the United Nations in Geneva. *See* Gerald P. Carmen, http://people.forbes.com/profile/gerald-p-carmen/31618 (last visited July 18, 2010).

- Jay Bybee was confirmed to the Ninth Circuit by the Senate on March 13, 2003. *See Sen. Leahy Issues Statement on Nomination of David Nahmias*, U.S. FED NEWS, Sept. 30, 2004. After his confirmation, it was discovered that Judge Bybee had signed a controversial memo advising President Bush to ignore laws forbidding torture. *Id.* Senator Patrick Leahy indicated that had Judge Bybee's role in sanctioning cruel, inhumane, and degrading treatment and abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise to follow the law. *Id.* Judge Bybee has not been impeached.

- William F. Baxter was the Assistant Attorney General in charge of the Antitrust Division in 1982. *See* Andrew Pollack, *Baxter Role Upheld in I.B.M. Case*, N.Y. TIMES, June 18, 1982, at D1. Baxter dismissed a thirteen-year old antitrust case against I.B.M. *Id.* Baxter did not disclose his past dealings with I.B.M. during his Senate confirmation hearings, which included aiding the evaluation of expert witnesses in a different case, research funded with an I.B.M. grant, and arguing on I.B.M's behalf before officials of the European Economic Community, which also had an antitrust suit pending against the company. *Id.* Baxter was never impeached. *See* Michael M. Weinstein, *W.F. Baxter, 69, Ex-Antitrust Chief, is Dead*, N.Y. TIMES, Dec. 2, 1998.

- G. William Miller served as both Chairman of the Federal Reserve Board and Treasury Secretary under President Carter. *See* Lawrence L. Knutson, THE ASSOCIATED PRESS, Feb. 1, 1980. It was revealed that a corporation of which Miller was chairman spent $600,000 to entertain Pentagon officials without informing stockholders, as required by federal law. *Id.* Miller claimed the payments were not improper because they were not illegal, but the SEC claimed that Miller knew at the time that the firm had failed to disclose the spending. *Id.* Although the expenditures were not illegal in themselves, Pentagon officials operate under regulations prohibiting them from being on the receiving end of such entertainment from potential defense contractors. *Id.* This matter did not come up during his confirmation hearings to head the Federal Reserve Board.

Id. Miller was never impeached, and resigned at the end of President Carter's term. *See* G. William Miller, http://www.ustreas.gov/education/history/secretaries/gwmiller.shtml (last visited July 18, 2010).

- William J. Casey, Director of the Central Intelligence Agency, did not disclose his stock holdings in three corporations in the financial disclosure report he filed with the Senate Select Committee on Ethics during his confirmation proceedings in 1981. *See* Edward T. Pound, *Casey Tells Federal Ethics Agency He Omitted Three Stock Holdings*, N.Y. TIMES, July 31, 1981, at A11. His interest in the companies were valued at approximately $75,000, and he claimed his failure to report was "just an oversight." *Id.* Casey was never impeached, and he resigned as director of the CIA because of his failing health. *See Shultz Among Mourners at Casey's Wake*, L.A. TIMES, May 8, 1987.

- Federico Pena had already been confirmed as Transportation Secretary when he acknowledged that he had failed to pay Social Security taxes for a baby-sitter who looked after his children in 1991. *See* Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, ASSOCIATED PRESS, Jan. 14, 2009. He promised to pay back taxes, was never impeached, and kept his position for President Clinton's first term. *Id.* Pena was then tapped as Energy Secretary, and resigned after one year to return to private life. *See* Matthew L. Wald, *Pena Resigns as Energy Secretary, Citing Concerns for Family*, N.Y. TIMES, Apr. 7, 1998.

There are also numerous other instances where a federal nominee failed to disclose certain information at the initial stages of his or her nomination, only then to have the information discovered by a third-party and disclosed by that party or whereby sufficient pressure was apparently placed on the nominee so that nominee disclosed the information at a later date. In each of the examples listed below, the Senate confirmed the individual despite the lack of full and timely disclosure of relevant material:

- Justice Stephen G. Breyer was a candidate to succeed Justice Byron White in 1993. *See* Aaron Epstein & Angie Cannon, *Consensus-Building Skills Gave Nominee the Edge*, THE MIAMI HERALD, May 14, 1994 at A13. Prior to a nomination, it was revealed that he had failed to pay Social Security taxes for a household helper. *Id.* Justice Breyer later paid the tax, but President Clinton nominated Justice Ruth Bader Ginsburg instead. *Id.* Justice Breyer was subsequently nominated and confirmed the next year as Justice Harry A. Blackmun's replacement. *Id.*

- Justice Sonia Sotomayor failed to disclose to the Senate Judiciary Committee a document she had authored arguing that the death penalty was "racist" and a violation of the present "humanist" thinking of society. *See* Pete Winn, *Sotomayor Failed to*

Disclose to Senate Memo in which She Argued Death Penalty is "Racist", June 5, 2009, http://www.cnsnews.com/news/print/49218 (last visited July 18, 2010). The Judicial Confirmation Network stated that the memo should have been disclosed as required under Question 12(b) of the Senate questionnaire. *Id.* Justice Sotomayor also did not reveal that she was a member of an allegedly gender-exclusive club – from which she subsequently resigned. *See* Sotomayor Resigns from Women's Club, http://www.cnn.com/2009/POLITICS /06/19/sotomayor.womens.club/index.html (last visited July 18, 2010). Republican senators had called for more information about her participation in the club. *Id.* Justice Sotomayor was subsequently confirmed by the Senate. *See* Amy Goldstein and Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009.

- Timothy Geithner was confirmed as Treasury Secretary despite his failure to pay payroll taxes for four years. *See* Jack Kelly, *Culture of Corruption II: What Happened to Obama's Promise to Clean Up Washington?*, PITTSBURGH POST-GAZETTE, Feb. 8, 2009. These errors were discovered by the IRS in an audit and during the vetting process. *See* Jonathan Weisman, *Geithner's Tax History Muddles Confirmation*, THE WALL STREET JOURNAL, Jan. 14, 2009. He also employed an immigrant housekeeper whose work-authorization papers expired during her tenure working for Geithner. *Id.*

- Justice Ruth Bader Ginsburg initially failed to list as a gift on her financial disclosure forms a $25,000 initiation fee for a country club near Washington. *See* Neil A. Lewis, *Ginsburg Hearings End in a Secluded Meeting*, N.Y. TIMES, July 24, 1993. The Woodmont Country Club routinely waived fees as a courtesy to members of the federal bench. *Id.* Justice Ginsburg said that she regretted not listing the waived fee as a gift on the form. *Id.* Justice Ginsburg was subsequently confirmed. *See #48 Ruth Bader Ginsburg, The 100 Most Powerful Women*, Aug. 19, 2009, http://www.forbes.com/lists/2009/11/power-women-09_Ruth-Bader-Ginsburg_D8D7.html (last visited July 19, 2010).

- Griffin B. Bell won confirmation as Attorney General from the Senate in 1977. *See* Spencer Rich & John M. Goshko, *Bell Wins Approval in 75-21 Vote; Bell is Confirmed as Attorney General; Attorney General May Face Clash on Ousting Kelley*, WASH. POST, Jan. 26, 1977 at A1. Some senators had questioned Bell's civil rights record and challenged his judicial ethics. *Id.* Bell's nomination was vigorously opposed by several civil rights groups. *Id.* Bell was criticized for failing to disclose for six years that he had received free memberships in two Atlanta clubs that excluded blacks and other minorities and for failing to disqualify himself from a 1976 case involving a similar club. *Id.*

- Judge Alex Kozinski was a nominee in 1985 to the Ninth U.S. Circuit Court of Appeals. *See* Chris Chrystal, *Levin: Kozinski Lacks Judicial Temperament*, United Press International, Nov. 2, 1985. Senate confirmation stalled because of allegations by former employees that he was harsh, cruel and demeaning. *Id.* Senator Carl Levin stated Judge Kozinski misled the Judiciary Committee by claiming an excellent working relationship with his former staff when six people had filed affidavits that he

treated employees unfairly. *Id.* Another allegation stemmed from his lack of disclosure about the circumstances surrounding his firing of Mary Eastwood, his predecessor at the Office of Special Counsel. *Id.* Eastwood testified that Judge Kozinski was "less than honest" with the panel by implying she had dropped her appeal of the firing when she had not, and by failing to disclose that she eventually won with back pay. *Id.* The Senate still confirmed Judge Kozinski. *See* Robert L. Jackson & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Judge*, L.A. Times, Nov. 8, 1985.

- John Dalton was Secretary of the Navy from 1993 to 1998. *See* Secretary of the Navy The Honorable John H. Dalton, http://www.navy.mil/navydata/people/secnav/dalton /daltbio.html (last visited July 18, 2010). When the White House announced his nomination, it concealed his leadership role in a savings and loan failure that cost taxpayers more than $100 million. *See* Editorial, *Senate Secrecy and Secretary Dalton*, N.Y. Times, July 27, 1994 at A20. The Senate confirmed him unanimously, without debate, even though he had been charged by federal regulators as having shown "gross negligence" in running the bankrupt Seguin Savings Association. *Id.* While the Senate executive committee may have known some of this information, it was never shared with most Senators prior to the confirmation hearing. *Id.* Dalton was never impeached, and retired in 1998. *See New Navy Secretary Selected, Sources Say*, L.A. TIMES, July 22, 1998.

- Prior to her confirmation, Secretary of Labor Hilda Solis failed to disclose her ties to the pro-labor union organization, American Rights at Work. *See Sen. Kyl Issues Statement on Rep. Solis Confirmation as Secretary of Labor*, U.S. FED NEWS, Feb. 25, 2009. She corrected her House disclosure forms only after the issue came to light, raising questions about her motivations to set the record straight, according to Senator Kyl. *Id.* Solis was confirmed by the Senate. *Id.*

As these examples highlight, the Senate has routinely dealt with nominees who failed to fully disclose information that the Senate as a whole, or individual Senators, believed to be relevant and material. Moreover, the Senate had previously determined, on numerous occasions that if they were privy to certain material prior to a nomination, even if its was not fully disclosed by the nominee, the confirmation of that individual would not necessarily be denied. Logically, impeachment is an inappropriate remedy for omissions that would not prevent confirmation.

Despite the fact that the non-disclosures of other nominees listed above range from the failure to fully list stock holdings to the failure to admit prior membership in the Ku Klux Klan,

Congress has never sought to use the extreme measure of impeachment. No one excused such failures to disclose and indeed they were rightfully rooted out. Such failures of disclosure have occurred with regularity and illustrate how easy removal from office could become if Members could reach back into confirmation documents and remove an unpopular judge or civil official for an alleged failure to disclose. Notably, the failure of disclosure alleged in this case pales in comparison to some of the allegations listed above. The House's own self-selected expert, Professor Akhil Reed Amar, agreed: "not all evasive or even downright false statements in the nomination and confirmation process deserve to be viewed as high misdemeanors." (Dec. 15th Hearing at 18.)

IV. Prior to His Confirmation, the Senate Was Aware of Many of the Alleged Facts the House Claims Judge Porteous Failed to Disclose.

Article IV concludes by arguing that "Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate . . . of information that would have had a material impact on his confirmation." 111 Cong. Rec. S1645 (Mar. 17, 2010). As such, the House premises the impeachability of the alleged false statements on the importance they would have played during the confirmation process. The House's argument fails, however, if the omissions were not material or if the Senate was otherwise aware of the facts in question.

In fact, prior to Judge Porteous's confirmation, the Senate was well aware of many of the facts or allegations that Judge Porteous purportedly failed to disclose. For example, the House alleges that Judge Porteous's alleged false statements by way of omission resulted in the Senate being deprived of the following information:

- Judge Porteous "accepted numerous things of value, including meals, trips, home repairs, and car repairs for his personal use and benefit."
- Judge Porteous took "official actions that benefitted the Marcottes."

- Judge Porteous "appointed Creely as a curator in hundreds of cases."[15]

(Article IV.) In fact, the Senate was made aware, or purposefully chose not examine these facts.

For example:

Accepted Things of Value

- Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that the Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks." (PORT000000526, attached as Exhibit 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI "that he sometimes goes to lunch with the candidate and attorneys in the area." (PORT000000471, attached as Exhibit 7.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- Prior to his confirmation, the FBI interviewed an individual, who asked that his identity remain anonymous, who stated that the candidate "indirectly received $10,000 from an individual in exchange for the candidate reducing his bond." (PORT000000463, attached as Exhibit 8.) Also, the FBI interviewed an individual, whose identity has been redacted from discovery documents, who reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it "would take $12,500 to get [the boyfriend] out of jail" and that "$10,000 would go to Judge Porteous for the bond reduction." (PORT000000524, attached as Exhibit 9.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

Took Official Actions that Benefitted the Marcottes

- Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." (PORT000000526, attached as Exhibit 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

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[15] There was also no reason for Judge Porteous to raise his alleged receipt of a portion of curator funds because it is simply not true. More importantly, Creely specifically testified that there was not a *quid pro quo* relationship between the curatorships and the gifts of cash that he provided to Judge Porteous. (*See* Creely Fifth Circuit Testimony at 209-210, stating "It had nothing to do with 'Look, why don't you give me these and I'll give you that back,' or 'Do something for me and – you know, and I'll give you this back.'")

- The FBI was also told by an anonymous source that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (*Id.*) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 10.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge Porteous "frequently sign[ed] bonds ahead of time for bondsmen." (PORT000000526, attached as Exhibit 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

Appointed Creely as a Curator in Hundreds of Cases

- These appointment of curatorships were public documents. Creely represented these individuals in public proceedings.

Assuming that Article IV must be given its plain meaning, then it is not the basis for an impeachment because the Senate was aware of these allegations or facts at the time of Judge Porteous's confirmation vote. This is precisely the element discussed by the House's own expert witnesses in describing the rare and narrow basis under which pre-federal conduct could be used to remove a judge. Professor Michael Gerhardt testified that "there's not been a successful impeachment; that is to say, moved through the House and the Senate based on events that took place prior to the person being a federal officer." (Dec. 15th Hearing at 51-52.) He specifically said that pre-federal conduct could be used as a basis for impeachment only if the conduct is "egregious but not known at the time of the judge's confirmation proceedings." He noted that if the Senate had knowledge of allegations before confirmation "the Senate . . . effectively ratifies the misconduct at the time it decides to confirm the judge." (*Id.* at 30.) In the case of Article IV, while there is a question whether the conduct alleged is egregious, but there can be no doubt that it was known before confirmation.

CONCLUSION

Article IV would effectively gut the impeachment standard to allow removal of a federal judge for his subjective view on what was material in responding to generally worded questions during the confirmation process. It is a back-door effort to do what the Senate has historically declined to do: remove a federal judge for pre-federal conduct. In this case, the alleged non-disclosure is virtually identical not only to non-disclosure by a long list of prior nominees (all of whom were confirmed and none of whom were impeached) but also to similarly ambiguous questions found by federal courts to be unconstitutionally vague. The consequences of adopting such a potentially mischievous standard could be extraordinary in terms of future office holders and impeachments. It makes little sense to cross that Rubicon for a judge who will be leaving the bench in roughly a year anyway. The Senate has traditionally maintained the line of a clear impeachment standard, often rejecting Articles that are vague or based on pre-federal conduct. Article IV is one such article that should be dismissed in its entirety.

WHEREFORE, Judge Porteous respectfully requests that the Senate dismiss Article IV in its entirety.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
Ian Barlow
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 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

Harold Damelin – harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

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

/s/ P.J. Meitl

Exhibit 1

October 25, 1994
8:00 a.m.

INTELLIGENCE REPORT

BY: ANTHONY RADOSTI

SUBJECT:
1. Aubry Wallace N/M DOB 6/28/59
2. Louis Marcotte W/M
3. Bail Bonds Unlimited, 221 Derbigney St., Gretna, La.
4. Judge Thomas G. Porteous, Jr., 24th Judicial Court, Jefferson Parish

On Tuesday, October 25, 1994 at 8:00 a.m., investigator and C. I. #420 met with FBI Special Agent Charlie McGinty at the FBI office on Poydras Street. C. I. advised agent McGinty of the facts surrounding his knowledge of Aubry Wallace's relationship with Louis Marcotte, and Marcotte's relationship with Judge Porteous.

McGinty advised that he had passed on information on the relationship between Marcotte and Porteous to the FBI agent that was doing the background check on Porteous for the Federal judgeship. McGinty had no idea if the lead was followed up by the agent.

McGinty advised the Bureau was looking into Porteous' activity as a possible violation of the Hobb Act, but would have to check with Washington every step of the way.

CONFIDENTIAL

Exhibit 2

SUPPLEMENT TO STANDARD FORM 86 (SF-86)

(Attach additional pages if necessary)

1S. Please list names of all corporations, firms, partnerships or other business enterprises, and all nonprofit organizations and other institutions with which you are now, or during the past five years have been, affiliated as an officer, owner, director, trustee, partner, advisor, attorney or consultant. In addition, please provide the names of any other organizations with which you were affiliated prior to the past five years that might present a potential conflict or appearance of conflict of interest with your prospective appointment. (Please note that in the case of an attorney's client listing, it is only necessary to provide the names of major clients and those that might present a potential conflict or appearance of conflict of interest with the prospective appointment).

NONE

2S. Please list all your interests in real property, other than a personal residence, setting forth the nature of your interest, the type of property and the address.

NONE

3S. Have you or any firm, company or other entity with which you have been associated ever been convicted of a violation of any Federal, state, county or municipal law, regulation or ordinance? If so, please provide full details.

NO

4S. Have you or any firm, company or other entity with which you have been associated ever been the subject of Federal, state or local investigation for possible violation of a criminal statute? If so, please give full details.

NO

5S. Have you ever been involved in civil or criminal litigation, or in administrative or legislative proceedings of any kind, either as a plaintiff, defendant, respondent, witness or party in interest? If so, please give full details identifying dates, issues litigated and the location where the civil action is recorded.

SEE ATTACHMENT #1

JUL-22-1994 10:20 FROM FBI NEW ORLEANS SQUAD 7 TO 8202324 F P.04

JUL-05-1994 11:04 FROM FI EW ORLEANS TO

65. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please give full details.

NO

73. Have you ever run for political office, served on a political committee or been identified in a public way with a particular organization, candidate or issue? Have any complaints been lodged against you or your political committee with the Federal Election Commission or state or local election authorities? If so, please describe.

SEE ATTACHMENT #2

85. Are you currently, or have you ever been, a member or office holder in any club or organization that restricts or restricted membership on the basis of sex, race, color, religion, national origin, age or handicap? If so, provide the name, address and dates of membership for each.

NO

89. Please identify any adults (18 years or older) currently living with you who are not members of your immediate family. Provide the names of those individuals, dates and places of birth, and whether or not they are United States citizens.

NONE

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

NO

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

Signature

9B

PORT000000298

Exhibit 3

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

G. THOMAS PORTEOUS, JR.
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Gabriel Thomas Porteous, Jr.

2. Address: List current place of residence and office address(es).

Residence: 4801 Neyrey Drive
Metairie, LA 70002

Office: 24th Judicial District Court
Division "A"
Gretna Courthouse Annex Bldg.
2nd Floor, Room 200
Gretna, LA 70053

3. Date and place of birth.

December 15, 1946 New Orleans, LA

4. Marital status (include maiden name of wife, or husband's name. List spouse's occupation, employer's name and business address(es).

Carmella Ann Giardina Porteous
Vascular Technician
Vascular Laboratory, Inc.
3939 Houma Blvd., Suite 20
Metairie, LA 70006

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Louisiana State University (New Orleans) 1964-1968
Bachelor of Arts - Economics
Degree Awarded: May, 1968

Louisiana State University Law School 1968-1971
Baton Rouge, LA
Juris Doctor
Degree Awarded: May, 1971

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

District Court Judge January 1, 1985 - Present
State of Louisiana
Division A, 24th Judicial District Court

Co-instructor: Loyola School of Law Spring 1990
Civil Procedure Spring 1991

District Court Judge, Ad Hoc August 24, 1984 - January 1, 1985
State of Louisiana
Division A, 24th Judicial District Court

District Attorney's Office Assistant District Attorney
Parish of Jefferson Supervisor:February 1,1975-August 6,1984
District Atty. John Mamoulides Chief Felony Complaint Div.:
Gretna Courthouse Annex Bldg. October 8,1973-January 31,1975
5th Floor
Gretna, LA 70053

St. Mary Dominican College
Instructor: Criminal law and procedure 1982

Porteous & Mustakas 3445 North Causeway Blvd. Metairie, LA 70002	Partner April 1980 - August 1984
City Attorney's Office City of Harahan 6437 Jefferson Hwy. Harahan, LA 70123	City Attorney July 1,1982 - August 23,1984
Porteous, Lee & Mustakas 139 Huey P. Long Ave. Gretna, LA 70053	Partner February 1976 - April 1980
Edwards, Porteous & Lee 139 Huey P. Long Ave. Gretna, LA 70053	Partner August 1974 - January 1976
Edwards, Porteous & Amato 139 Huey P. Long Ave. Gretna, LA 70053	Partner October 1973 - July 1974
Attorney General State of Louisiana P.O.Box 94005 Baton Rouge, LA 70804	Special Counsel September 10, 1971 - October 7, 1973
B & L Associates Dick Barrios 512 Acadia Baton Rouge, LA 70806 (800) 673-0545 (504) 751-4791 Position: Clerk/Assistant	1970 - 1971

Baker Shoe Stores 1968 - 1971
Westside Shopping Center
Gretna, LA 70053
(no longer at that location)
main branch - 837 Canal St.
New Orleans, LA 70112
(504) 524-7904
Position: Shoe Salesman

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

None.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

La. State Bar Association
4th & 5th Circuit Judges Association President - 1991
Chief Judge - 24th Judicial district Court - 1992
American Bar Association
Jefferson Bar Association
American Judges Association
American Judicature Society
La. District Attorney's Association President Assistant - 1974
District Attorney Section

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

None.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such membership lapsed. please explain the reason for any lapse of member ship. Give the same information for administrative bodies which require special admission to practice.

All State Courts of Louisiana	September 7, 1971
United States District Court, Eastern District of Louisiana	September 19, 1972
United States Supreme Court	April 18, 1977
United States Court of Appeals, 5th Circuit	October 1, 1981

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you please supply them.

See Attachment "A".

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent - May, 1990.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was first elected without opposition in 1984 for the term to commence January 1, 1985. At the request of the Louisiana Supreme Court, because the Division "A" seat was vacant, I was appointed to sit as the Ad Hoc Judge, effective August 24, 1984. I was re-elected without opposition in 1990 for the term commencing January 1, 1991.

The 24th Judicial District Court is a state trial court of general civil and criminal jurisdiction. However, juvenile proceedings and traffic violations are not included in our jurisdiction. Other specific courts dispose of these two areas.

15. Citations: If you are or have been a judge, provide:

(1) citations for the ten most significant opinions you have written;

(1) David Egudin v. Carriage Court Condominium, et al., 528 So.2d 1043, (La. App 5 Cir., June 1988)
(2) In the Matter of Wrongful Death of Stanton J. Stark, #No. 86-CA-34 (La. App. 5 Cir., June, 1986) (Not designated for publication)

See Attachment "B-1"

(3) Edgar Carlsen v. Mehaffey & Daigle, Inc., et al., 519 So.2d 1187, (La. App. 5 Cir., Jan. 1988); 522 So.2d 1091, (LA 1988)
(4) Paul Fuller v. William Barattini, 574 So.2d 412, (La. App. 5 Cir., Jan.,1991)
(5) Paul Hidding v. Dr. Randall Williams, 578 So.2d 1192, (La. App. 5 Cir., April,1991)
(6) Karen Jewell v. The Bershire Development, 612 So.2d 749, (La. App. 5 Cir. Dec.,1992)
(7) Thuan Ngoc Do v. Phuong Hoang Ngo, et al., 618 So.2d 1213, (La. App. 5 Cir., May,1993)
(8) Betty Ann Dunn v. Kreutziger, D.D.S., et al., 625 So.2d 672, (La. App. 5 Cir., Oct., 1993)
(9) Judy Watts on behalf of minor, Polly Watts v. J.C. Penny et al., App.Ct. # _____, (La. App 5 Cir.,1994)(Not designated for publication)

See Attachment "B-2"

(10) Kenneth Poche and Scott Key v. Bayliner Marine Corporation and Wagner Marine, Inc., 632 So.2d 1170, (La. App. 5 Cir.,Feb.,1994)

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

State v. Abadie, 612 So.2d 1 (LA 1993). Defendant made a statement implicating himself in the murder of a seven year old girl, Raquel Fabre. The issue of right to counsel was involved on appeal from ruling that the statement was admissible. The Supreme Court found that defendant sufficiently invoked right to counsel by unsuccessfully attempting to obtain legal advice on telephone, and defendant did not "initiate " or "reopen" interrogation by expressing his possible willingness to talk to particular officer in response to police's chief's request that he submit to lie detector test.

State v. Lindsey, 491 So.2d 371 (LA 1986). LSA-R.S. 14:71 (A)(2) Issuing worthless checks - presumption. The statute provides that a presumption exists, as follows: if an offender fails to pay a check within ten days after notice of its nonpayment, it shall be presumptive evidence of his intent to defraud. Prior rulings by the Supreme Court led me to believe that this presumption would be a mandatory presumption, as opposed to a permissive presumption, hence, unconstitutional. The Supreme Court ruled that the statute was ambiguous as to whether it created a mandatory or permissive presumption; therefore, it is interpreted as constitutional and with lenity toward the defendant. The Court recognized that its holding in this case was in conflict with its prior holdings in State v. Williams, 400 So.2d 575, (LA 1981) and State v. McCoy, 395 So.2d 319 (La. 1980). It explained how those cases could be reconciled and interpreted. My lower court ruling was vacated and the matter remanded.

Yount v. Maisano, 616 So.2d 1382, (La. App. 5 Cir. 1993); 620 So.2d 823 (LA 1993). Jury award against homeowner's policy reversed. Exclusion in policy for bodily injury "expected or intended by the insured." Supreme Court reversed, finding the actions of defendant to be an intentional act and excluded from coverage.

Marshall v. Citicorp Mortgage, Inc., 601 So.2d 669, (La. App. 5 Cir. 1992). Summary judgment reversed finding issue of material facts existed. Issue of decreasing credit life for less than loan balance when combined with rule of '78's in rebating finance charge.

Succession of Ziifle, 595 So.2d 776, (La. App. 5 Cir. 1992). Protracted litigation since 1978. A default judgment, taken before Judge Price, the previous judge of Division A, was found to be a nullity; hence, subsequent judgments were set aside.

Tracy v. Travelers Ins. Companies, 594 So.2d 541, (La. App. 5 Cir 1992) reversed trial court on exclusion of coverage on comprehensive general liability policy.

Wills v. State Farm Auto, 578 So.2d 1006, (La. App. 5 Cir. 1991). Reversed granting of summary judgment on whether insured had offered choice of limits for uninsured motorist coverage and affirmatively selected lower limits.

Kuebler v. Martin, 578 So.2d 113, (LA 1991). This is one of two cases argued before me on the same day. In the first, Autin v. Martin, I granted the defendant's relief on all claims and dismissed plaintiff's claims against the banks. The 5th Circuit Court of Appeals affirmed my decision at 576 So.2d 72, writs were denied by the Louisiana Supreme Court on April 11, 1991.

The second case is the one cited. In that case I granted the bank's motions. Likewise, this was affirmed by the appellate court but reversed by the Supreme Court only as to one of the banks finding the general language in plaintiff's petition did state a cause of action as to that one bank.

American Motorist Ins. Co., 579 So.2d 429, (LA 1991); 566 So.2d 121, (La. App. 5 Cir. 1990). Court of Appeals changed the amount of quantum on portions of the award. Supreme Court reversed the Court of Appeals, in part, and the trial court, in part, on different elements of damage award.

Lutz v. Jefferson Parish School, 565 So.2d 1071, (La. App. 5. Cir 1990); 503 So.2d 106, (La. App. 5 Cir. 1987). Judgment granting reduction in workman compensation payments based upon claimant receiving disability

retirement benefits. Reversed, finding statute was prospective only.

Cabral v. National Fire Ins.Co., 563 So S.2d 533, (La. App. 5 Cir 1990); writ denied, 567 So.2d 1129. Reversed default judgment because insufficient trial record made by plaintiff.

Succession of Austin, 527 So.2d 483, (La. App. 5 Cir. 1988). Foreign will modified by the trial court to reduce the portion that impinged on the legitime. Court of Appeals reversed finding that subsequent birth and legitimation of children revoked the will.

Augustine v. Griffen, 525 So.2d 540, (La. App. 5 Cir. 1988); writ denied, 532 So.2d 118. Twelve-year old on bike hit by auto. I reduced award by 20% for comparative negligence of child. Court of Appeals changed percentage of negligence on child to 80%.

First National Bank v. Verheugen, et al., 527 So.2d 453, (La. App. 5 Cir. 1988); writ denied 530 So.2d 576. Reversed in part on issue of attorney's fees.

Thibodeaux v. Burton, 525 So.2d 1103, (La. App. 5 Cir.1988); 531 So.2d 767, (LA 1989). Plaintiff left a quadriplegic after an auto accident. Pacific Employer Insurance Company failed to answer. Plaintiff obtained default judgment. Court of Appeals upheld default judgment and refusal of new trial. Supreme Court reversed with 3 dissents, finding an incomplete record was made by plaintiff when he confirmed the default.

Southern States Masonry, Inc. v. J.A. Jones Construction Co., et al., 507 So.2d 198, (LA 1987). Granted exception of prematurity. "Pay when paid" clause of contract between contractor and subcontractor.

Cooper v. Brownlow, 491 So.2d 693, (La. App. 5 Cir. 1986). Ruled Levee District was immune from liability under provision of LSA-R.S. 9:2791 and 2795, on a summary judgment. Court of Appeals ruled question of material facts in dispute which precluded summary judgment.

Administration of Tulane Education, 497 So.2d 27, (La. App. 5, 1986). Suit on tuition. Directed verdict for defendant was reversed finding university's

records admissible. Remanded.

Markey v. Howard, 484 So.2d 165, (La. App. 5 Cir. 1986). Jury's assessment of 30% negligence to plaintiff driver was manifestly erroneous. Appellate Court removed this allocation, in all other particulars affirmed.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

State v. Manuel Caballero, 472 So.2d 85, (La. App 5 Cir., June,1985); 492 So.2d 1215
State v. Edward Parr, 498 So.2d 103, (La. App 5 Cir., Nov.,1986); writ denied 532 So.2d 113
State v. Antoinne Williams, 483 So.2d 626, (La. App 5 Cir., Feb.,1986)
State v. Nolan Grant, 517 So.2d 1151, (La. App 5 Cir., Dec.,1987)
State v. Karen Copeland, 631 So.2d 1223, (La. App. 5 Cir., Jan.,1994)
State v. Darrell Williams, 545 So.2d 651, (La. App. 5 Cir.) writ denied 556 So.2d 53 and 584 So.2d 1157
State v. Jessie Head, 598 So.2d 1202, (La. App. 5 Cir., April,1992)
State v. Lane Nelson, 105 S.Ct 2050; 459 So.2d 510; *post conviction relief*
See Attachment "B-3"

16. Public office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Special Counsel, Attorney General State of Louisiana	9/10/71 - 10/7/73
Assistant District Attorney Parish of Jefferson	2/1/73 - 8/6/84

Both were appointed positions

No unsuccessful candidacies for elective public office

17. Legal career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

District Court Judge State of Louisiana Division A, 24th Judicial District Court	January 1, 1985 - Present
Co-instructor: Loyola School of Law Civil Procedure	Spring 1990 Spring 1991
District Court Judge, Ad Hoc State of Louisiana Division A, 24th Judicial District Court	August 24, 1984 - January 1, 1985
Instructor: Criminal law and procedure St. Mary Dominican College	1982

District Attorney's Office Parish of Jefferson District Atty. John Mamoulides Gretna Courthouse Annex Bldg., 5th Floor Gretna, LA 70053	Assistant District Attorney Supervisor: 2/1/75 - 8/6/84 Chief Felony Complaint Div.: 10/8/73 - 1/31/75
City Attorney's Office City of Harahan 6437 Jefferson Hwy. Harahan, LA 70123	City Attorney 7/1/82 - 8/23/84
Porteous & Mustakas 3445 North Causeway Blvd. Metairie, LA 70002	Partner April 1980 - August 1984
Porteous, Lee & Mustakas 139 Huey P. Long Ave. Gretna, LA 70053	Partner February 1976 - April 1980
Edwards, Porteous & Lee 139 Huey P. Long Ave. Gretna, LA 70053	Partner August 1974 - January 1976
Edwards, Porteous & Amato 139 Huey P. Long Ave. Gretna, LA 70053	Partner October 1973 - July 1974
Attorney General State of Louisiana P.O. Box 94005 Baton Rouge, LA 70804	Special Counsel 9/10/71 -10/7/73

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

General Civil Practice - in private practice & City Attorney
Criminal Prosecution - Attorney General & District Attorney

2. Describe the typical former clients, and mention the areas, if any, in which you have specialized.

My clients were all individuals until approximately 1975. Subsequently, my practice consisted of corporate representation in areas such as: maritime defense for barge fleeting operations, NLRB appearances, and general corporate representation. Additionally, from 1979 until 1984, I dealt with corporations that developed and operated tank terminal facilities.

As City Attorney, I handled all matters involving the City of Harahan & also prosecuted municipal violations, in the Mayor's Court

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently.

2. What percentage of these appearances was in:
   (a) federal courts - 20%
   (b) state courts of record - 80%
   (c) other courts - 0%

3. What percentage of your litigation was;
   (a) civil - 50%
   (b) criminal - 50%

4. State the number of cases in court of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

350 plus cases - Sole Counsel, 80%; Chief Counsel, 15%; Associate Counsel, 5%.

5. What percentage of these trials were:
   (a) jury 40%
   (b) non-jury 60%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the names of the court and name of the judge or judges before whom the case was litigated; and
(c) the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Tellepsen Construction Co. et al v. M/S SANTISTA, et al
Civil Action #75-2249, U.S. District Court, Eastern Dist. of Louisiana
Section "C", Honorable Alvin Rubin

This matter was tried for the most part; a settlement was reached during trial and an agreement to dismiss was filed prior to rendition of judgment, August 9, 1976.

Capsule summary of case: Ship collision. I handled this case through all pre-trial discovery and pleadings and participated in all conferences with Judge Alvin Rubin with respect to the case. The dock was constructed by my clients, Tellepsen Construction Company and Lagradeur International. This case was noteworthy because it was major litigation involving issues of negligence, and limitation and remoteness of damage claims.

Final Disposition: Settled to my clients' satisfaction.

G. Thomas Porteous, Jr.
Counsel for Tellepsen Construction Co. & Lagradeur International
(Sole Counsel)

Opposing Counsel:
Terriberry, Carroll, Yancey & Farrell
Walter Carroll, Jr.(retired)
3100 Energy Centre

1100 Poydras St.
New Orleans, LA 70163
(504) 523-6451

2. William E. Cazaubon v. Acme Truck Lines, Inc. and Commercial Union Assurance Company c/w
William E. Cazaubon v. Ocean Chandler Service, Inc., Daniel S. Barrilleaux and Aetna Casualty and Surety Co.
Civil Action # 244-229, 24th Judicial District Court, State of Louisiana Division "A", Judge Roy Price

Trial on the merits, November 22nd & 23rd, 1982

Chief Counsel for Plaintiff: G. Thomas Porteous, Jr.

Capsule summary of case: This matter concerned a suit for personal injuries resulting from an automobile accident. There were significant questions in regard to: causation of the accident; the extent to which plaintiff's injuries were related to the accident; and the amount of future wages that would justly compensate plaintiff. I was associated to try this matter because of my extensive litigation experience. Final Disposition: Judgment for plaintiff.

Co-Counsel:
Don Gardner
6380 Jefferson Hwy.
Harahan, LA 70123
(504) 737-6651

Opposing Counsel:
Rene A. Pastorek
Ste. 1060
3900 N.Causeway Blvd.
Metairie, LA 70002
(504) 831-3747

Wayne T. McGaw
365 Canal Street
Room 1870
New Orleans, LA 70140
(504) 528-2058

3. State of Louisiana v. John J. Storms, III
Criminal # 79-1114, 24th Judicial District Court
Division "M", Judge Robert J. Burns
Citation: 406 So.2d 135, (La. 1981)

Jury Trial, November 26, 27, 28, 29th, 1979.

Chief Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: Count 1 aggravated rape; Count 2, aggravated crimes against nature. This case required the testimony of a ten-year old victim. Case preparation was crucial. This necessitated many visits and meetings with the child in order to gain her trust and confidence which was essential to her trial testimony. When I initially met the victim and her mother, she would not comment. Then, she later made only isolated statements. The child had to be shown the courtroom, where she would be seated and where all the lawyers, defendant and judge would be seated. In advanced preparation for trial, D.A. personnel were placed in the courtroom to simulate the public. Great efforts were made to make the child understand what was about to happen and to make her comfortable and responsive. Final Disposition: Jury Verdict - Guilty as charged; Affirmed.

Trial Assistant for State:
Assistant District Attorney Arthur Lentini
2551 Metairie Road
Metairie, LA 70001
(504) 838-8777

Defense Counsel:
Sam Dalton
2001 Jefferson Hwy.
Jefferson, LA 70121
(504) 835-4289

Co-Defense Counsel:
George Troxell
4330 Canal Street
New Orleans,LA 70119
(504) 488-8800

4. State of Louisiana v. Leonard J. Fagot
Criminal # 76-2116, 24th Judicial District Court
Division "J", Judge Patrick E. Carr
Citation: None, defendant died while out on bond prior to appeal.

Jury Trial, December 12, 13, 14, 15, 16, 19th, 1977.

Chief Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: Second Degree Murder. This was a major case involving a prominent local lawyer; it received a lot of public attention. The case was made more complex because of the health of defendant. Medical support was provided during trial in the event the defendant required treatment. The appearance of defendant on a stretcher invoked the emotions of the jury and it took considerable perseverance to prevent the jury from being swayed by sympathy. My participation was from the inception of this case. This matter required appearances in Federal Court, prior to trial in State District Court, because of defendant's claim of denial of due process based on his state of health. The Federal District Court denied defendant's claim and favorably commended our procedures and precautionary measures.
Final Disposition: Verdict - Guilty as charged; No appeal; defendant alleged to have committed suicide, body found in trunk of car.

Co-Counsel for State:
Assistant District Attorney William Hall
3500 N. Hullen Street

Metairie, LA 70002
(504) 456-8692

Defense Counsels:
Robert Broussard (deceased)
Roy Price (deceased)

5. State of Louisiana v. Jan J. Poretto
Criminal # 80-1980, 81-1003, 24th Judicial District Court
Division "G", Judge Herbert Gautreaux
Citation: 468 So.2d 1142, (La. May,1985); 475 So.2d 314,(La. Sept.,1985)

Jury Trial, November 2, 3, 4, 5, 6th, 1981.

Chief Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: Second Degree Murder and Aggravated Battery. The defendant in this case was a New Orleans policeman. Major question concerning use of certain statements and hypnotic procedures used on the victim/wife by the police. I handled this matter from the initial motion to reduce the bond. This was critical because at this stage we were able to positively connect the defendant with the weapon. Trial preparation was very time consuming because out of state trips were required to secure the presence of a witness. An appearance before a District Court Judge in Annapolis was required to secure the immediate apprehension and transportation of the witness to Louisiana, along with returning this witness to Annapolis.
Final Disposition: Jury Verdict - Guilty as charged; Affirmed.

Co-Counsel for State:
Assistant District Attorney Gordon Konrad
P.O. Box 10890
Jefferson, LA 70181 /or
3900 River Rd., Suite 6
Jefferson, LA 70121
(504) 831-9985

Defense Counsel:
Ralph Whalen
3170 Energy Centre
1100 Poydras Street
New Orleans, LA 70163
(504) 582-2333

6. State of Louisiana v. James Nolen
Criminal # 81-4045, 24th Judicial District Court
Division "J", Judge Jacob Karno
Citation: 461 So.2d 1073 (La. App. 5th Cir 1984)

Jury Trial, August 12, 13, 14, 15th, 1982.

Sole Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: Aggravated rape case involved a vicious attack on a young woman. Defense put the victim's credibility at issue because she voluntarily left with the attacker and she was employed as a bartender. Throughout the trial the defendant remained belligerent, this compelled the trial judge to issue warnings. Use of restrains were later necessitated in order to maintain appropriate trial decorum.

Final Disposition: Jury verdict - Guilty as charged; 5th Cir. Ct of Appeals - Affirmed.

Defense Counsel:
Phil Johnson
(inactive) The Louisiana Bar Association reports no current address for this attorney and could only provide the following telephone number:
(714) 275-6066

7. State of Louisiana v. Joseph Batiste
Criminal #71-1081, 24th Judicial District Court
Division "A", Judge Louis DeSonier
Citation: 318 So.2d 27 (LA 1975)

Jury Trial, April 10, 11th, 1972.

Chief Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: Murder. This was the first capital case I tried. The trial involved complex issues of law and fact.
Multiple motions to suppress were argued. A photographic line up was suppressed, but the victim's in-court identification was allowed because a sufficient predicate was established to show an independent basis for the identification. Final Disposition: Jury verdict - Guilty of Murder, Death Sentence; Supreme Court - Affirmed conviction, death sentence annulled and set aside per: Furman v. Georgia, 408 U.S. 238; remanded, life imprisonment.

Defense Counsel:
Philip Schoen Brooks
723 Hillary St.
New Orleans, LA 70118
(504) 866-6666

8. State v. Christopher J. Rebstock

Criminal # 82-67, 24th Judicial District Court
Division "A", Judge Roy A. Price
Citation: 413 So.2d 510, (April, 1982); 418 So.2d 1306, (La. Sept 1982)

Motion to Suppress Confession: April 13, 1982.

Chief Counsel: Assistant District Attorney G. Thomas Porteous, Jr.

Capsule summary of case: Defendant charged with: 2nd Degree Murder. The case involved a sixteen year old. Issues of law involving the statements he made to police. There were two statements involved. One was an inculpatory statement made to his father. The other was a recorded confession. The Supreme Court held that the boy's arrest was not illegal and the statement obtained as result of the arrest was admissible since the boy and his father had a short private conversation in police station, free from presence of police. A second recorded confession was suppressed because the court found the defendant did not knowingly and intelligently waive his constitutional rights.
Final disposition of case: Defendant pled guilty to manslaughter and received 21 years.

Defense Counsel:
Jacob Amato, Jr.
901 Derbigny Street
Gretna, LA 70053
(504) 367-8181

9. Marlex Terminals, Inc. v. Parish of Jefferson, et al.
Civil Action # 247-364, 24th Judicial District Court, State of Louisiana
Division "A ", Judge Louis G. DeSonier, Jr.

Trial on the summary judgment, December 18, 1980

Sole Counsel: G. Thomas Porteous, Jr.

Capsule summary of case: Petition for mandamus seeking a building permit. Complex litigation involving the rights of the parish government to deprive the applicant of a permit to construct a terminal. The parish government had passed a moratorium on the issuance of permits. The moratorium was challenged on the basis of the parish's failure to properly advertise the notice of the moratorium legislation.
Final Disposition: Mandamus granted. Parish was ordered to issue a permit.

Opposing Counsel:
Alvin J. Dupre, Jr.
Suite A, 2701 Houma Blvd.
Metairie, LA
(504) 454-1061

10. Eppling v. Jon-T Chemical, Inc.
Civil Action # , 24th Judicial District Court, State of Louisiana
Division "B", Judge Zaccaria
Citations: 363 So.2d 1263

Trial on the summary judgment

Sole Counsel: G. Thomas Porteous, Jr. for Defendant

Capsule summary of case: Suit to collect for appraisal fees. Motion for summary judgment on behalf of my client Jon-T Chemicals alleging the doctrine of accord and satisfaction. The case was noteworthy because it was handled in an expedient manner via summary judgment.
Final Disposition: Summary judgment granted; Court of Appeals - Affirmed.

Opposing Counsel:
Thomas Loop
(deceased)

Additionally, the following ten individuals have recently dealt with me on legal matters within the last five years:

Scott W. McQuaig
1500 One Galleria Blvd.
Metairie, LA 70001
(504) 836-5070

Edward J. Rice, Jr.
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Lawrence J. Centola, Jr.
650 Poydras St., Ste. 2100
New Orleans, LA 70130
(504) 523-1385

Raymond A. Pelleteri
1539 Jackson Ave., 6th Floor
New Orleans, LA 70130
(504) 561-5000

Jay Zainey
2543 Metairie Road
Metairie, LA 70001
(504) 831-6766

Robert Glass
530 Natchez Street
New Orleans, LA 70130
(504) 581-9083

Patricia LeBlanc
1615 Metairie Road
Metairie, LA 70005
(504) 834-2612

Kathryn T. Wiedorn
3421 N. Causeway Blvd., 9th Floor
Metairie, LA 70002
(504) 831-4091

Allan Berger
4173 Canal Street
New Orleans, LA 70119
(504) 486-9481

Joseph R. McMahon, Jr.
111 Veterans Blvd.
Heritage Plaza, Ste. 740
Metairie, LA 70005
(504) 837-1844

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

State v. Lane Nelson, This matter was before me on defendant's application for post conviction relief. Defendant was earlier found guilty, by a prior court, of first degree murder and sentenced to death. I set aside the death penalty because of ineffective assistance of counsel. Defendant subsequently pled guilty to first degree and he was resentence to life in prison, without

capital punishment. (Attachment "B-3")

Marlex Terminal, Inc. v. Parish of Jefferson, et al., Civil Action # 247-364, 24th J.D.C., State of Louisiana, Division "A", Judge Louis G. DeSonier,Jr.

The brief represents my sole personal work. Trial on the summary judgment, December 18, 1980. Sole Counsel: G. Thomas Porteous, Jr.

Capsule summary of case: Petition for mandamus seeking a building permit. Complex litigation involving the rights of the parish government to deprive the applicant of a permit to construct a terminal. The parish government had passed a moratorium on the issuance of permits. The moratorium was challenged on the basis of the parish's failure to properly advertise the notice of the moratorium legislation.
Final Disposition: Mandamus granted. Parish was ordered to issue a permit.

Instructor: Criminal Law/Criminal Procedure
For three years, I taught at St. Mary Dominican College. The class was a required course in the Criminal Justice program.

Co-instructor: Civil Procedure.
In conjunction with another attorney, I volunteered my time to teach third-year law students at Loyola School of Law. The emphasis was not only on the written and codified law, but also on the practical application of the law during trial proceedings. I taught the course during the Spring term in 1990 and 1991.

Speaker - Continuing Legal Education. I appeared as a speaker for numerous CLE programs, such as: the Jefferson Bar Association, Louisiana Judicial College and Louisiana State Bar Association Summer School for Lawyers

District Court Judge
State of Louisiana
Division A, 24th Judicial District Court

District Court Judge, Ad Hoc
State of Louisiana
Division A, 24th Judicial District Court

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Louisiana State Employee Retirement System. If I am appointed prior to the end of my term, i.e., December 31, 1996, the benefits can only be drawn when I attain age 60.

2. Explain how you will resolve any potential conflict of interest, including the procedures you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will follow the mandates of the Federal Rules of Civil & Criminal Procedure. I will also follow the guidelines of the Code of Judicial Conduct. I will also consider the model codes and recommendation of the ABA which are pertinent.

   The only possible areas of conflict of interest would be reviewing cases from Louisiana State Court, 24th Judicial District Court, Division A, during the time I sat or a challenge to the Louisiana State Employee Retirement System. As to the retirement, a conflict could arise only if I remained on the Jefferson bench twelve (12) years, until 1996. If I took the Federal bench prior to this point, I would not be eligible for retirement proceeds until age sixty (60).

Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See Attachment "C"

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See Attachment "D"

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Only the campaign wherein I was elected District Court Judge.

III. GENERAL (PUBLIC)

1. An ethical consideration under Cannon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   Speaker - Continuing Legal Education. I appear as a speaker for numerous

CLE programs, such as: the Jefferson Bar Association, Louisiana Judicial College and Louisiana State Bar Association Summer School for Lawyers

Since I took the bench, I invited field trips to Division "A", 24th J.D.C. for school children about once a month. The students would observe the docket and I then speak with them on the working of the court system. Afterwards, I entertain questions to explain either the particular case or the function of the courts.

I have also visited many schools in Orleans and Jefferson Parish to speak on the court systems, the functions and the duties of a judge.

Judging Moot Court Competitions on numerous occasions at Tulane School of Law and Loyola Law School.

I recently participated in the National Institute of Trial Advocacy program at Louisiana State University School of Law

At Loyola School of Law, I volunteered as co-instructor for Civil Procedure for two terms.

To serve the community, since 1978, I continue to be active with the Recreation Department for the Parish of Jefferson in coaching and refereeing.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

   No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your

nomination?

No.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Initially, I met with Senator John Breaux to discuss the possibility of being recommended for the federal bench. Both Senators Breaux and Johnston sent my name to the White House and I was recommended.

After completing multiple questionnaires, I was interviewed in Washington by members of the Justice Department, Office of Policy Development.

The FBI and the ABA have also conducted extensive reviews of my credentials and qualifications, along with conducting interviews.

On August 25, 1994, I was officially nominated by the President for the United States District Court, Eastern District of Louisiana.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Our country, with its three separate and distinct branches of government, has withstood the test of time and the criticism of some. Even though the branches are separate, there will always be occasions when there is interaction among them while still preserving the separation of powers.

We, in the judiciary, have a duty to listen to the facts of a case and render a decision according to law pertinent to those issues. The presentation of the facts are for the litigants and we should always guard against participating in that presentation. A trier of fact should in no way devise, invent or concoct facts; it should rule on the case before it. Unless a question is certified before the court by the Louisiana Supreme Court or any other tribunal properly, it may not render an advisory opinion. Novel questions of law occasionally arise, and they must be dealt with according to the facts before the court. The judiciary must decide cases according to the facts and law as an impartial arbitrator.

In performing our duties there are occasions when our judgments may

be interpreted as judicial activism. When we declare a law unconstitutional and unenforceable that may be interpreted by some as interfering with the legislative function. However, such action is part of our duty and responsibility and is far different from actually legislating.

When we deal with individual grievances, we must be ever mindful to follow judicial precedent and constitutional interpretation. The personal feelings of a judge should never replace sound, established judicial precedent and constitutional interpretation. In instructing juries, I always remind them that "your decision must not be based on bias, prejudice, sympathy or public opinion." We in the judiciary must be ever mindful of this guideline when we are the trier of the facts.

Once a matter is before a court on a trial on the merits, the judiciary's duty is to render our decision solely based on the law and evidence. Prior to trial, a judge may be called upon to counsel or intervene as an unbiased peacemaker, encouraging the parties to be open minded and understanding.

If we attempt to go beyond our role, we may in fact infringe on areas reserved to the other branches of government. If we attempt to do less, we will not be adhering to our oaths and weakening the judicial branch of government. It is always a careful balance.

IV CONFIDENTIAL

1. Full name (include names used).

   Gabriel Thomas Porteous, Jr.

2. Address: List current place of residence and office address(es). List all office and home telephone numbers where you may be reached.

Residence:	4801 Neyrey Drive Metairie, LA 70002	(504) 455-5879
Office:	Division "A" Gretna Courthouse Annex Bldg. 2nd floor, Room 200 Gretna, LA 70053	(504) 364-3850

3. Have you ever been discharged from employment for any reason or have you ever resigned after being informed that your employer intended to discharge you?

   No.

4. Were all your taxes (federal, state, and local) current (filed and paid) as of the date of your nomination?

   Yes.

5. Has a tax lien or other collection procedure (to include receipt of computer balance due notices) ever been instituted against you by federal, state, or local authorities? If so, give full details.

   No.

6. Have you or your spouse ever been the subject of any audit, investigation or inquiry for either federal, state, or local taxes? If so, give full details.

   No.

7. Have you or your spouse ever declared bankruptcy? If so, give particulars.

No.

8. Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.

No.

9. Have you ever been the subject of a complaint to any court, administrative agency, bar association, disciplinary committee, or other professional group for a breach of ethics, unprofessional conduct or a violation of any rule of practice? If so, give particulars.

No.

10. Have you ever been sued by a client or other party? Have you ever been a party to any litigation? If so, give full particulars.

Clark, et al v. Edwards, et al.
86-435, U.S. District Court, Eastern District of Louisiana

Suit challenging the method of election of judges in Louisiana. All judges were sued as nominal parties; we were sued in our official capacity. Resolution: Jefferson Parish, the 24th Judicial District Court, established sub-districts wherein an individual candidate runs, as opposed to running throughout the entire parish as was previously the procedure.

24th Judicial District Court, Indigent Defender Board & Sam Dalton v. State of Louisiana, Governor Roemer, et al.
413-728, 24th Judicial District Court
Declaratory judgment on constitutionality of LSA-R.S. 15:144(B)(D). All judges were sued, we were sued in our official capacity.

Resolution: Supreme Court issued a TRO and remanded to lower court. At the request of the Chief Justice and all interested parties, we have deferred further proceedings pending resolution by the legislature. The Indigent Defender Board has stated that they will voluntarily dismiss this suit within the next 30 days.

Augustus, et al. v. State of Louisiana, Governor Roemer, et al
#90-4667 U. S. District Court, Eastern District of Louisiana

Constitutionality of LSA-R.S. 13:994(B)(1),(2),(3). This concerned a Louisiana statute which assessed a 2% fee on bail bonds. All judges were sued as nominal parties in their official capacity. This is virtually the same claim as Sierra, et al v. State of Louisiana, Governor Roemer, et al, except it was filed in Federal court.

Injunction granted, statute declared unconstitutional.

Sierra, et al v. State of Louisiana, Governor Roemer, et al
#405-429, 24th Judicial District Court
All judges were sued as nominal parties in their official capacity. Constitutionality of LSA-R.S. 13:994(B)(1),(2),(3). Post Augustus ruling, parties petitioned in state court for refunds of the fees collected to date. Refunds denied by the trial and appellate courts. The Louisiana Supreme Court denied plaintiffs' writs on June 24, 1994.

DeGrange, et al v. 24th Judicial District Court
89-3535, U.S. District Court, Eastern District of Louisiana

All judges were sued in their official and individual capacity. Petitioners, Shurmaine DeGrange and Ida Williams alleged discrimination. Both petitioners were former employees of the late Judge Lionel Collins. After his death, De Grange, his former law clerk, alleged she was not hired as a hearing officer in Domestic Court because of discrimination. Ida Williams, his former secretary, alleged discrimination because her services were not retained by the newly elected judge of the division.

Resolution: The matter was settled without any admission of liability or responsibility.

11. Please advise the Committee of any unfavorable information that may affect your nomination.

To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

AFFIDAVIT

I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Gretna, Louisiana this 6 day of September, 1994.

Gabriel Thomas Porteous, Jr.

Notary

Exhibit 4

INTERVIEW OF CANDIDATE

FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 7/8/94

GABRIEL THOMAS PORTEOUS, JR., Judge, Division A, 24th Judicial District Court, Parish of Jefferson, was interviewed at his place of business, JEFFERSON PARISH COURTHOUSE, Gretna, Louisiana 70053, 504/364-3850. PORTEOUS was advised that he was being interviewed as a result of a request for the FBI to conduct a background investigation concerning his candidacy for U.S. District Judge, Eastern District of Louisiana. PORTEOUS was advised that the scope of the questions asked during the interview was not necessarily limited to the timeframe on the SF-86 and that his response to each question should cover his entire adult life, since age 18. It was also pointed out the PORTEOUS that Question 23 on the SF-86, pertaining to "Police Record," covers activities since his 16th birthday.

PORTEOUS currently resides at 4801 Neyrey Drive, Metairie, Louisiana, which is the only property he owns at this time. PORTEOUS attended LOUISIANA STATE UNIVERSITY AT NEW ORLEANS (LSU-NO), from September, 1964, to May, 1968, while he resided with his family at 2218 Madrid Street, New Orleans, Louisiana. LSU-NO is known as the UNIVERSITY OF NEW ORLEANS (UNO) today. PORTEOUS was employed by BAKER'S SHOE STORES as listed in his application the summer after his graduation from high school and during his attendance at LSU-NO.

After graduation from LSU-NO in May, 1968, PORTEOUS continued to work for BAKER'S SHOE STORES during the summer. During PORTEOUS' attendance at LSU LAW SCHOOL in Baton Rouge, Louisiana, he continued to work part-time for BAKER'S and affiliated shoe stores in Baton Rouge. He believes BAKER'S is owned by EDISON SHOES. After PORTEOUS' first year of law school, from May, 1969, to approximately August, 1969, he resided with his parents on Madrid Street for a few months while he prepared for his wedding. PORTEOUS said that after graduation from law school in May, 1971, he was preparing for the Bar examination which he took in late June or early July, 1971. He believes he began working at the Office of the Attorney General, State of Louisiana, throughout the Summer of 1971, before becoming Special Counsel there in September, 1971.

Investigation on 7/6 & 7/8/94 at Gretna, Louisiana File # 77A-HQ- F

by SA SA S Date dictated 7/8/94

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

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

77A-HQ- F

Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. On 7/6 & 7/8/94 Page 2

PORTEOUS advised that from July, 1982, until August, 1984, he was employed part-time as a city attorney for the City of Harahan, simultaneously working as a Jefferson Parish District Attorney. He advised that the law firm of EDWARDS, PORTEOUS, & AMATO that he had been with beginning January, 1973, is the firm that evolved into PORTEOUS & MUSTAKAS, of which he was a partner until August, 1984. PORTEOUS said that he was employed part-time with B&L ASSOCIATES from August, 1970, to May, 1971, while at the same time working part-time for BAKER'S. He said that he was basically "on call" for B&L ASSOCIATES to conduct interviews and take statements.

PORTEOUS said that he does not really have a supervisor currently but listed HUGH COLLINS on his application as COLLINS is the judicial administrator for the State of Louisiana.

PORTEOUS said that he has no personal or business credit issues, including but not limited to repossessions, delinquent student loans, debts placed for collection, or bankruptcy. He advised that he is current on all Federal, State, and local tax obligations, including but not limited to income taxes, Medicare taxes, Social Security taxes, and unemployment taxes. PORTEOUS said that the only back payment of taxes he has had to make was either in 1974, 1975, or 1976 when he was with the firm EDWARDS, PORTEOUS & LEE. He advised that upon an Internal Revenue Service (IRS) audit, the firm was advised that advances the firm paid for filing fees could not be considered expenses, as the firm had indicated on their tax returns. The firm paid the taxes on the difference of taxable income excluding the filing fees as expenses.

PORTEOUS stated that other than the civil suits listed on the supplement to his SF-86, he has not been involved in any civil suits as a plaintiff or defendant, to include divorces. PORTEOUS said that he has had no involvement in criminal matters as a suspect or subject or any criminal charge, arrest, or conviction.

PORTEOUS said that he had not been denied employment or been dismissed from employment, to include the Federal sector. PORTEOUS advised that he has had no contact with official representatives of foreign countries.

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

77A-HQ- F

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

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

PORTEOUS stated that he has had no professional complaints or any non-judicial disciplinary action against him, to include Bar Association grievances, Better Business Bureau complaints, student or military disciplinary proceedings, Equal Employment Opportunity complaints, and Office of Professional Responsibility inquiries. PORTEOUS said that in his official capacity, he, along with all judges in the 24th Judicial District Court, was sued by SHURMAINE DE GRANGE and IDA WILLIAMS for alleged discrimination. He said that both petitioners were former employees of the late Judge LIONEL COLLINS. The suit is referred to in PORTEOUS' supplemental SF-86.

PORTEOUS advised that he is not involved in any business or investment circumstances that could or have involved conflicts of interest allegations.

PORTEOUS said that he has had no psychological counseling with psychiatrists, psychologists, or other qualified counselors, including marital counselors.

PORTEOUS said that he has not abused alcohol or prescription drugs or used illegal drugs, to include marijuana, during his entire adult life. He has had no participation in drug or alcohol counseling/rehabilitation programs since age 18.

PORTEOUS advised that he has had no involvement in any organization which advocates the use of force to overthrow the U.S. Government or any involvement in the commission of sabotage, espionage, or assistance of others in any of these acts. PORTEOUS knows of no current or past circumstances that could have a bearing on his suitability for Federal employment or access to classified information.

PORTEOUS advised that he has no current membership in any organization or social/private club which restrict membership on the basis of sex, race, color, religion, or national origin. PORTEOUS currently is a member of the following: American Bar Association, Jefferson Bar Association, American Judges

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

77A-HQ- F

Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. On 7/6 & 7/8/94 Page 4

Associations, American Judicature Society, Louisiana District Attorney's Association, 4th and 5th Circuit Judges Association, Chateau Golf and Country Club, and St. Clement of Rome Men's Club. PORTEOUS has held the office of President of the 4th and 5th Circuit Judges Association within the last five years but does not currently hold that position. PORTEOUS advised that St. Clement is the church which he attends. He said that within the church there is a women's and men's club which have different functions in the church.

PORTEOUS advised that sometime between 1979 and 1982, he was a member of the Mardi Gras krewe of CAESAR for two years. The Mardi Gras krewe is an organization which sponsors a parade and other festivities during Mardi Gras. He advised that this was an all-male krewe at the time, but he is not sure what its membership consists of currently. PORTEOUS did not hold an office in this organization.

PORTEOUS advised that he has not written any articles for publication or made any major speeches. He said that he gives a presentation annually to the Jefferson Bar Association on topics such as conflicts of interest and medical malpractice. He has given presentations to the Louisiana Bar Association and the Louisiana Judicial College as well. These presentations consist of an outline, a short synopsis, and case examples for the continuing legal education of these organizations' members.

PORTEOUS said that he has been taking out student loans for his son through a "Parent-Plus" Program at FIRST NATIONAL BANK OF COMMERCE (FNBC), New Orleans, each semester. Repayment of these loans had been deferred until his son's graduation until recently. PORTEOUS advised that on March 7, 1994, he received his first notice that payment on the loan was due. By this time, it was overdue. In April, 1994, he received forms to fill out for deferment of payment until his son's graduation. He filled the forms out, and the school signed them on April 14, 1994. On May 3, 1994, PORTEOUS received a letter of ineligibility for deferment since the parent is paying back the loan. On May 25, 1994, he sent the lending institution a request for forbearance on the debt because of the confusion over eligibility for deferment. PORTEOUS then paid $96.83 to FNBC which covered accrued interest and, on June 28, 1994, commenced making payments as scheduled. PORTEOUS said this loan is now current.

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

77A-HQ- F

Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. On 7/6 & 7/8/94 Page 5

PORTEOUS advised that he has seen a plastic surgeon for surgery on his ear whose name is Dr. GUSTAVE COLON. He said his internist is Dr. ROBERT SONGY.

PORTEOUS provided the supplement to his SF-86 with Attachments 1 & 2 to the interviewing Agents. PORTEOUS signed an FD-465, Medical Release Form, at this time. Also provided to the Agents was a copy of certification from Chief Disciplinary Counsel, Louisiana State Bar Association, stating that there is no pending or past record of any complaint, grievance, disciplinary action, or disciplinary proceeding against PORTEOUS.

Exhibit 5

1 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
2 NEW ORLEANS, LOUISIANA

3

4 LIFEMARK HOSPITALS, INC. Docket No. 93-179-4-"T"

5 Plaintiff,

6 v. New Orleans, Louisiana
Wednesday, October 16, 1996
7 LILJEBERG ENTERPRISES, INC. 10:17 a.m.

8 Defendant.

9

10 PLAINTIFF'S MOTION TO RECUSE
BEFORE THE HONORABLE G. THOMAS PORTEOUS, JR.
11 UNITED STATES DISTRICT JUDGE

12

APPEARANCES:
13

For the Plaintiff: Frilot, Partridge, Kohnke &
14 Clements
BY: JOSEPH MOLE, ESQ.
15 STEPHANIE MAY
GARY RUFF, ESQ.
16 1100 Poydras Street
Suite 3600
17 New Orleans, Louisiana 70163

18

For the Defendant: Weigand, Levenson & Costa
19 BY: LEONARD LEVENSON, ESQ.
427 Gravier Street
20 First Floor
New Orleans, Louisiana 70130
21

Amato & Creely
22 BY: JAKE AMATO, ESQ.
901 Derbigny Street
23 Gretna, Louisiana 70054

24 BY: HANS LILJEBERG, ESQ.
1221 Elmwood Park Boulevard
25 Suite 701
Harahan, Louisiana 70123

1 APPEARANCES (CON'T):

2 Court Reporter: DAVID A. ZAREK, CCR, RPR, CP
501 Magazine Street, Room 406
3 New Orleans, LA 70130
(504) 523-6062
4

5 Proceedings recorded by mechanical stenography;
transcript produced by dictation.
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1 P R O C E E D I N G S
2 MORNING SESSION
3 (Wednesday, October 16, 1996)
4 THE COURT: Let's take up this next matter, which is
5 93-1794 and all consolidated cases also. This is the motion
6 filed with respect to all of the particular cases to recuse.
7 Let me dictate one thing into the record before everybody
8 commences so that everybody is not necessarily on edge as
9 they might think. Bernard v. Coyne, which is 31 F.3d 842
10 involved the request to disqualify a circuit court judge of
11 the 9th circuit. In that decision that Judge wrote, and I
12 cite and "this" (reading) with full acquiescence counsel for
13 a party who believes Judge's impartiality is reasonably
14 subject to question has not only a professional duty to his
15 client to raise the matter but an independent responsibility
16 as an officer of the court. Judges are not omniscient, and
17 despite safeguards overlook a conflict of interest. A
18 lawyer who reasonably believes that the Judge before whom he
19 is appearing should not sit must raise the issue so that it
20 may be confronted and put to rest. Any other course would
21 risk undermining public confidence in our judicial system."
22 I cite that so that everyone understands that I recognize my
23 duty and obligations, and I am fully prepared to listen.
24 All right, go ahead.
25 MR. MOLE: I appreciate your remarks. It is not a very

1 easy thing to confront the federal judge with the suspicion
2 that he probably doesn't want to hear. I am sure that in
3 the course of trying -- I don't know you very well, Judge,
4 and I have gotten to learn about you only through this
5 case --
6 THE COURT: You told me the last time we graduated from
7 Cor Jesu.
8 MR. MOLE: That's about all we have in common. What I
9 learned about you from trying to investigate what I should
10 do about what I have raised that you probably did read
11 briefs and gave it some intelligent thought. So I don't
12 want to go back through everything I have said.
13 What I would like to emphasize is mainly by what has
14 been established in response to my motion to recuse. I have
15 gotten to know Mr. Levenson and Mr. Amato.
16 THE COURT: Let me make also one other statement for
17 the record if anyone wants to decide whether I am a friend
18 with Mr. Amato and Mr. Levenson, I will put that to rest for
19 the answer is affirmative, yes. Mr. Amato and I practiced
20 the law together probably 20-plus years ago. Is that
21 sufficient?
22 MR. MOLE: Yes.
23 THE COURT: 20-plus is sufficient. So if that is an
24 issue at all, it is a non-issue.
25 MR. MOLE: What prompted us to file the motion is the

1 timing of what happened. This case is 10 years old, the
2 oldest part is 10 years old. The lawyers who are in the
3 case now are these previous to September 12th when you
4 granted leave to add Mr. Amato and Mr. Levenson, who has
5 been in for years. The case was set for trial, and you had
6 an emphasis about keeping the trial date. They were added
7 within two months of the trial date. And the case with that
8 length I don't know Mr. Levenson or Mr. Amato very well. I
9 know they are fun to practice against; they have a sense of
10 humor, and they have given me by doing this quite literally
11 none to my knowledge other than they are your friends. They
12 have been given 11 percent contingency fee in a case that
13 the Liljebergs, everybody -- I disagreed -- value at $140
14 million, at least part of this we have a percentage of. And
15 I think that bears even more weight when you consider Mr.
16 Liljeberg has taken the position that he doesn't give
17 contingency fees. Jim Cobb has sued him in Bankruptcy Court
18 for a fee claiming he had continued standing of plaintiff
19 Liljeberg as a matter of the plaintiff doesn't give those
20 away. This is like how we do it at the last minute. Mr.
21 Levenson in his response to my reply brief says he has been
22 in the case for a lot longer than the time when he showed
23 up. It raises additional questions. Mr. Levenson is also,
24 indeed, your friend: Has he discussed the case with us
25 before at that time he appeared when he was investigating

1 it? Did he wait to see when you would hold on to the case
2 rather than pass it on to Judge Lemmon? Those are the sort
3 of questions that are going to be in the case no matter what
4 happens forever if you be the Judge.
5 Mr. Levenson has accused me and my client of engaging
6 innuendo. I looked up the word. Innuendo is a generally
7 derogatory and witty way of making accusations indirectly.
8 I don't think I have done that. I have been very direct.
9 Mr. Levenson, and I think it is a good tactic, has tried to
10 dare me to say what I think is the nature of the
11 relationship between you and him and you and Mr. Amato, that
12 are the two gentlemen behind me. And if they have something
13 to contradict the statement that I made, which is that you
14 all are indeed very, very close friends, I would have
15 assumed that he would have made it. I am happy to tell the
16 Judge what the public perception is of the relationship.
17 THE COURT: Well, the case you cite by the way involved
18 the judge's wife. So I assume they were fairly close
19 friends, too.
20 MR. MOLE: Probably. You don't have to stipulate.
21 THE COURT: Well, it could be a question sometimes.
22 MR. MOLE: I understand, Your Honor. I don't know what
23 the Court wants to do with that issue, whether or not the
24 Court wants to make a statement or accept the statement.
25 THE COURT: No, I have made the statement. Yes, Mr.

1 Amato and Mr. Levenson are friends of mine. Have I ever
2 been to either one of them's house? The answer is a
3 definitive no. Have I gone along to lunch with them? The
4 answer is a definitive answer yes. Have I been going to
5 lunch with all of the members of the bar? The answer is
6 yes.
7 MR. MOLE: I understand.
8 THE COURT: Has, in fact, at the last status conference
9 I had I saw Mr. Lane here I think in reality aligned with
10 your side who spoke with me, and Mr. Lane and I have been to
11 lunch together. I mean there is not a hell of a lot of
12 lawyers in this city I haven't maintained a very open,
13 friendly relationship with. So if you want to explore in
14 detail, feel free to explore it. I don't have a problem
15 with exploring it. But I don't know what you want to make
16 with it.
17 MR. MOLE: Well, Your Honor --
18 THE COURT: And I also must say something for the
19 record I think other than connecting the dots that the last
20 status conference I had I virtually told everyone I was
21 continuing this case. So this rush to trial that you
22 suggest I am maintaining, I did all but connect the dots the
23 last time.
24 MR. MOLE: Well, I understand.
25 THE COURT: The lawyers have come to this case like a

1 storm cloud through Louisiana. Look at the list. I ran a
2 chaser sheet. Up until I think maybe Mr. Steeg and Mr.
3 O'Connor. Mr. O'Connor were attorneys and they are out for
4 whatever reason. They had a conflict situation. I have no
5 idea what it was. Then you all got in it. Welcome, jump
6 in. I mean I tried to make it clear at the last conference
7 I don't care how many people are on the side or "X" amount
8 of people are talking. Did I not say that?
9 MR. MOLE: It was pretty clear, Your Honor. Well, I
10 would emphasize, Your Honor, that the standard is what a
11 reasonable person would perceive if they knew all the facts.
12 I think the timing of the appearance of Mr. Amato and Mr.
13 Levenson creates the biggest concern along with the fact
14 that they did not practice law together. All they have in
15 common is that they are your close friends. The public
16 perception is that they do dine with you, travel with you,
17 that they have contributed to your campaigns.
18 THE COURT: Well, luckily I didn't have any campaigns.
19 So I'm interested to find out how you know that. I never
20 had any campaigns, counsel. I have never had an opponent.
21 One time I had an opponent --
22 MR. MOLE: I had a campaign return from the --
23 THE COURT: The first time I ran, 1984, I think is the
24 only time when they gave me money.
25 MR. MOLE: 1990 is what I have.

1 THE COURT: 1990 that was the Justice for All Program
2 where they gave to every judge probably, but I could be
3 wrong there.
4 MR. MOLE: I'm sorry if I'm wrong.
5 THE COURT: I don't know. You got the record. What
6 did it say? Let me see them. Don't hide them if there is
7 something in there that's deeply devious, tell me about it.
8 MR. MOLE: May I approach the bench?
9 THE COURT: Sure.
10 (Counsel Mole hands document to the Court.)
11 THE COURT: Yeah, I think if you look at this, you will
12 find that whatever those numbers total, and I'm not a
13 mathematician, but I think those numbers on these pages
14 total more than $6,794. I am fairly certain adding that up.
15 Did you?
16 MR. MOLE: I did not, Your Honor.
17 THE COURT: Well, let's go to the, pick a page at
18 random starting with the firm of Anderson Tranthene and
19 Mateern. There is over $200 on that page, one page out of I
20 don't know how many it is. I think you will find that that
21 was a function that was thrown by the entire judiciary of
22 Jefferson Parish for which I received I forget whatever my
23 portion was, but I reported it, which was $6,794 is what it
24 looks like what it says here. And that's what it was. So,
25 yes, I don't doubt that they contributed. I mean I don't

1 know. Maybe it is pertinent. Maybe microscopes and maybe
2 that's why we shouldn't have it. But, yeah, okay, it's
3 there.
4 MR. MOLE: Your Honor, I appreciate the Court's remarks
5 at the beginning. What I have done again is in an effort to
6 represent my client at the risk of offending the Court --
7 THE COURT: You haven't offended me. But don't
8 misstate, don't come up with a document that clearly shows
9 well in excess of $6700 with some innuendo that that means
10 that they gave that money to me. If you would have checked
11 your homework, you would have found that that was a Justice
12 for all Program for all judges in Jefferson Parish. But go
13 ahead. I don't dispute that I received funding from
14 lawyers.
15 MR. MOLE: Right, Your Honor.
16 THE COURT: No question.
17 MR. MOLE: If the perception is that my client, and I
18 have it that Mr. Levenson and Mr. Amato are not any more
19 sinister than any other member of the bar, then we would be
20 happy to have them or you dispel that. I think you have
21 been honest with us. There is not much more I can say.
22 THE COURT: I understand. Let me tell you, no, it is a
23 uncomfortable position you find yourself in, counselor. You
24 know, I have been doing this for awhile. With all candor I
25 must admit this is the first time a motion for my recusal

1 has ever been filed. Did it get my attention? Yeah, I
2 guess it got my attention. But does that mean that any time
3 a person I perceive to be friends who I have dinner with or
4 whatever that I must disqualify myself? I don't think
5 that's what the rule suggests. I, likewise, don't think
6 that's what the Court had in mind. And even in your own
7 pleadings and even in the case, it is the Travelers case
8 from the Fifth Circuit published opinion which you gave, me
9 that courts even recognized in citing from Murphy in its
10 cite, and I think it is important to state (reading) "In
11 today's legal culture friendship among judges and lawyers
12 are common. They are more than common, they are desirable.
13 A judge need not cut himself off from the rest of the legal
14 community. Social as well as official communications among
15 judges and lawyers may improve the quality of the legal
16 decisions. Social interaction also makes some on the bench
17 quite isolated and as a rule more tolerable to judges. Well
18 qualified people would hesitate to become judges if they
19 knew that wearing the robe meant either discharging one's
20 friends or risking disqualification in a substantial number
21 of cases. Courts have held that a judge need not disqualify
22 himself just because a friend, even a close friend, appears
23 as a lawyer." And that is a Seventh Circuit case but was
24 cited in the Fifth Circuit decision.
25 Now that's a predicament all of us find ourselves in.

1 Mr. Amato and Mr. Levenson have both appeared before me and
2 they have both won and both lost.
3 MR. MOLE: Your Honor, it is again it is not the fact
4 of the friendship, it is the timing. Anyone who you would
5 describe the situation to I think would generally be
6 concerned that the timing is odd that a case of this length
7 amply lawyered when other lawyers appear within the
8 contingency fee in the way they have and that's why we made
9 the motion.
10 THE COURT: I understand it, and it is a perception,
11 clearly it is perception. I agree with you, but again even
12 before this motion was even urged because I believe the
13 status I had before you filed the motion, in fact, I know it
14 was I made it plain that this November 4th date was probably
15 fixed in everybody's mind. I mean I don't know what else to
16 tell you. That was a near fix. We will see what we have
17 got, but I understand, counselor and appreciate your
18 position. And you have to urge these things, and I
19 understand that. I take no animus toward you on that. If
20 you did that, I don't need to repeat that.
21 MR. MOLE: Judge, what you said -- it is the first time
22 I have had to do this myself. I would think one of the
23 lawyers opposing me asked me how many times did you sit
24 around discussing this with your client or your partners,
25 and his answer was to a political extent easy to do. But we

1 convinced ourselves we had to do it.
2 THE COURT: All right.
3 MR. MOLE: Only after great deliberation.
4 THE COURT: All right.
5 MR. LEVENSON: Judge, I feel a little peculiar in this
6 situation as well. I don't recall in the twenty years I
7 have practiced law being in this situation. I think that
8 you must take into consideration the admission by Lifemark
9 in their pleading that they do not question your
10 impartiality. And if they had done any investigation in
11 connection with this matter, they could come up with no
12 other result but that. And that is the test in this type
13 of situation. It is the appearance to a well-informed,
14 thoughtful, objective observer as stated in Jordan. And
15 I think the key point there is well informed. Both well
16 informed about our friendship, well informed about our
17 reputation, well informed about the reputation and
18 experience of Mr. Amato as well as that of myself.
19 Mr. Mole stated that the timing is odd. Well, I
20 think it is correct that from the time that I was
21 originally contacted by the Liljeberg attorneys in
22 connection with this matter the Frilot firm has been
23 involved in this case a very short period of time longer
24 than I.
25 Mr. Mole brought up that when he first learned of that

1 yesterday he questioned why I waited so long to get into the
2 case. Well, when I saw file cabinet upon file cabinet upon
3 file cabinet of the paper, it wasn't candidly a very easy
4 thing to assess for myself nor for Mr. Amato to take and
5 became quite a bit of work to determine whether or not I
6 wanted to dedicate a substantial portion of my future effort
7 to this case which would deprive me of other income and
8 other work as well. Mr. Mole didn't know that because he
9 didn't ask me.
10 The next point Mr. Mole made was that there is nothing
11 in common between Mr. Amato and myself except your
12 friendship. That is incorrect. Another question Mr. Mole
13 should have perhaps inquired into.
14 In Mr. Mole's brief he somewhat criticized my
15 experience or perhaps the lack thereof in his mind in
16 matters of this sort. Mr. Amato and myself have acted as
17 primarily personal injury lawyers. That, of course, is not
18 true. Mr. Amato and myself have tried hundreds if not
19 thousands of cases and rules before juries, judges, state
20 and federal, bankruptcy and federal court and just about
21 every other court I can think of. In fact, at the risk of
22 blowing my own horn, I think that I am probably the only
23 lawyer in this room and maybe the only lawyer with all of
24 the firms combined who has been written up in the WALL
25 STREET JOURNAL in connection with litigation I had handled,

1 and it was not personal injury cases. My experience
2 involves personal injury admittedly in recent years due to
3 the change in the economy this year but also involved
4 commercial litigation, bankruptcy, real estate and title law
5 expertise which I think will become very important in this
6 litigation.
7 Mr. Mole has alluded that in his pleadings that Mr.
8 Amato and myself are your two closest friends. I find it
9 interesting that Mr. Amato and myself are your closest
10 friends that we were not contacted in connection with the
11 background check which must be performed in connection with
12 your appointment. Maybe other people don't think our
13 friendship is viewed the same as Mr. Mole.
14 Finally, Mr. Mole says that we have contributed money
15 to your campaign. Your Honor, as you know I didn't even
16 know you when you ran for office. I only met you in the
17 course of litigating cases in your court. To the best of my
18 knowledge I have never given a campaign contribution to you.
19 To the best of my knowledge you have never had a campaign to
20 which to contribute to. The Justice for All Ball was
21 something that was put together so that all of the judges of
22 the 24th Judicial District Court could have a single fund-
23 raiser, and I think the intent of that was to make it easier
24 on lawyers who contributed to judge's campaigns, and there
25 was some particular form as to how those proceeds were

1 divided up. I don't think they were divided up equally,
2 although how they were distributed I wasn't part of.
3 THE COURT: I don't remember the breakdown, but I do
4 know I was the smallest for what that's worth.
5 MR. LEVENSON: Judge, I think that the rule under
6 Section 455 in the cases make it clear that whether or not
7 we are your friend or even your close friend that is not
8 ground for recusation, and I think that the motion should
9 properly be denied.
10 THE COURT: Mr. Mole anything else you would like to
11 add again?
12 MR. MOLE: Yes, Your Honor. One of the difficult
13 decisions to make is how much of a record should I try to
14 make on this without a balance of the fact that I have to
15 practice law with these gentlemen and before you the rest of
16 my life but that I have a duty to my client. But I think
17 that the record that is made here today is enough, because I
18 don't think Mr. Levenson and Mr. Amato, they have said that
19 they dared me to say what I think are rumors. I don't want
20 to do that. They have not denied what I have said about the
21 relationship between you and them.
22 THE COURT: I have not denied it, and I don't think
23 they deny it.
24 MR. MOLE: Then the fact of the matter is Mr. Levenson
25 could very well deny it if he wanted to, and he has chosen

1 not to do that. That speaks more loudly than anything I
2 could say.
3 THE COURT: Well, you know the issue becomes one of, I
4 guess the confidence of the parties, not the attorneys.
5 Because when it is all said and done you all have been but
6 the spokesperson for the true people in interest and that's
7 the litigants. My concern is not with whether or not
8 lawyers are friends and for whatever value that contribution
9 is to a group as a whole. My concern is that the parties
10 are given a day in court which they can through you present
11 their case, and they can be adjudicated thoroughly without
12 bias, favor, prejudice, public opinion, sympathy, anything
13 else, just on law and facts. That's basically the charge we
14 give juries. We are no longer the juries, but if it was a
15 non-jury trial, we are the trier of fact. And there is a
16 ton of case law that says that I should charge myself
17 according to the same way I would charge a jury.
18 I have always taken the position that if there was ever
19 any question in my mind that this Court should recuse itself
20 that I would notify counsel and give them the opportunity if
21 they wanted to ask me to get off. That includes a case
22 wherein my cousin, Billy, Billy Porteous tries a case in
23 front of me in Gretna, and the plaintiff's lawyer is
24 absolutely delited. And I have got to go fully explain to
25 the jury that I never practiced with him and that they are

1 not to read anything into it. I don't fault you for your
2 filing. I think it is a situation where because of this
3 upward ongoing quick activity of this case because of dates
4 approaching that on its face it appears to be evil or bad or
5 improper. The reality is that none of the above are true.
6 The reality is that if anyone thinks they gain favor from me
7 because someone is in a case need only basically look at
8 what I have done in the past to know that that is a fiction.
9 The question is again in that Bernard case the court
10 said Section 450 requires not only that a Judge be
11 subjectively confident of his ability to be even handed but
12 there is a informed, rational objective observer would not
13 doubt his impartiality. Well, everything we do in the
14 judiciary is under a microscope anyhow. But if the rules
15 were such that every time a contributor and you take a case
16 with current contributions have been made, not 1990
17 contributions, have allowed the Judge to sit where
18 friendship, even "Close friendships are not to be
19 considered," I don't have any difficulty trying this case.
20 Now, after I rule can a party feel that they were
21 wronged? I can't stop that feeling. There is no tie:
22 somebody wins, somebody loses. Are they then upset?
23 Possibly. But that's not for me to concern myself with
24 because again whichever side wins by the evidence and the
25 law will win by the evidence and the law. And as I have

1 told plaintiff lawyers in the past, if 40 percent of zero is
2 zero, I assure you eleven percent of zero is still zero.
3 Now, does that ease your client's mind? I don't know. I
4 can't help you there. Does that make the informed observer
5 satisfied? I don't know. But in my mind I am satisfied
6 because if I had any question as to my ability, I would have
7 called and said, "Look, you're right." Do not think for one
8 moment that this Court went out and solicited this case.
9 This case this Court drew because some other members of the
10 bench couldn't hear it. The pool of judges was very small,
11 and I drew it.
12 Now, I ran the chaser sheet on this, and the reason I
13 talk about a flurry of activity up until the time I drew
14 this case, which was on January 16, 1996, document No. 190
15 or entry 190 in the case re-alloted Judge G.T. Porteous,
16 Jr., since that day when only 190 over a 3-year period
17 entries had been made we have to date, now we have had 102
18 entries made. It always happens that when we get close to
19 trial people get real, real interested. I can't explain it.
20 It just happens. I don't read anything devious or bad about
21 it. In fact, since the time you have come into the case or
22 your firm which was entry No. 210, we have had 82 of them.
23 So there has been a lot of activity, and I will attend to
24 it.
25 I received a multitude of pleadings to find out in

1 taking up other issues today, and I had issued an order and
2 I am hoping everyone got a copy of it. And if they didn't,
3 I don't know what happened. But entry no. 278 says, "Having
4 received the plaintiff's Motion to Recuse, the Court finds
5 it is in the best interest of justice that all motions are
6 deferred pending resolution of the motion to recuse.
7 MR. MOLE: I got that.
8 THE COURT: So I don't know what to tell you all other
9 than I do not believe this is a case where 28 USC 455 is
10 applicable. I don't think a well-informed individual can
11 question my impartiality in this case. Part of me has to
12 sit here and make sure that I don't over help or hurt either
13 one of you. That's always going to be a problem if you know
14 somebody on one side. I'm human, but I assure you I have
15 done this long enough that it won't bother me at all.
16 Saying no is the easiest thing. Saying zero is just a
17 number. Whether it is worth $140 million as you suggest, I
18 don't know. I don't know enough about this case. I don't
19 even know if you all know enough about this case given the
20 rash of pleadings that go back and forth. I'm not even sure
21 it is that complex, but it is sure being made fairly
22 complex.
23 Now, having said all of the above, I tell you now that
24 there is no way on this earth that I can get through any of
25 the motions pending and have a trial date by November 4th.

1 You all can forget it. It is actually impossible, which is
2 exactly what I virtually said when we had the status. I
3 won't be pushing anybody to trial on November 4th. I do
4 want, however, that these things remain in effect. The
5 requirements, those witness lists are cast in stone. I
6 think you all both submitted them. That much is a finished
7 deal. We are not going to be adding witnesses absent a
8 hearing for good cause shown why they should be added. Now,
9 I am not going to say that, I guess something could come up.
10 But that's cast in stone. Both Magistrate Wilkinson and I
11 have told you all that we are available for whatever
12 assistance you need because this is a non-jury trial. I
13 don't intend to enter into any discussions with you all on
14 that. I told you that I believe that Magistrate Wilkinson
15 did. My input is over at that point then. He acts as an
16 arbitrator or mediator if that ever gets to that. If it
17 doesn't, we try your case.
18 Because I know this is an important issue for you and
19 an important issue for your client, I am, in fact, going to
20 issue a judgment denying your motion to recuse myself. It
21 is significant, it is important. If you think it deserves
22 attention by the Fifth Circuit, that's why I am giving you
23 the judgment. If you go there, you do it with no offense to
24 me. And if they disagree with me, then they disagree with
25 me. I don't have a problem with that, counselor. I don't

1 want the issue to be left that you didn't have a mechanism,
2 and I don't think any of you want to do this thing twice.
3 So if you choose to go there, go there. Would I
4 conceive of any grant of a stay? Yes. Would I ask that
5 they expedite it? Probably, yes. And I would hope that you
6 would ask that they expedite it because that does not innure
7 to either side's benefit in this case.
8 MR. MOLE: One of the things that occurred to us and
9 that is that we have a remedy for a writ of mandamus, and we
10 haven't decided to do that.
11 THE COURT: That's why I thought a judgment was
12 necessary, and I don't know if an order would have given you
13 that ability. I am issuing it as a judgment denying your
14 motion to recuse for the reasons I stated on the record,
15 which you can get a transcript of it, of course. But, yes,
16 I told you now that's what I am going to do is give you the
17 guidance to do that.
18 MR. MOLE: One of my concerns is that we have a
19 November 4th trial date. I would have to try to get
20 discovery before then.
21 THE COURT: Does anyone here really believe I can
22 dispose of all of your motions before November 4th? I'm not
23 super human. I have continued all your motions because of
24 this motion to recuse myself.
25 MR. MOLE: We didn't file them to delay things. But I

1 understand Your Honor.
2 THE COURT: I didn't take it for that, but I'm saying I
3 did that on my own motion. Nobody asked me to stay it. I
4 could have done it, but I think whenever somebody asks for a
5 judge to recuse themselves, although technically I can
6 continue a proceeding and particularly in the ruling I had
7 made I think they are entitled for me not to do anything
8 more until we take up the issue. We took the issue up. If
9 you want to go across and do that, I am giving you the
10 procedural tool to do it.
11 MR. MOLE: I appreciate that.
12 THE COURT: Okay, anything else I can dispose of?
13 MR. LEVINSON: On October the 23rd it is scheduled to
14 appear for a pretrial conference.
15 THE COURT: Ignore it. Ignore it. There is no way on
16 earth I am going to do your pretrial. You have got too many
17 motions especially that you would have in the pretrial that
18 the motions are open.
19 MR. LEVENSON: I understand that, Judge. But would you
20 consider making it as a status conference so we can proceed?
21 THE COURT: I will do that as a status conference with
22 you all.
23 MR. MOLE: And no pretrial order?
24 THE COURT: No, obviously not. They will issue an
25 order that the pretrial order is hereby converted to a

1 status conference for whatever time I had it set. Just
2 whatever if that time is blocked out, we keep it at that
3 time.
4 MR. LEVENSON: That's fine, Judge.
5 THE COURT: Discovery I suggest that I believe should
6 be closed at this point in time.
7 MR. MOLE: I think we have everything scheduled that
8 needs to be scheduled, but we still have depositions going
9 on through the last one is October 28th.
10 THE COURT: That's fine. But that's by agreement?
11 MR. MOLE: That's by agreement.
12 THE COURT: That's by agreement. And then as I
13 understand it discovery will be closed?
14 MR. MOLE: Yes, Your Honor. We are cooperating pretty
15 much.
16 THE COURT: Depending on what you do, whether you will
17 be going to go forward and whether there is a stay over
18 there or request for expedited hearing, will depend on when
19 I give you a trial date. Maybe by the 23rd I would ask you
20 and if you are not in position to do it, counselor, I
21 understand. But on the 23rd it is a status conference. If
22 it is your client's desire to proceed with a mandamus or
23 appeal or whatever procedural remedy that is at his disposal
24 with the Fifth Circuit, if you will simply notify me to that
25 effect whether I would or would not set a date. I'm going

1 to set a date with that pending, I am not going to pass on
2 this case while the ruling of mine which may have some
3 impact on whether to recuse myself on this case. So if you
4 could let me know by that date.
5 MR. MOLE: We will do that, Judge.
6 THE COURT: Okay, all right. Thank you all.
7 MR. MOLE: Thank you, Judge.
8 (Hearing concludes.)
9 REPORTER'S CERTIFICATE
10
11 The undersigned certifies, in his capacity of Official
12 Court Reporter, United States District Court, Eastern
13 District of Louisiana, the foregoing to be a true and
14 accurate transcription of his Stenograph notes taken
15 Wednesday, October 16, 1996.
16 New Orleans, Louisiana, this 21st day of October, 1996.
17
18
19 David A. Zarek
20 David A. Zarek
Official Reporter, Section "A"
21
22
23
24
25

Exhibit 6

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

77A-HQ- F

Continuation of FD-302 of NO T-6, On 8/8/94, Page 3

E

NO T-6 further advised that he/she had heard that DIANE BOURG, in the Clerk's office, had told people that PORTEOUS was signing the bonds in blank. (NO T-6 advised that he/she believed this practice was illegal). NO T-6 also heard that BOURG was reprimanded for signing the bonds with just a judge's signature without verifying the property.

NO T-6 also advised that he/she had heard of another case where PORTEOUS was paid to reduce a bond. NO T-6 advised that he/she heard that PORTEOUS had been given $1,500 to reduce a bond in a matter which he/she believed involved a TRACY IRELAND who had been arrested for theft. According to the person with whom NO T-6 spoke, PORTEOUS reduced the bond from $500,000 cash to $50,000 property in return for the payment of $1,500. NO T-6 further commented that he/she has heard that Judge PORTEOUS works with certain individuals in writing bonds, specifically Bondsman ADAM BARNETT, Attorney RALPH BARNETT (Adam's father), PAUL BOUDOUSQUE, and other bonding people such as LOUIS and LORI MARCOTTE. Apparently LOUIS MARCOTTE has told people that they "kick back" money to Judge PORTEOUS for reducing the bonds. They also frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks. NO T-6 has also heard from various court personnel that DIANE BOURG is still signing the bonds that the judges give to her, even though they are not properly filled out.

NO T-6 advised that he/she had also heard that PORTEOUS had transferred a case from another division to his (PORTEOUS') to help

E

When the case was reassigned to PORTEOUS, he (PORTEOUS) gave the individual probation. NO T-6 advised that he/she had not heard whether PORTEOUS had ever taken any money for cases and he/she advised that he/she did not think he had but that he did frequently sign bonds ahead of time for bondsmen.

Exhibit 7

AUG-05-1994 11:29 FROM FBI NEW ORLEANS TO 8-202324 F P.005/01

77A-HQ-
CDT:cdt

New Orleans Division
at Gretna, Louisiana

REFERENCE

The following investigation was conducted by Special Agent on 8/1/94.

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

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

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

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

Exhibit 8

\ (Rev. 01/25/91)

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
COMMUNICATION MESSAGE FORM

^PAGE 2 UNCLAS

CANDIDATE INDIRECTLY RECEIVED $10,000 FROM KLINE FOR REDUCING HIS BOND, BUT THAT KLINE HAD TO GET HIS LAWYER TO GET THE MONEY BACK

E

E SHOULD BE ASKED: A) WHAT IS THE SIGNIFICANCE OF E

E AND WAS IT A RESULT OF ANYTHING THE CANDIDATE DID OR AS A RESULT OF THE ALLEGED $10,000 PAYMENT TO THE CANDIDATE?; B) HOW DID E HEAR ABOUT THE $10,000 PAYMENT TO THE CANDIDATE? DID E TELL E ?; AND C) WHY DID E

E

NEW ORLEANS IS REQUESTED TO CONDUCT THE INTERVIEW OF E AND SUREP RESULTS TO FBIHQ, ROOM 4383, ATTN: PSS S

BT

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Exhibit 9

FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/10/94

NO T-6, who requested that his/her identity be protected from anyone outside the FBI, was contacted regarding his/her knowledge of the candidate.

NO T-6 advised that he/she had heard from an individual whom he/she declined to identify but described as reliable that THOMAS PORTEOUS was paid $10,000 to reduce a bond. NO T-6 advised that this unnamed individual told him that when KEITH KLINE was arrested by the Jefferson Parish Sheriff's office (JPSO) for a cocaine-related charge, KLINE's girlfriend, whose name NO T-6 could not remember, had approached LOUIS MARCOTTE at MARCOTTE's bail bond office on Derbigny Street in Gretna to arrange bail for KLINE.

NO T-6 heard that this unknown female wanted MARCOTTE to get KLINE out of jail immediately. MARCOTTE telephoned a lawyer named PHILLIP J. BOUDOUSQUE, Gretna, Louisiana. BOUDOUSQUE came over to the office and talked to MARCOTTE with the unknown female. NO T-6 advised that during part of the conversation, BOUDOUSQUE told KLINE's girlfriend and MARCOTTE that he would approach Judge THOMAS PORTEOUS and attempt to get a bond reduction for KLINE.

The female left and came back later that evening with a large amount of cash in a shoe box. NO T-6 heard that MARCOTTE told KLINE's girlfriend that it would take $12,500.00 to get KLINE out of jail. He (MARCOTTE) advised that $10,000.00 of this would go to Judge PORTEOUS for the bond reduction and the other $2,500.00 would go directly for the bond. He (MARCOTTE) stated that BOUDOUSQUE would write up the $10,000.00 as attorney's fees in order to protect the judge.

NO T-6 advised that he/she had heard from E

E

ACY has repeated to an individual who advised NO T-6

Investigation on 8/8/94 at E Louisiana File # 77A-HQ- F

by SA S :rsq Date dictated 8/10/94

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

Exhibit 10

8/19/94

NOTE TO DOJ:

RE: GABRIEL THOMAS PORTEOUS, JR.
BACKGROUND INVESTIGATION
PRESIDENTIAL APPOINTMENT WITH SENATE CONFIRMATION

The background investigation on Mr. Gabriel Thomas Porteous was opened on June 24, 1994. Mr. Porteous is currently a judge in Gretna, Louisiana. Mr. Porteous is being considered for a Presidential appointment as a United States District Court Judge for the Eastern District of Louisiana, a position which requires Senate confirmation. Partial investigations were furnished to your office on July 29, 1994, and August 8, 1994.

An individual who requested total confidentiality, characterized as NO T-6, advised that he/she has heard that the candidate was once paid $10,000 to reduce a bond for an individual named Keith Kline. T-6 advised that an unknown female approached a bail bondsman named Lewis Marcotte to arrange for Kline's immediate release. Marcotte allegedly contacted a lawyer named Phillip Boudousque, who subsequently approached the candidate to get a bond reduction for Kline. T-6 advised that Boudousque delivered $10,000 to the candidate from the unknown female to secure the bond reduction. T-6 further advised that he/she heard that the candidate was paid $1500 to reduce the bond of an individual named Tracy Ireland. T-6 also stated that Lewis Marcotte has told people that the candidate receives "kick backs" for reducing bonds.

T-6 also advised that he/she heard that an individual named Jolene Acy had smoked marijuana with the candidate and had also been at a party on a yacht allegedly owned by the candidate where cocaine and marijuana was used.

Several individuals were interviewed to include Boudousque, Marcotte, and Acy. All denied the allegations put forth by T-6 and favorably recommended him.

T-2 was recontacted and could provide no examples of how the candidate lives beyond his means.

The candidate was reinterviewed and denied all the allegations put forth by T-6.

The background investigation is complete.

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 DISMISS THE ARTICLES OF IMPEACHMENT AS UNCONSTITUTIONALLY AGGREGATED; OR, IN THE ALTERNATIVE, TO REQUIRE VOTING ON SPECIFIC ALLEGATIONS OF IMPEACHABLE CONDUCT

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Counsel for G. Thomas Porteous, Jr.
United States District Court Judge
for the Eastern District of Louisiana

Dated: July 21, 2010

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, and respectfully requests that the Senate dismiss the Articles of Impeachment (I, II, III, and IV) lodged against him by the House of Representatives on the ground that each Article contains multiple and disparate allegations and charges, rendering each individual Article constitutionally deficient. The manner in which these Articles of Impeachment were drafted permits two-thirds of the Senate to convict on an Article of Impeachment even if two-thirds of the voting Senators do not agree on any one allegation contained therein.[1] Alternatively, Judge Porteous requests that the Senate, prior to its final vote on each Article, separately vote on the constituent allegations made within each Article for a determination of whether the alleged acts have been proven and whether each allegation alone amounts to an impeachable offense. Members would then vote on the final Article as a whole. In support of his motion, Judge Porteous states as follows:

INTRODUCTION AND SUMMARY

The Articles of Impeachment are constitutionally invalid because they impermissibly aggregate multiple claims in single Articles. This aggregation violates two separate constitutional provisions. First, it effectively overrides the requirement that "no Person shall be convicted without the Concurrence of two-thirds of the members present." U.S. CONST. art. I, §

[1] As a an example of the practical effect of aggregate claims, consider an Article that alleges four different acts (such as Article I). Even if all one hundred Senators vote on this Article – and assuming for a moment that any of the allegations are impeachable offenses – a conviction would be sustained if sixty-seven Senators voted to convict. But with four separate allegations, it is entirely possible that Judge Porteous could be convicted with as few as seventeen Senators agreeing that he committed any particular impeachable act. It is difficult to imagine a plainer violation of the super-majority requirement than a conviction resting on seventeen votes out of one hundred Senators.

3. Second, it creates a circumstance in which Judge Porteous could be convicted for misconduct that does not rise to the level of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. Moreover, if the Senate convicts on these Articles, the aggregation deprives Judge Porteous, the public, and the historical record of a clear finding as to the specific basis for the removal from federal office.

In prior impeachments, the House of Representatives has drafted and submitted to the Senate several Articles that were based on individualized, specific allegations of misconduct or criminal activity, with each individual allegation serving as the basis for just one Article of Impeachment. Together with these individualized Articles, the House frequently submitted one "omnibus" Article summarizing the other specific, individualized Articles. Votes on the individualized Articles thus provide a clear record of both whether the Senators found that the act occurred and whether those acts constitute impeachable offenses. Votes on the "omnibus" Articles, however, fail to provide such a clear record. Moreover, these "omnibus" Articles also work as a clever mechanism for the House to aggregate a small number of votes on the individualized Articles and achieve a super-majority on the one "omnibus" motion. Indeed, these Articles often group specific acts contained in individual Articles to guarantee conviction when there is insufficient support for any individual Article. This practice has received much criticism, most notably in the controversial Ritter impeachment trial where Judge Ritter was acquitted on each individualized Article and convicted (by a one-vote margin) on the "omnibus" Article. *See* Jonathan Turley, *The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1834 (1999). In that case, both defense counsel and individual Senators objected to such tactics. *See, e.g.,* Proceedings in the Trial of Impeachment of Robert W. Archbald, vols. 16, 17, 18, 62nd Cong. 3d sess., 1912-13

(Washington, D.C.: Government Printing Office, 1913) at 17:1642 (statement of Sen. George Sutherland (R-UT) noting in the Archbald case "It occurred to me," when faced with an omnibus Article, "that I cannot consistently vote upon this article one way or the other").

In Judge Porteous's case, though, the House now employs this controversial method in each of the four Articles by aggregating multiple claims of alleged misconduct. For example, in Article II, the House piles on top of each other the following list of alleged impeachable acts:

- Judge Porteous engaged in a longstanding pattern of corrupt conduct;
- Judge Porteous "engaged in a corrupt relationship" with the Marcottes;
- Judge Porteous "solicited and accepted numerous things of value;"
- Judge Porteous engaged in "official actions that benefitted the Marcottes;"
- Judge Porteous "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business;" and
- Judge Porteous "well knew and understood" that "Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." 111 Cong. Rec. S1645 (Mar. 17, 2010).

The Senate should put an end to this tactic by dismissing these Articles. If the Senate is not willing to dismiss the Articles on a threshold challenge due to the aggregation of impeachable claims, Judge Porteous respectfully requests that the Senate require preliminary voting on each specific claim of misconduct within each Article to preserve a full and fair record of these hearings and to ensure constitutional validity of the result. The Senate often votes in this manner on legislation with multiple component acts or independent sections. Normally, the Senate would not tolerate forced up-or-down votes on a complex bill without preliminary votes on amendments – effectively individual votes on the components of the bill – and Judge Porteous urges the Senate to be equally as vigilant when dealing with an impeachment where the constitutionally-imposed threshold requires a super-majority. In this way, the Senate would make clear both which acts have been found to have occurred and which acts constitute

impeachable offenses. Such a process would facilitate clear, constitutionally valid vote-counts on each allegation within each Article of Impeachment, and would encourage proper pleading in Articles of Impeachment from the House.

The importance of a clear record is especially apparent in this impeachment trial. Here, unlike many past impeachment cases (including the last two trials for Judges Hastings and Nixon), there was no indictment or trial in court creating a detailed record for review. In the cases of the impeachments of Judges Hastings and Nixon, some of the facts alleged in the Articles of Impeachment had already been thoroughly litigated and could be grouped into a single Article of Impeachment. This case is different. Here, the Senate evidentiary hearing will be the first full testimony and argument on these allegations, and the prejudice caused by unconstitutionally aggregated allegations is at its zenith.

ARGUMENT

I. The Articles of Impeachment Aggregate Multiple Claims Within Each Article.

Each Article of Impeachment that has been levied against Judge Porteous contains numerous allegations that are distinct and separate charges, any one of which may be an appropriate ground for removal if two-thirds of the Senate agree. A breakdown of the allegations within each Article can be properly categorized as follows:

A. Article I

Article I alleges that Judge Porteous:

1. Improperly denied a recusal motion in the *Lifemark* case;
2. When deciding the recusal motion, failed to disclose his relationship with his long-time friends and former law partners Jacob Amato and Robert Creely;
3. Made intentionally misleading statements at the recusal hearing; and

4. Improperly solicited and accepted things of value from Amato and Creely while the *Lifemark* case was under advisement.[2] *See* 111 Cong. Rec. S1645 (Mar. 17, 2010).

B. Article II

Article II aggregates at least four separate allegations of alleged misconduct. The Article alleges that Judge Porteous:

1. Engaged in a longstanding pattern of corrupt conduct;
2. Engaged in a corrupt relationship with the Marcottes;
3. Solicited and accepted numerous things of value;
4. Took official actions that benefitted the Marcottes;
5. Used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business; and
6. Well knew and understood that Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. *See id.*

C. Article III

Article III alleges that Judge Porteous engaged in misconduct in connection with his Chapter 13 bankruptcy, accusing him of five specific acts:

1. Using a false name and a post office box address to conceal his identity as the debtor in the case;
2. Concealing assets;
3. Concealing preferential payments to certain creditors;
4. Concealing gambling losses and other gambling debts; and
5. Incurring new debts while the case was pending, in violation of the bankruptcy court's order. *See id.*

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[2] As discussed in the Motion to Dismiss Article I, being filed concurrently herewith, the construction of Article I mandates that the alleged pre-federal conduct not be the basis for impeachment, but only serves as context for an analysis of Judge Porteous's decision to deny the Motion to Recuse himself in the *Lifemark* matter.

D. Article IV

Article IV alleges that Judge Porteous made seven separate false statements in three separate forums as follows:

1. On his Supplemental SF-86, he falsely stated that:
   a. there was nothing in his personal life that could be used to coerce or blackmail him; and
   b. there was nothing in his life that would cause an embarrassment to Judge Porteous or the President;
2. During his background check, on two separate occasions, he falsely stated that:
   a. he was not concealing any conduct that could be used to influence or coerce him; and
   b. he was not concealing any conduct that would impact negatively on his character, reputation, judgment, or discretion.
3. On the Senate Judiciary Committee's 'Questionnaire for Judicial Nominees," he falsely stated that he was unaware of any unfavorable information that could affect his nomination. *See* 111 Cong. Rec. S1645 (Mar. 17, 2010).

In addition, the Article claims that Judge Porteous's failure to disclose these facts "deprived the United States Senate and the public of information that would have had a material impact on his confirmation." *Id.* Article IV also alleges that "Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." *Id.*

II. Aggregation of Multiple Offenses Circumvents the Constitutional Requirement that Two-Thirds of the Senate Find that the Official Committed Treason, Bribery, or Other High Crimes or Misdemeanors.

A. Aggregation of Multiple Offenses Within a Single Article Overrides the Constitutional Requirement that a Super-Majority Vote for Impeachment.

Article I, Section 3, Clause 6 of the Constitution states that "no Person shall be convicted [in an impeachment trial] without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3. By necessity, the Constitution not only requires that two-thirds of the Senate agree that each act alleged in an Article of Impeachment occurred but also that each act

constitutes an impeachable offense. Permitting a multitude of alleged impeachable misconduct to be included within a single Article, however, unconstitutionally circumvents this requirement. Impeachment should not be reduced to a "Dim Sum" menu where different Senators can pick from a long list of acts in a single Article and then aggregate their votes to satisfy the two-thirds requirement of Article I of the Constitution. Such aggregation could allow conviction on any or all of the four Articles with less than the constitutionally mandated two-thirds majority on any single allegation.

B. Multiple Allegations Within a Single Article Improperly Combine Unimpeachable Acts to Reach the High Constitutional Threshold for Impeachment.

Permitting an Article to contain a multiplicity of allegations could also improperly allow members to find that an aggregate of the alleged conduct satisfies the impeachment standard, even if no one of the individual allegations would be found to meet that constitutional standard. This could result in elevating acts which are arguably improper but do not individually constitute "high Crimes and Misdemeanors" into impeachable acts simply by sheer repetition and piling on. The Framers clearly wanted to confine impeachment to those acts that a super majority of the Senate found to rise to the level of the select impeachable offenses, namely "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. There is a great danger that the compilation of alleged acts in each Article of Impeachment, if considered improperly as a whole, will result in concluding that Judge Porteous should be convicted merely because he may be considered to be a "bad person," rather than for any one, specific impeachable act.

That is clearly the House's intent by alleging "pattern[s] of conduct," as the basis for impeachment in Articles I, II, and III. 111 Cong. Rec. S1645 (Mar. 17, 2010). This is nothing more than a constitutional "cheat" by the House to encourage Senators to rule on their general

impressions rather than convicting on the basis of finding, with a two-thirds vote, that specific acts occurred and are proper grounds for removal.

Clearly, many of the acts alleged in the Articles of Impeachment are demonstrably below the standard of a high crime or misdemeanor. For example, in Article IV the House seeks removal for the alleged failure to disclose a statement allegedly made to him by Louis Marcotte *after* Judge Porteous completed the forms and background interview cited in the Article. (*See* 111 Cong. Rec. S1645 (Mar. 17, 2010).) Article IV also asserts that Judge Porteous should be removed from office based on his subjective view of what would or would not be embarrassing to a president. Similarly, in Article III, the House seeks removal for an elaborated series of commonplace mistakes Judge Porteous and his wife made in their bankruptcy filing, similar to the mistakes made routinely in bankruptcy. (*See* accompanying Motion to Dismiss Article III.) By aggregating such alleged acts within one Article, the House apparently hopes to avoid an actual vote on whether each such individual act occurred and, if so, whether each one is a "high crime" or "misdemeanor." This artful drafting by the House is an impermissible end run around the constitutional requirement that defines impeachable offenses as "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

C. The Aggregation in These Articles of Impeachment Deviates from the House of Representatives' Recent Practice of Aggregating Multiple Allegations Within a Single Article of Impeachment Only Where those Multiple Allegations are Undisputed.

In addition to passing omnibus Articles, the House of Representatives has previously passed Articles of Impeachment that aggregated multiple allegations in the same manner as the Articles here. However, the extent of the aggregation in these Articles is unprecedented. Unlike other recent impeachments, there is not even one Article exclusively based on just one specific alleged act. Furthermore, in the recent impeachments of federal judges, the aggregated

allegations were generally for conduct of which the defendant had already been found criminally liable. The 2009 impeachment of Judge Samuel Kent, who pled guilty to obstruction of justice before he was impeached, is a prime example of this practice.

In the Kent impeachment, the House set forth four Articles of Impeachment. Article I alleges specific inappropriate sexual behavior as related to a specific employee. It does not aggregate claims. Article II alleges separate specific inappropriate sexual behavior as related to another specific employee. It does not aggregate claims. Notably, the House did not attempt to allege a separate "pattern of activity" by combining Articles I and II.

Article IV alleges that Judge Kent made specific "false and misleading statements about the nature and extent of his non-consensual sexual contact with two employees" on two dates: November 30, 2007 and August 11, 2008. Article IV, therefore does not aggregate multiple types of conduct into a single Article.

Article III, however, alleges that Judge Kent "corruptly obstructed, influenced, or impeded an official proceeding" and then details the numerous ways in which Judge Kent allegedly performed this obstruction, influence, and impeding. While this Article is an aggregation of charges, reprinted almost verbatim from the "Factual Basis for the Plea" that was attached to Judge Kent's guilty plea. (*See* Kent Plea Agreement, attached as Exhibit 1.) As a result, Kent had already agreed to the factual basis for Article III before it was even drafted. Had the matter gone to a Senate vote, the Senate would not have been forced to decide which acts within Article III had been proved.

While aggregation of claims is never a good practice, a judge who has been criminally charged has at least had an opportunity to litigate the underlying acts. In contrast, Judge Porteous has never been indicted for any criminal act, and he faces a far greater challenge in

defending himself against unconstitutionally aggregated claims within the Articles of Impeachment.

III. The Disaggregation of Voting Would Protect the Integrity of the Constitutional Standard While Allowing a Vote on Each Article.

In the event that the Senate declines Judge Porteous's request to dismiss the Articles of Impeachment, Judge Porteous urges the Senate to disaggregate the claims by voting on the separate allegations, as a means of ensuring that, as required by the constitution, two-thirds of the Senators support both the factual allegations and concur that each allegation constitutes an impeachable offense. This practice would be comparable to the use of specialized verdict forms in civil trials. *See* FED. R. CIV. P. 49(a). It is also similar to allowing votes on amendments for and against insular components of legislation leading to a final vote of adoption.

Specifically, as to any Article that remains despite Judge Porteous's Motions to Dismiss, Judge Porteous respectfully requests that the Senate initially vote on Judge Porteous's guilt or innocence, *i.e.,* whether or not each of the following specific allegations is true and justifies impeachment:

With regard to Article I, did Judge Porteous:

1. Deprive the parties and the public of the right to the honest services of Judge Porteous's office in connection with the *Lifemark v. Liljeberg* trial?
2. Create an appearance of impropriety sufficient to prejudice the public respect for, and confidence in, the Federal Judiciary by soliciting and accepting things of value from the attorneys in the *Lifemark* case?

With regard to Article II, did Judge Porteous:

1. Improperly solicit and accept things of value from the Marcottes?
2. Improperly set, reduce, and split bonds in exchange for the Marcottes because they had given him things of value?
3. Improperly expunge or set aside convictions for Marcotte employees because the Marcottes had given him things of value?

4. Engage in impeachable conduct by introducing his friends the Marcottes to other friends who were state officials?
5. Know and understand that Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench?

With regard to Article III, did Judge Porteous:

1. Make a materially false statement in connection with a bankruptcy proceeding and violate a court order by using a false name and a post office box address briefly to conceal his identity as the debtor in the case?
2. Make a materially false statement in connection with a bankruptcy proceeding or violate a court order by concealing assets?
3. Make a materially false statement in connection with a bankruptcy proceeding or violate a court order by concealing preferential payments to certain creditors?
4. Make a materially false statement in connection with a bankruptcy proceeding or violate a court order by concealing gambling losses and other gambling debts?
5. Make a materially false statement in connection with a bankruptcy proceeding or violate a court order by incurring new debts while the case was pending, in violation of the bankruptcy court's order?

With regard to Article IV, did Judge Porteous:

1. Make a false statement on his Supplemental SF-86?
2. Make a false statement on two separate occasions during his background check?
3. Make a false statement on the Senate Judiciary Committee's Questionnaire for Judicial Nominees?
4. Deprive the United States Senate and the public of information that would have had a material impact on his confirmation?
5. Know and understand that Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench?

Ideally, the Senate would hold a separate preliminary vote on each allegation with regard to whether the alleged act occurred and, separately, whether it amounts to an impeachable offense. As a middle ground, though, the Senate might simply vote on each allegation without separate votes as to the factual and constitutional determinations. Even this middle ground approach, confirming both the occurrence and basis for removal of each alleged act with one

vote, would be far superior to approving the aggregation of disparate acts in each Article as drafted by the House. The Senate still could vote ultimately on the Articles as a whole, but only after resolving what acts have been accepted by two-thirds of the members as proper grounds for the removal of a federal judge.

CONCLUSION

WHEREFORE, Judge Porteous respectfully requests that the Senate dismiss each of the four Articles of Impeachment. Alternatively, Judge Porteous requests that the Senate hold preliminary votes on each allegation made within each Article, prior to voting on the Article as a whole.

Respectfully submitted,

/s/ Jonathan Turley

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Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 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

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

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

/s/ P.J. Meitl

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	**CRIMINAL NO. 4:08CR0596-RV**
	§	
v.	§	
	§	
SAMUEL B. KENT	§	
	§	
Defendant.	§	
	§	

PLEA AGREEMENT

The United States of America, by and through its undersigned attorneys for the Public Integrity Section, Criminal Division, United States Department of Justice, and SAMUEL B. KENT (hereinafter referred to as the "defendant") enter into the following agreement:

Charges and Statutory Penalties

1. The defendant agrees to plead guilty to Count Six, Obstruction of Justice, in violation

of Title 18, United States Code, Section1512(c)(2), of the Superseding Indictment. The United States agrees to seek dismissal of Counts One through Five of the Superseding Indictment after sentencing.

2. The defendant understands that Count Six has the following essential elements, each of which the United States would be required to prove beyond a reasonable doubt at trial:

a. First, the defendant corruptly obstructed, influenced, or impeded, or attempted to corruptly obstruct, influence, or impede an official proceeding;

b. Second, the defendant acted knowingly;

c. Third, the official proceeding is a proceeding before a judge or court of the United States.

3. The defendant understands that pursuant to 18 U.S.C. §1512(c)(2), Count Six carries a maximum sentence of twenty years of imprisonment, a fine of $250,000, a $100 special assessment, and a three-year term of supervised release, an order of restitution, and an obligation to pay any applicable interest or penalties on fines or restitution not timely made.

4. If the Court accepts the defendant's pleas of guilty and the defendant fulfills each of the terms and conditions of this agreement, the United States agrees that it will not further prosecute the defendant for any crimes described in the attached factual basis or for any conduct of the defendant now known to the Public Integrity Section and to the law enforcement agents working with the Public Integrity Section. Nothing in this agreement is intended to provide any limitation of liability arising out of any acts of violence.

Factual Stipulations

5. The defendant agrees that the attached "Factual Basis for Plea" fairly and accurately describes the defendant's actions and involvement in the offense to which the defendant is pleading guilty. The defendant knowingly, voluntarily and truthfully admits the facts set forth in the Factual Basis for Plea.

Sentencing

6. The defendant is aware that the sentence will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by

the court relying in part on the results of a Pre-Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise that advisory sentence up to and including the statutory maximum sentence or lower that advisory sentence. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense(s) identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

7. The United States reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, the United States further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. The defendant is aware that any estimate of the probable sentence or the probable sentencing range relating to the defendant pursuant to the advisory Sentencing Guidelines that the defendant may have received from any source is only a prediction and not a promise, and is not

binding on the United States, the probation office, or the court, except as expressly provided in this plea agreement.

Sentencing Guidelines Stipulations

9. The defendant understands that the sentence in this case will be determined by the Court, pursuant to the factors set forth in 18 U.S.C. § 3553(a), including a consideration of the guidelines and policies promulgated by the United States Sentencing Commission, Guidelines Manual 2007 (hereinafter "Sentencing Guidelines" or "USSG"). Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), and to assist the Court in determining the appropriate sentence, the parties stipulate to the following:

a. The Base Offense Level pursuant to USSG §2J1.2(a) is 14.

b. Acceptance of Responsibility

Provided that the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the United States, through the defendant's allocution and subsequent conduct prior to the imposition of sentence, the United States agrees that a 2-level reduction would be appropriate, pursuant to U.S.S.G § 3E1.1(a).

The United States, however, may oppose any adjustment for acceptance of responsibility if the defendant:

i. fails to admit a complete factual basis for the plea at the time the defendant is sentenced or at any other time;

ii. challenges the adequacy or sufficiency of the United States' offer of proof at any time after the plea is entered;

iii. denies involvement in the offense;

iv. gives conflicting statements about that involvement or is untruthful with the Court, the United States or the Probation Office;

v. fails to give complete and accurate information about the defendant's financial status to the Probation Office;

vi. obstructs or attempts to obstruct justice, prior to sentencing;

vii. has engaged in conduct not currently known to the United States prior to signing this Plea Agreement which reasonably could be viewed as obstruction or an attempt to obstruct justice, and has failed to fully disclose such conduct to the United States prior to signing this Plea Agreement;

viii. fails to appear in court as required;

ix. after signing this Plea Agreement, engages in additional criminal conduct; or

x. attempts to withdraw the plea of guilty.

c. Agreement as to Maximum Sentencing Recommendation by the Government:

The United States agrees that the maximum term of imprisonment that it may seek at sentencing is three years, or 36 months, and it may seek a sentence less than 36 months if it is within the applicable Guidelines range.

d. Criminal History Category

Based upon the information now available to the United States (including representations by the defense), the defendant has no criminal history points and is in Criminal History Category I.

Agreement as to Sentencing Allocution

10. The parties have no other agreement as to the Guidelines calculations and may argue for upward or downward adjustments or departures. The parties agree that either party may seek a sentence outside of the Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

11. In support of any variance argument, the parties agree to provide reports, motions, memoranda of law and documentation of any kind on which the defendant intends to rely at sentencing not later than twenty-one days before sentencing. Any basis for sentencing with respect to which all expert reports, motions, memoranda of law and documentation have not been provided to the United States at least twenty-one days before sentencing shall be deemed waived.

Court Not Bound by the Plea Agreement

12. It is understood that pursuant to Federal Rules of Criminal Procedure 11(c)(1)(B) and 11(c)(3)(B) the Court is not bound by the above stipulations, either as to questions of fact or as to the parties' determination of the applicable Guidelines range, or other sentencing issues. In the event that the Court considers any Guidelines adjustments, departures, or calculations different from any stipulations contained in this Agreement, or contemplates a sentence outside the Guidelines range based upon the general sentencing factors listed in Title 18, United States Code, Section 3553(a), the parties reserve the right to answer any related inquiries from the Court.

Appeal Waiver

13. The defendant is aware that the defendant has the right to challenge the defendant's sentence and guilty plea on direct appeal. The defendant is also aware that the defendant may, in some circumstances, be able to argue that the defendant's guilty plea should be set aside, or sentence set aside or reduced, in a collateral challenge (such as pursuant to a motion under 28 U.S.C. § 2255). Knowing that, and in consideration of the concessions made by the United States in this Agreement, the defendant knowingly and voluntarily waives his right to appeal or collaterally challenge: (a) the defendant's guilty plea and any other aspect of the defendant's conviction, including, but not limited to, any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues; and (b) the defendant's sentence or the manner in which [his/her] sentence was determined pursuant to 18 U.S.C. §3742, except to the extent that the Court sentences the defendant to a period of imprisonment longer than the statutory maximum, or the Court departs upward from the applicable Sentencing Guideline range pursuant to the provisions of U.S.S.G. §5K.2 or based on a consideration of the sentencing factors set forth in 18 U.S.C. §3553(a).

14. The defendant further understands that nothing in this agreement shall affect Public Integrity's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that the defendant has discussed the appeal waiver set forth in this agreement with the defendant's attorney. The defendant further agrees, together with the United States, to request that the district court enter a specific finding that the waiver of the defendant's right to appeal the sentence to be imposed in this case was knowing and voluntary.

15. The defendant's waiver of rights to appeal and to bring collateral challenges shall not

apply to appeals or challenges based on new legal principles in the Fifth Circuit Court of Appeals or Supreme Court cases decided after the date of this Agreement that are held by the Fifth Circuit Court of Appeals or Supreme Court to have retroactive effect.

Release/Detention

16. The defendant acknowledges that while the United States will not seek a change in the defendant's release conditions pending sentencing, the final decision regarding the defendant's bond status or detention will be made by the Court at the time of the defendant's plea of guilty. Should the defendant engage in further criminal conduct or violate any conditions of release prior to sentencing, however, the United States may move to change the defendant's conditions of release or move to revoke the defendant's release.

Breach of Agreement

17. The defendant understands and agrees that if, after entering this Plea Agreement, the defendant fails specifically to perform or to fulfill completely each and every one of the defendant's obligations under this Plea Agreement, or engages in any criminal activity prior to sentencing, the defendant will have breached this Plea Agreement. In the event of such a breach: (a) the United States will be free from its obligations under the Agreement; (b) the defendant will not have the right to withdraw the guilty plea; (c) the defendant shall be fully subject to criminal prosecution for any other crimes, including perjury and obstruction of justice; and (d) the United States will be free to use against the defendant, directly and indirectly, in any criminal or civil proceeding, all statements made by the defendant and any of the information or materials provided by the defendant, including such statements, information and materials provided pursuant to this Agreement or during the course

of any debriefings conducted in anticipation of, or after entry of this Agreement, including the defendant's statements made during proceedings before the Court pursuant to Fed. R. Crim. P. 11.

18. The defendant understands that Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. The defendant knowingly and voluntarily waives the rights which arise under these rules.

19. The defendant understands and agrees that the United States shall only be required to prove a breach of this Plea Agreement by a preponderance of the evidence. The defendant further understands and agrees that the United States need only prove a violation of federal, state, or local criminal law by probable cause in order to establish a breach of this Plea Agreement.

20. Nothing in this Agreement shall be construed to permit the defendant to commit perjury, to make false statements or declarations, to obstruct justice, or to protect the defendant from prosecution for any crimes not included within this Agreement or committed by the defendant after the execution of this Agreement. The defendant understands and agrees that the United States reserves the right to prosecute the defendant for any such offenses. The defendant further understands that any perjury, false statements or declarations, or obstruction of justice relating to the defendant's obligations under this Agreement shall constitute a breach of this Agreement. However, in the event of such a breach, the defendant will not be allowed to withdraw this guilty plea.

Waiver of Statute of Limitations

21. It is further agreed that should any conviction following the defendant's plea of

guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the United States has agreed not to prosecute or to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

Complete Agreement

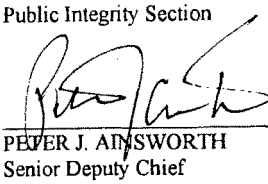
22. No other agreements, promises, understandings, or representations have been made by the parties or their counsel than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by the defendant, defense counsel, and a prosecutor for the Public Integrity Section.

23. The defendant further understands that this Agreement is binding only upon the Public Integrity Section, Criminal Division, United States Department of Justice. This Agreement does not bind the Civil Division or any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against the defendant.

24. If the foregoing terms and conditions are satisfactory, the defendant may so indicate by signing the Agreement in the space indicated below and returning the original to me once it has been signed by the defendant and by you or other defense counsel.

Respectfully submitted,

WILLIAM M. WELCH II
Chief
Public Integrity Section

By: 

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DEFENDANT'S ACCEPTANCE

I have read this agreement in its entirety and discussed it with my attorney. I hereby acknowledge that it fully sets forth my agreement with the United States. I further state that no additional promises or representations have been made to me by any official of the United States in connection with this matter. I understand the crimes to which I have agreed to plead guilty, the maximum penalties for those offenses and Sentencing Guideline penalties potentially applicable to them. I am satisfied with the legal representation provided to me by my attorney. We have had sufficient time to meet and discuss my case. We have discussed the charges against me, possible defenses I might have, the terms of this Plea Agreement and whether I should go to trial. I am entering into this Agreement freely, voluntarily, and knowingly because I am guilty of the offenses to which I am pleading guilty, and I believe this Agreement is in my best interest.

Date: Feb 23rd, 2009

SAMUEL B. KENT
Defendant

ATTORNEY'S ACKNOWLEDGMENT

I have read each of the pages constituting this Plea Agreement, reviewed them with my client, and discussed the provisions of the Agreement with my client, fully. These pages accurately and completely sets forth the entire Plea Agreement. I concur in my client's desire to plead guilty as set forth in this Agreement.

Date: 23 Feb 09

DICK DEGUERIN, ESQ.
Attorney for the Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	**CRIMINAL NO. 4:08CR0596-RV**
	§	
v.	§	
	§	
SAMUEL B. KENT	§	
	§	
Defendant.	§	
	§	

FACTUAL BASIS FOR PLEA

The United States of America, by and through its undersigned attorneys within the United States Department of Justice, Criminal Division, Public Integrity Section, and the defendant, SAMUEL B. KENT, personally and through his undersigned counsel, hereby stipulate to the following facts pursuant to United States Sentencing Guideline § 6A1.1 and Rule 32(c)(1) of the Federal Rules of Criminal Procedure:

INTRODUCTION

At all times relevant hereto:

1. Defendant SAMUEL B. KENT was a United States District Judge in the Southern District of Texas. From 1990 to 2008, defendant KENT was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.
2. Person A was an employee of the Office of the Clerk of Court for the Southern District of Texas, and served as a Deputy Clerk in the Galveston Division assigned to defendant KENT's courtroom.
3. Person B was an employee of the United States District Court for the Southern District of Texas, and served as the secretary to defendant KENT.

4. In August 2003 and March 2007, the defendant engaged in non-consensual sexual contact with Person A without her permission.

5. From 2004 through at least 2005, the defendant engaged in non-consensual sexual contact with Person B without her permission.

OBSTRUCTION OF JUSTICE

6. On or about May 21, 2007, Person A filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). In response, the Judicial Council of the Fifth Circuit appointed a Special Investigative Committee to investigate Person A's complaint.

7. On or about June 8, 2008, at defendant KENT's request and upon notice from the Special Investigative Committee, defendant KENT appeared before the Committee.

8. As part of its investigation, the Committee and the Judicial Council sought to learn from defendant KENT and others whether defendant KENT had engaged in unwanted sexual contact with Person A and individuals other than Person A.

9. On June 8, 2007, in Houston, Texas, the defendant appeared before the Special Investigative Committee of the Fifth Circuit.

10. The defendant falsely testified regarding his unwanted sexual contact with Person B by stating to the Committee that the extent of his non-consensual contact with Person B was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with Person B without her permission.

11. The defendant also falsely testified regarding his unwanted sexual contact with Person B

by stating to the Committee that when told by Person B that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.

All in violation of Title 18, United States Code, Section 1512(c)(2).

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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	))))))

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

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Dated: July 28, 2010

TABLE OF CONTENTS

OVERVIEW 1

I. PRELIMINARY JURISDICTIONAL CONSIDERATIONS 1

A. Overview 1

B. THE SENATE COMMITTEE SHOULD DENY THE MOTIONS AT THIS TIME AND PERMIT JUDGE PORTEOUS TO RAISE THEM BEFORE THE FULL SENATE AFTER THE EVIDENTIARY HEARING 2

II. FACTUAL SUMMARY 5

A. Judge Porteous's Corrupt Conduct as a State Court Judge with Lawyers and Bail Bondsmen 5

B. Judge Porteous Lies to Obtain the Office of Federal Judge 7

C. Judge Porteous's Deceptive Omissions of Fact, Failure to Recuse, and Solicitation of Cash in the Liljeberg Case 11

D. Judge Porteous's False Statements, Intentional Omissions of Fact, and Violation of a Court Order in his Bankruptcy 15

E. Conclusion 16

III. THE STANDARD FOR IMPEACHMENT 17

A. The Substantive Law Governing Impeachments and Removal 18

B. The Procedural Requirements for Impeachments 20

ARGUMENT 21

I. ARTICLE I PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE 22

A. Judge Porteous Mischaracterizes the Facts in Article I. 23

B. Because Article I Does Not Allege a Violation of a Specific Federal Criminal Statute, the Supreme Court's Decision in Skilling is Irrelevant. 24

C. Article I Sets Forth an Impeachable Offense. 28

II. ARTICLE II PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE 29

A. Article II Properly Charges Conduct For Which Removal is Appropriate 30

B. Impeachment Can Be Based on Pre-Federal Bench Conduct....32

1. The Constitution, in Providing for Impeachment for Treason, Bribery and High Crimes or Other Misdemeanors, Provides No Time Limit as to When Impeachable Conduct Must Occur....33

2. The Archbald Conviction on the "Omnibus" Count Supports the Impeachment of Judge Porteous. 36

3. Corrupt Pre-Federal Bench Conduct Has Prevented or Dissuaded Judges Throughout History from Ascending to the Federal Bench And Caused Others to Resign Rather than be Impeached 38

4. The Constitution's "Good Behavior" Language Does Not Set Forth a Substantive Standard of Conduct, But Instead Was Intended to Provide for Life Tenure for Federal Judges....41

III. ARTICLE III PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE....43

A. Judge Porteous Misconstrues Article III and Misstates the Facts....43

B. Personal Misconduct is Recognized as an Appropriate Basis for Impeachment....47

1. Criminal Prosecution for Personal Misconduct is Not Required to Impeach for that Conduct....48

2. Congress Has Rejected a Distinction Between Private and Public Conduct in the Impeachment Context. 50

a. The Judge Claiborne Impeachment. 50

b. The Judge Walter Nixon Impeachment 52

IV. ARTICLE IV PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE....53

V. THE ARTICLES OF IMPEACHMENT DO NOT IMPERMISSIBLY AGGREGATE DISCRETE ALLEGATIONS 59

CONCLUSION....62

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

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

OVERVIEW

I. PRELIMINARY JURISDICTIONAL CONSIDERATIONS

A. Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. FACTUAL SUMMARY[10]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Porteous signed that document under the following statement:

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

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

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

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

[12] Id.

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

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

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

> [Question] Please advise the Committee of any unfavorable information that may affect your nomination.
>
> [Answer] To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.[15]

The signature block in the form of an "Affidavit," reads as follows:

> AFFIDAVIT
>
> I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.
>
> Gretna, Louisiana, this 6 day of September, 1994.

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

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

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

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

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

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

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

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[16] Id.

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

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

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

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

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

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

* * *

Professor Amar:

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

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

> what is actually at the core of the question. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery.
>
> And what he lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone. There is a pattern.[17]

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

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

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

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

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

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

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

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

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

* * *

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

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

* * *

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

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

Q. And had cash in it?

A. Yes, sir.

Q. And it was from Creely and/or——

A. Amato.

Q. Amato?

A. Yes.

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

A. To help defray the cost, yeah.

Q. And was used——

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

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

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

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

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

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

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

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

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[24] Id. at 136–137.

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

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

[27] Id. at 92.

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

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

E. Conclusion

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

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

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

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

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

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

III. THE STANDARD FOR IMPEACHMENT

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

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

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

A. The Substantive Law Governing Impeachments and Removal

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

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

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

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

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

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

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

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[33] Id.

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

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

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

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

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

B. The Procedural Requirements for Impeachments

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

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

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

[40] U.S. CONST. art. I, § 2, cl. 5.

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

A. Judge Porteous Mischaracterizes the Facts in Article I.

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

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

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

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

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

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

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

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

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

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

Task Force Hearing Part I, at 143.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Article I Sets Forth an Impeachable Offense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[61] Id. at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Gerhardt explained in his written statement:

> Say, for instance, that the offence was murder—it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a Federal judge. The timing of the murder is of less concern that the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.[66]

Professor Amar stated at the hearing:

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

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

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

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

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

Turley, supra note 3, at 7.

Professor Geyh stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[73] Id. at 1663.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article III, Section 1, of the Constitution provides:

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

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

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

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

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

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

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

[78] Id.

[79] Id. at 84.

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

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

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

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

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

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

[80] Id. at 85.

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

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

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

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

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

[82] Id. at 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> First, the nature of Congress's determination whether to impeach is fundamentally different from DOJ's decision whether to prosecute. Congress does not decide guilt or innocence with reference to a criminal statute. Rather, it is for Congress to make what is in essence a "fitness for office" determination. Congress alone has the power to remove an unfit Federal judge, and conduct that renders a judge unfit may not necessarily violate a criminal statute.
>
> Second, Congress has an independent responsibility to review the evidence and cannot rely on DOJ's assessment of what the evidence reveals. Thus, just as the House heard the evidence involving Judge Samuel B. Kent, and before that of Judges Walter Nixon and Robert Collins, and did not rely solely on the fact that each of those judges had been criminally convicted, so it is proper for Congress to consider and review the evidence that relates to the conduct of Judge Porteous, even though some of that evidence (but not all) was considered by the Department of Justice.
>
> * * *
>
> Fifth, the Impeachment Task Force has . . . uncovered new evidence that simply was not considered by the Department, . . . [specifically] the Task

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

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

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

a. The Judge Claiborne Impeachment.

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The Judge Walter Nixon Impeachment

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

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

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

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

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

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

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

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

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

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

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

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

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[100] Id. at 3.

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

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

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

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

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

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

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

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

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

> [E]veryone knows what is actually at the core of the question[s]. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery.
>
> And what he lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone. . . .
>
> * * *
>
> [W]e know what those questions at their core [were] about, and he lied at the core. There is vagueness at the periphery, but this was really central.[105]

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

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

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

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

> For reasons set forth in the discussion of Article II, it is appropriate to consider pre-Federal bench conduct as a basis to impeach. Even though Judge Porteous did not make the statements in a judicial capacity, and even though this conduct did not carry over into his tenure as a Federal judge, the false statements corrupted the judicial appointment and rendered it illegitimate from its inception. As Professor Amar testified before the Task Force, after stating why pre-Federal bench "bribery" would constitute impeachable conduct:
>
> > Now what is true of bribery is equally true of fraud. A person who procures a judgeship by lying to the President and lying to the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.
>
> Professor Gerhardt agreed that "lying to or defrauding the Senate in order to be approved as a Federal judge" is likely to justify impeachment. First of all, that conduct is serious as a stand-alone matter in that it "plainly erodes the essential, indispensable integrity without which a Federal judge is unable to do his job." Professor Gerhardt noted, however, that in the case of Judge Porteous, it is not necessary to determine whether the false statements themselves demonstrated his unfitness.
>
> > For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of information that would undoubtedly have changed the outcome in his confirmation hearing. His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.[107]

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

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

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

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

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

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

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

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

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

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

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

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

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

[110] Id. at 1.

[111] Id. at 2.

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

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 28, 2010

Attachment One

SUPPLEMENT TO STANDARD FORM 86 (SF-86)

(Attach additional pages if necessary)

1S. Please list names of all corporations, firms, partnerships or other business enterprises, and all nonprofit organizations and other institutions with which you are now, or during the past five years have been, affiliated as an officer, owner, director, trustee, partner, advisor, attorney or consultant. In addition, please provide the names of any other organizations with which you were affiliated prior to the past five years that might present a potential conflict or appearance of conflict of interest with your prospective appointment. (Please note that in the case of an attorney's client listing, it is only necessary to provide the names of major clients and those that might present a potential conflict or appearance of conflict of interest with the prospective appointment).

NONE

2S. Please list all your interests in real property, other than a personal residence, setting forth the nature of your interest, the type of property and the address.

NONE

3S. Have you or any firm, company or other entity with which you have been associated ever been convicted of a violation of any Federal, state, county or municipal law, regulation or ordinance? If so, please provide full details.

NO

4S. Have you or any firm, company or other entity with which you have been associated ever been the subject of Federal, state or local investigation for possible violation of a criminal statute? If so, please give full details.

NO

5S. Have you ever been involved in civil or criminal litigation, or in administrative or legislative proceedings of any kind, either as a plaintiff, defendant, respondent, witness or party in interest? If so, please give full details identifying dates, issues litigated and the location where the civil action is recorded.

SEE ATTACHMENT #1

6S. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please give full details.

NO

7S. Have you ever run for political office, served on a political committee or been identified in a public way with a particular organization, candidate or issue? Have any complaints been lodged against you or your political committee with the Federal Election Commission or state or local election authorities? If so, please describe.

SEE ATTACHMENT #2

8S. Are you currently, or have you ever been, a member or office holder in any club or organization that restricts or restricted membership on the basis of sex, race, color, religion, national origin, age or handicap? If so, provide the name, address and dates of membership for each.

NO

9S. Please identify any adults (18 years or older) currently living with you who are not members of your immediate family. Provide the names of those individuals, dates and places of birth, and whether or not they are United States citizens.

NONE

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

NO

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

Signature

98

Attachment Two

FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 7/8/94

GABRIEL THOMAS PORTEOUS, JR., Judge, Division A, 24th Judicial District Court, Parish of Jefferson, was interviewed at his place of business, JEFFERSON PARISH COURTHOUSE, Gretna, Louisiana 70053, 504/364-3850. PORTEOUS was advised that he was being interviewed as a result of a request for the FBI to conduct a background investigation concerning his candidacy for U.S. District Judge, Eastern District of Louisiana. PORTEOUS was advised that the scope of the questions asked during the interview was not necessarily limited to the timeframe on the SF-86 and that his response to each question should cover his entire adult life, since age 18. It was also pointed out the PORTEOUS that Question 23 on the SF-86, pertaining to "Police Record," covers activities since his 16th birthday.

PORTEOUS currently resides at 4801 Neyrey Drive, Metairie, Louisiana, which is the only property he owns at this time. PORTEOUS attended LOUISIANA STATE UNIVERSITY AT NEW ORLEANS (LSU-NO), from September, 1964, to May, 1968, while he resided with his family at 2218 Madrid Street, New Orleans, Louisiana. LSU-NO is known as the UNIVERSITY OF NEW ORLEANS (UNO) today. PORTEOUS was employed by BAKER'S SHOE STORES as listed in his application the summer after his graduation from high school and during his attendance at LSU-NO.

After graduation from LSU-NO in May, 1968, PORTEOUS continued to work for BAKER'S SHOE STORES during the summer. During PORTEOUS' attendance at LSU LAW SCHOOL in Baton Rouge, Louisiana, he continued to work part-time for BAKER'S and affiliated shoe stores in Baton Rouge. He believes BAKER'S is owned by EDISON SHOES. After PORTEOUS' first year of law school, from May, 1969, to approximately August, 1969, he resided with his parents on Madrid Street for a few months while he prepared for his wedding. PORTEOUS said that after graduation from law school in May, 1971, he was preparing for the Bar examination which he took in late June or early July, 1971. He believes he began working at the Office of the Attorney General, State of Louisiana, throughout the Summer of 1971, before becoming Special Counsel there in September, 1971.

Investigation on 7/6 & 7/8/94 at Gretna, Louisiana File # 77A-HQ- F

by SA BOBBY P. HAMIL, JR., and SA CHEYENNE D. TACKETT:rsg Date dictated 7/8/94

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

77A-HQ- F

Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. , On 7/6 & 7/8/94 Page 2

PORTEOUS advised that from July, 1982, until August, 1984, he was employed part-time as a city attorney for the City of Harahan, simultaneously working as a Jefferson Parish District Attorney. He advised that the law firm of EDWARDS, PORTEOUS, & AMATO that he had been with beginning January, 1973, is the firm that evolved into PORTEOUS & MUSTAKAS, of which he was a partner until August, 1984. PORTEOUS said that he was employed part-time with B&L ASSOCIATES from August, 1970, to May, 1971, while at the same time working part-time for BAKER'S. He said that he was basically "on call" for B&L ASSOCIATES to conduct interviews and take statements.

PORTEOUS said that he does not really have a supervisor currently but listed HUGH COLLINS on his application as COLLINS is the judicial administrator for the State of Louisiana.

PORTEOUS said that he has no personal or business credit issues, including but not limited to repossessions, delinquent student loans, debts placed for collection, or bankruptcy. He advised that he is current on all Federal, State, and local tax obligations, including but not limited to income taxes, Medicare taxes, Social Security taxes, and unemployment taxes. PORTEOUS said that the only back payment of taxes he has had to make was either in 1974, 1975, or 1976 when he was with the firm EDWARDS, PORTEOUS & LEE. He advised that upon an Internal Revenue Service (IRS) audit, the firm was advised that advances the firm paid for filing fees could not be considered expenses, as the firm had indicated on their tax returns. The firm paid the taxes on the difference of taxable income excluding the filing fees as expenses.

PORTEOUS stated that other than the civil suits listed on the supplement to his SF-86, he has not been involved in any civil suits as a plaintiff or defendant, to include divorces. PORTEOUS said that he has had no involvement in criminal matters as a suspect or subject or any criminal charge, arrest, or conviction.

PORTEOUS said that he had not been denied employment or been dismissed from employment, to include the Federal sector. PORTEOUS advised that he has had no contact with official representatives of foreign countries.

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

77A-HQ- F

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

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

PORTEOUS stated that he has had no professional complaints or any non-judicial disciplinary action against him, to include Bar Association grievances, Better Business Bureau complaints, student or military disciplinary proceedings, Equal Employment Opportunity complaints, and Office of Professional Responsibility inquiries. PORTEOUS said that in his official capacity, he, along with all judges in the 24th Judicial District Court, was sued by SHURMAINE DE GRANGE and IDA WILLIAMS for alleged discrimination. He said that both petitioners were former employees of the late Judge LIONEL COLLINS. The suit is referred to in PORTEOUS' supplemental SF-86.

PORTEOUS advised that he is not involved in any business or investment circumstances that could or have involved conflicts of interest allegations.

PORTEOUS said that he has had no psychological counseling with psychiatrists, psychologists, or other qualified counselors, including marital counselors.

PORTEOUS said that he has not abused alcohol or prescription drugs or used illegal drugs, to include marijuana, during his entire adult life. He has had no participation in drug or alcohol counseling/rehabilitation programs since age 18.

PORTEOUS advised that he has had no involvement in any organization which advocates the use of force to overthrow the U.S. Government or any involvement in the commission of sabotage, espionage, or assistance of others in any of these acts. PORTEOUS knows of no current or past circumstances that could have a bearing on his suitability for Federal employment or access to classified information.

PORTEOUS advised that he has no current membership in any organization or social/private club which restrict membership on the basis of sex, race, color, religion, or national origin. PORTEOUS currently is a member of the following: American Bar Association, Jefferson Bar Association, American Judges

Associations, American Judicature Society, Louisiana District Attorney's Association, 4th and 5th Circuit Judges Association, Chateau Golf and Country Club, and St. Clement of Rome Men's Club. PORTEOUS has held the office of President of the 4th and 5th Circuit Judges Association within the last five years but does not currently hold that position. PORTEOUS advised that St. Clement is the church which he attends. He said that within the church there is a women's and men's club which have different functions in the church.

PORTEOUS advised that sometime between 1979 and 1982, he was a member of the Mardi Gras krewe of CAESAR for two years. The Mardi Gras krewe is an organization which sponsors a parade and other festivities during Mardi Gras. He advised that this was an all-male krewe at the time, but he is not sure what its membership consists of currently. PORTEOUS did not hold an office in this organization.

PORTEOUS advised that he has not written any articles for publication or made any major speeches. He said that he gives a presentation annually to the Jefferson Bar Association on topics such as conflicts of interest and medical malpractice. He has given presentations to the Louisiana Bar Association and the Louisiana Judicial College as well. These presentations consist of an outline, a short synopsis, and case examples for the continuing legal education of these organizations' members.

PORTEOUS said that he has been taking out student loans for his son through a "Parent-Plus" Program at FIRST NATIONAL BANK OF COMMERCE (FNBC), New Orleans, each semester. Repayment of these loans had been deferred until his son's graduation until recently. PORTEOUS advised that on March 7, 1994, he received his first notice that payment on the loan was due. By this time, it was overdue. In April, 1994, he received forms to fill out for deferment of payment until his son's graduation. He filled the forms out, and the school signed them on April 14, 1994. On May 3, 1994, PORTEOUS received a letter of ineligibility for deferment since the parent is paying back the loan. On May 25, 1994, he sent the lending institution a request for forbearance on the debt because of the confusion over eligibility for deferment. PORTEOUS then paid $96.83 to FNBC which covered accrued interest and, on June 28, 1994, commenced making payments as scheduled. PORTEOUS said this loan is now current.

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

77A-HQ- F

Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. , On 7/6 & 7/8/94 Page 5

PORTEOUS advised that he has seen a plastic surgeon for surgery on his ear whose name is Dr. GUSTAVE COLON. He said his internist is Dr. ROBERT SONGY.

PORTEOUS provided the supplement to his SF-86 with Attachments 1 & 2 to the interviewing Agents. PORTEOUS signed an FD-465, Medical Release Form, at this time. Also provided to the Agents was a copy of certification from Chief Disciplinary Counsel, Louisiana State Bar Association, stating that there is no pending or past record of any complaint, grievance, disciplinary action, or disciplinary proceeding against PORTEOUS.

Attachment Three

FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/18/94

Judge THOMAS PORTEOUS, Louisiana State Court Judge for the 24th Judicial District, was interviewed in his office located in Gretna, Louisiana (LA), regarding information received from confidential source, NO T-6, on August 8, 1994.

PORTEOUS stated that he was somewhat aware of the nature of the inquiry due to his Criminal Court Clerk, JOLENE ACY, having been interviewed by this interviewing Agent on the previous day. ACY had related to Judge PORTEOUS a summation of that interview. PORTEOUS was initially asked if he recalled having been involved in a bond reduction matter for a criminal defendant named KEITH KLINE, who was arrested by the Jefferson Parish Sheriff's Office on a cocaine charge in March, 1987. Judge PORTEOUS could not specifically recall a bond reduction matter involving this named individual, but after being provided with some of the information obtained from NO T-6, PORTEOUS seemed to recall that this individual, who already had an extensive criminal history involving narcotics violations, had a very high bond initially set. Upon request from the arresting officer or possibly Deputy Chief RICHARD RODRIGUE, who is in charge of Criminal Detectives for the Jefferson Parish Sheriff's Department (JPSD), he reluctantly agreed to reduce the bond. PORTEOUS stated that if the incident that he is recalling is in fact an incident that involved the named subject, KEITH KLINE, the agreement to reduce the bond was based on reporting from a JPSD officer that E E PORTEOUS further stated that if this was the incident he is attempting to recall, then Assistant District Attorney PAT MC GINNITY, (who is currently in private practice as a criminal defense attorney, with office located on Girod Street, New Orleans, LA, telephone P-1 would have been involved in the bond reduction discussion. PORTEOUS stated that it is routine for the prosecuting attorney along with the arresting officer to be involved in a discussion regarding any bond reductions. PORTEOUS could not recall any involvement of a girlfriend of KEITH KLINE in monetary transactions regarding the bond reduction. Furthermore, PORTEOUS categorically denied that

Investigation on 8/18/94 at Gretna, Louisiana File # 77A-HQ- F

by SA BOBBY P. HAMIL, JR./glm Date dictated 8/18/94

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HP Exhibit 69(k)

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

77A-HQ- F

Continuation of FD-302 of JUDGE THOMAS PORTEOUS . On 8/18/94 . Page 2

he was paid a sum of $10,000, or for that matter, any sum in exchange for an agreement to reduce the bond for KEITH KLINE.

With regards to an allegation that PORTEOUS had received $1,500 to reduce a bond in a matter involving a TRACY IRELAND, who had been arrested for theft, PORTEOUS, already having been aware of this allegation from previous discussion with JOLENE ACY (as referenced above), had the criminal file available for review. PORTEOUS pointed out that IRELAND's bond had originally been set at $300,000, based on a mere two counts of theft. The bond was initially set by Judge JOHN MOLAISON. Upon review of the matter, PORTEOUS agreed to reduce the bond to a $50,000 property bond. He recalls ADAM BARNETT being the bondsman in this matter, a trusted bondsman who he had known for a long time. PORTEOUS stated that he felt, based upon the Jefferson Parish jails being extremely overcrowded at that time (last year), the fact that the details of the arrest did not appear to warrant such a high bond, along with limited criminal history of the defendant, this situation warranted a reduction in bond. PORTEOUS pointed out that the bond was reduced to a $50,000 property bond. Although it was later shown that the surety was insufficient for the amount of the bond, the defendant appeared in court for every hearing, and was ultimately given credit for time served in jail, and placed on probation. He recalled the New Orleans Times Picayune newspaper as making an issue of this technical error in allowing a property bond to be set when there was insufficient surety. PORTEOUS stated that although there was a technical error here, it proved to be a harmless error, in light of the fact that the defendant never failed to appear for any of her court hearings. However, PORTEOUS again categorically denied that he had been given $1,500 or any amount of money to reduce the bond for TRACY IRELAND.

Judge PORTEOUS also denied that he had ever owned a yacht either individually or jointly with others, and furthermore, denied that he had ever owned any type of boat. He also denied that he had ever been present when cocaine, marijuana, or any other illegal narcotic was being utilized. He also denied that he had ever used any illegal narcotic personally.

Lastly, Judge PORTEOUS denied that he had ever signed any bail bonds "in blank;" and stated that he was unaware of anything in his background that might be the basis of attempted

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

77A-HQ-

Continuation of FD-302 of JUDGE THOMAS PORTEOUS, On 8/18/94, Page 3

influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgement or discretion.

Attachment Four

Resolution: The matter was settled without any admission of liability or responsibility.

11. Please advise the Committee of any unfavorable information that may affect your nomination.

To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

AFFIDAVIT

I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Gretna, Louisiana this 6 day of September, 1994.

Gabriel Thomas Porteous, Jr.

Notary

Attachment Five

1 THE SPECIAL COMMITTEE FOR
THE FIFTH CIRCUIT JUDICIAL COUNCIL
2
IN RE: . DOCKET NUMBER
3 COMPLAINT OF JUDICIAL . 07-05-351-0085
MISCONDUCT AGAINST .
4 UNITED STATES DISTRICT JUDGE . NEW ORLEANS, LOUISIANA
G. THOMAS PORTEOUS, JR., . OCTOBER 29, 2007
5 EASTERN DISTRICT OF LOUISIANA. 10:00 A.M
. . . . . .
6
7 TRANSCRIPT OF PROCEEDINGS HAD BEFORE
EDITH H. JONES, CHIEF JUDGE, US COURT OF APPEALS, FIFTH CIRCUIT;
8 FORTUNATO BENAVIDES, US CIRCUIT JUDGE;
AND SIM LAKE, US DISTRICT JUDGE
9
VOLUME 1 OF 2
10
11 A P P E A R A N C E S:
12 INVESTIGATIVE COUNSEL FOR THE SPECIAL COMMITTEE:
13 Ronald G. Woods
Attorney at Law
14 5300 Memorial Drive
Suite 1000
15 Houston, Texas 77007
713-862-9600
16
Lawrence D. Finder
17 Haynes and Boone, LLP
1221 McKinney Street
18 Suite 2100
Houston, Texas 77010
19 713-547-2006
20 FOR JUDGE G. THOMAS PORTEOUS, JR:
21 Judge G. Thomas Porteous, Jr.
500 Poydras Street
22 Room C206
New Orleans, Louisiana 70130
23 504-589-7585
24 Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.
25 - - - - -

1 A P P E A R A N C E S: (Continued)

2 ALSO APPEARING:

3 Patrick Fanning for Joseph M. Mole
Ralph Capitelli for Robert Creely and Jacob Amato
4 Jerome Winsberg for Claude Lightfoot, Jr.

5 OFFICIAL COURT REPORTER:

6 Cheryll K. Barron, CSR, CM, FCRR
U.S. District Court
7 515 Rusk Street
Room 8016
8 Houston, Texas 77002
713-250-5585

9 ALSO PRESENT:

10 Pam Wood
Jerry Fink
11 Peter Ainsworth
Dan Petalas
12 Wayne Horner
Julie Mandelsohn

13

14

15

16 - - - - -

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11:41 1 Q. And the current value of that interest is $100, correct?
2 A. Yes, sir.
3 Q. And that's on Page 95?
4 A. Bates Page 95.
11:41 5 Q. Bates Page 95. Bates Page 96, Schedule B, Question 17,
6 "Other liquidated debts -- other liquidated debts owing debtor,
7 including tax refunds, give particulars." And in the next box,
8 it's checked off "none," correct?
9 A. Yes, sir.
11:42 10 Q. Attached to this exhibit, starting on Bates Page 112, the
11 statement of financial affairs, are you familiar with that,
12 sir?
13 A. Yes, sir.
14 Q. And on the last page of that statement of financial
11:42 15 affairs, with Bates Number SC116?
16 A. Right.
17 Q. "I declare under penalty of perjury that I have read the
18 answers contained in the foregoing statement of financial
19 affairs and any attachments thereto and they are true and
11:42 20 correct," dated April 9th, '01, the date of the amended
21 petition, signed by you and your wife, correct?
22 A. Yes, sir.
23 Q. So, you would agree with me, Judge Porteous, this is a
24 document that had a jurat that required that it be signed --
11:43 25 well, that it be signed under penalty of perjury, correct?

11:43 1 A. Yes, sir. You just read that.
2 Q. Right. There was another one. This -- that had to do with
3 statement of financial affairs.
4 On Page 111, "Declaration concerning debtors'
11:43 5 schedules," just about the schedules. Now, "Declaration under
6 penalty of perjury by individual debtor," it states, "I declare
7 under penalty of perjury that I have read the foregoing summary
8 and schedules consisting of 16 sheets plus the line summary
9 page and that they are true and correct to the best of my
11:43 10 knowledge, information, and belief," dated April 9th, '01,
11 signed by you and your wife, correct?
12 A. Right.
13 Q. Isn't it true, Judge Porteous, that although you replied
14 "none" to "tax returns," that you and your wife filed for a
11:44 15 federal tax refund on March 23rd, 2001, in the amount of
16 $4,143.72, which was just five days before your original
17 Chapter 13 petition was filed? Do you recall that?
18 A. I know we filed for a tax refund.
19 Q. All right. Let me show it to you.
11:44 20 Exhibit 24, do you recognize this as being your
21 1040 return?
22 A. Yes, sir.
23 Q. For tax year -- for 2000 --
24 A. 2000.
11:44 25 Q. -- correct?

11:44 1 And this is Bates Page 600?
2 A. Right.
3 Q. This is going to be tough to read, but feel free to look at
4 your copy.
11:45 5 Under the section "Refund," which is sort of cut
6 off on my copy, Line 67a, "Amount of Line 66 you want refunded
7 to you, $4,143.72" --
8 A. Yes, sir.
9 Q. -- correct?
11:45 10 It's signed, again under penalty of perjury, by
11 you and your wife on March 23rd, 2001, correct?
12 A. Yes, sir.
13 Q. And has your occupation as judge and your wife -- your
14 wife's occupation as housewife?
11:45 15 A. Right.
16 Q. And this is on Page 601, correct, Bates page?
17 A. Yes, sir.
18 Q. March 23rd, 2001, less than a week before you filed
19 Chapter 13, correct?
11:45 20 A. Yes, sir.
21 Q. And on your schedule, you put that you had no refund?
22 A. When that was listed, you're right.
23 Q. Okay. From your Exhibit 25, from your Bank One bank
24 account, Judge G. Thomas Porteous, Jr., Account 6902379554 --
11:46 25 actually, that number is a little bit different than the one

11:46 1 that was on the schedule. Maybe there was a typo.
2 If you look on Schedule B that we've read before,
3 this account starts with 002379554, but the actual statement
4 has a different few numbers that start. Probably just a typo,
11:46 5 don't you think?
6 A. I know there's bottom numbers on those checks. I always
7 called that account, I think, 00.
8 Q. All right. Now, going back to this Exhibit 25 --
9 A. Uh-huh.
11:47 10 Q. And I regret that I can't get this clearer; but it shows on
11 April 13th, a deposit of an IRS tax refund of $4,143.72,
12 correct?
13 A. Yes, sir.
14 Q. And that deposit was April 13th?
11:47 15 A. Yes, sir.
16 Q. Just four days after your amended return was filed,
17 correct?
18 A. Yes, sir.
19 Q. Your amended return was April 9th?
11:47 20 A. Yes, April 9th.
21 Q. But nothing was mentioned on that return?
22 A. No. I know I called my -- I called Claude when I got it.
23 And by Claude, I meant Mr. Lightfoot. I'm sorry.
24 Q. You discussed that with Mr. Lightfoot?
11:47 25 A. I did.

11:48 1 Q. Did he tell you not to put it on the return?
2 A. No, no. I discussed that I received the refund, what
3 should I do with it.
4 Q. What did Mr. Lightfoot tell you?
11:48 5 A. Said, "If the trustee didn't put a lien on it, put it in
6 your account; but they may -- they may ask for it back."
7 Q. But, Judge Porteous, that schedule was signed under penalty
8 of perjury.
9 A. It was omitted. I don't know how it got omitted. There
11:48 10 was no intentional act to try and defraud somebody. It just
11 got omitted. I don't know why.
12 We had been fighting this, trying not to go into
13 bankruptcy for a long time. And I don't know. It just didn't
14 appear on the schedule.
11:48 15 Q. Okay.
16 JUDGE BENAVIDES: How many days before the schedule
17 was made that omitted that was the request for refund made of
18 the filing?
19 MR. FINDER: About five days, five days from the
11:49 20 original petition, your Honor. The schedule was on the amended
21 petition and --
22 JUDGE BENAVIDES: Well, I'm trying to get the
23 difference in date between the date he signs the statement
24 saying he has no refund coming --
11:49 25 MR. FINDER: Right.

01:41 1 Amato or Creely, cash gifts, in any of these financial
2 disclosures?
3 A. No.
4 Q. But you certified every one as being true and correct?
01:41 5 A. Correct.
6 Q. And there was an omission, then, correct?
7 A. Not that I'm aware of.
8 Q. Well, if someone gave you money during those years and it
9 was more than $250, wouldn't that be reportable?
01:41 10 A. I do not recall receiving any cash from them during that --
11 Q. Do you recall in 1999, in the summer, May, June, receiving
12 $2,000 for them?
13 A. I've read Mr. Amato's grand jury testimony. It says we
14 were fishing and I made some representation that I was having
01:42 15 difficulties and that they loaned me some money or gave me some
16 money.
17 Q. You don't -- you're not denying it; you just don't remember
18 it?
19 A. I just don't have any recollection of it, but that would
01:42 20 have fallen in the category of a loan from a friend. That's
21 all.
22 Q. Has the loan ever been paid back --
23 A. No.
24 Q. -- if you got it?
01:42 25 A. No.

Attachment Six

ing of a statutory term unless Congress explicitly rejects that meaning. *See Taylor v. United States*, 495 U.S. 575, 592, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

Second, the plain language of the phrase "crimes against the person" connotes conduct that is *intentionally* directed against another person—which would exclude reckless conduct with the likely effect of harming others. Here again, the definition of "crime of violence" in § 16(b), as construed in *Chapa-Garza*, provides a more suitable reference point than the Guidelines definition because § 16(b) includes only those offenses that are likely to involve the intentional use of force.

In sum, we conclude that the term "crimes against the person" should be construed in accordance with its accepted common law meaning to include only those offenses that, by their nature, are likely to involve the intentional use or threat of physical force against another person. Under this definition, Trejo's misdemeanor convictions for driving under the influence are not "crimes against the person." *See Chapa-Garza*, 243 F.3d at 927-28; *cf. Solem v. Helm*, 463 U.S. 277, 280, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (noting that, for purposes of Eighth Amendment proportionality review, a "third-offense driving while intoxicated" is not "a crime against a person"). Consequently, Trejo is not eligible for an enhanced sentence of supervised release under § 1326(b)(1).

III

Because Trejo's three misdemeanor convictions for driving under the influence were not "crimes against the person" under § 1326(b)(1), the district court erred in sentencing Trejo to a term of supervised release in excess of the maximum term authorized for a conviction under § 1326(a). Accordingly, we VACATE Trejo's three-year term of supervised release and remand the case to the district court for resentencing in a manner not inconsistent with this opinion.

VACATED and REMANDED.

In the Matter of: LILJEBERG ENTERPRISES, INC., Debtor.

Lifemark Hospitals, Inc., Appellant-Cross-Appellee,

v.

Liljeberg Enterprises, Inc., Appellee-Cross-Appellant,

Liljeberg Enterprises, Inc., Appellee-Cross-Appellant,

v.

Lifemark Hospitals, Inc., Appellant-Cross-Appellee,

Lifemark Hospitals, Inc., Appellant-Cross-Appellee,

v.

St. Jude Hospital of Kenner, Louisiana, L.L.C., Appellee-Cross-Appellant,

Liljeberg Enterprises, Inc., Appellee-Cross-Appellant,

v.

Lifemark Hospitals of Louisiana, Inc.; Lifemark Hospitals, Inc.; American Medical International; Tenent Healthcare Corporation, Appellants-Cross-Appellees.

No. 00-30645.

United States Court of Appeals, Fifth Circuit.

Aug. 28, 2002.

In consolidated proceedings involving Chapter 11 debtor-company which had ex-

HP Exhibit 63

clusive right to provide pharmaceutical services at hospital, orders were entered by the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., J., overturning judicial sale of hospital, reinstating various agreements which defined financing and lease of hospital, and denying holder of hospital mortgage a claim for deficiency judgment. Damages award was entered in debtor's favor on its circumvention claim, and order was entered conditionally granting debtor's motion to assume pharmacy agreement. Appeal was taken. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) mortgage lender that provided financing for construction of hospital did not, by virtue of mortgagor's pledge of its own collateral mortgage note, undertake fiduciary duties as pledgee; (2) mortgage lender's exercise of its contractual rights did not support claim of bad faith or self-dealing, such as might allow district court to upset judicially confirmed sale; (3) pharmacy agreement was "executory" contract; (4) cross-default provision was enforceable, such that an incurable breach of lease agreement by affiliate precluded debtor from assuming pharmacy agreement; and (5) damages award was supported by evidence in part.

Affirmed in part, reversed in part, and remanded in part.

1. Federal Courts ⚷776, 850.1

Court of Appeals reviews *de novo* district court's legal conclusions but reviews its findings of fact for clear error.

2. Federal Courts ⚷776, 850.1

As to mixed questions of law and fact, Court of Appeals reviews district court's fact findings for clear error and its legal conclusions and application of law to fact *de novo*.

3. Mortgages ⚷211, 529(3)

Under Louisiana law, mortgage lender that provided $40 million in financing for construction of hospital did not, by virtue of mortgagor's pledge to lender of its own collateral mortgage note, undertake any fiduciary duties as pledgee to timely reinscribe collateral mortgage or buy out intervening creditor's lien, and its failure to do so did not provide basis for setting aside confirmed judicial sale to lender after intervening creditor foreclosed.

4. Federal Courts ⚷382.1, 383

In diversity case, federal court has to apply substantive law of state in which it sits as it believes that highest court of that state would do, looking to decisions of intermediate state courts for guidance where state's highest court has not spoken clearly to issue.

5. Pledges ⚷28

Under Louisiana law, trust relationship exists between pledgor and pledgee, which carries with it attendant duties to protect obligation and collateral.

6. Pledges ⚷1

Under Louisiana law, "pledge" is accessory contract by which debtor gives something to creditor as security for his debt.

See publication Words and Phrases for other judicial constructions and definitions.

7. Mortgages ⚷199(2)

Under Louisiana law, where collateral assignment of rents specifically provided that mortgage lender would not be obligated to perform or to discharge any obligation, duty or liability under lease, its holding of right to basic rent under collateral assignment of rents did not subject it to any duty to preserve lease covering these assigned rents.

8. **Mortgages** ⚷529(3)

Under Louisiana law, mortgage lender's exercise of its contractual rights, in not reinscribing its collateral mortgage and thereby allowing another mortgagee to gain priority, and in acquiring property on credit bid submitted in connection with intervening mortgagee's foreclosure sale, did not support claim of bad faith or self-dealing, such as might permit district court to upset judicially confirmed sale of property.

9. **Judicial Sales** ⚷34.1

Under Louisiana jurisprudence, judicial sale, once completed, cannot generally be undone.

10. **Bankruptcy** ⚷3106

Pharmacy agreement pursuant to which performance was still owing on both sides at time of debtor's Chapter 11 filing was "executory" contract, which debtor could assume, even after debtor's postpetition default; contract did not provide for automatic termination on default, but required notice from nonbreaching party, and notice was never given. Bankr.Code, 11 U.S.C.A. § 365.

See publication Words and Phrases for other judicial constructions and definitions.

11. **Bankruptcy** ⚷3106

To determine whether debtor's contract is "executory," for purpose of assumption or rejection, court must inquire whether performance remains due to some extent on both sides, such that failure of either party to complete performance would constitute a material breach and excuse other party from performing. Bankr.Code, 11 U.S.C.A. § 365.

12. **Contracts** ⚷217

Under Louisiana law, contract will not terminate, even though it explicitly provides for automatic termination, unless non-breaching party seeks judicial dissolution of contract or at least provides notice of intent to terminate contract for default.

13. **Bankruptcy** ⚷3110.1

Act of assuming contract must be grounded, at least in part, on conclusion that maintenance of contract is more beneficial to estate than doing without other party's services. Bankr.Code, 11 U.S.C.A. § 365.

14. **Bankruptcy** ⚷3114

Bankruptcy statute which conditions debtor's right to assume executory contract on his either curing, or providing adequate assurance of cure, of any defaults and providing assurance of future performance essentially allows debtor to continue in beneficial contract, provided that the other party is made whole at time of debtor's assumption of contract. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

15. **Bankruptcy** ⚷3114

Bankruptcy statute which conditions debtor's right to assume executory contract on his either curing, or providing adequate assurance of cure, of any defaults and providing assurance of future performance is meant to provide means whereby debtor can force other party to contract to continue to perform under contract if (1) debtor can provide adequate assurance that he, too, will continue to perform, and if (2) the debtor can cure any defaults in his past performance. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

16. **Bankruptcy** ⚷3110.1

Debtor must take full account of cost to cure all existing defaults owed to non-debtor party when assessing, for assumption or rejection purposes, whether executory contract is beneficial to estate. Bankr.Code, 11 U.S.C.A. § 365.

17. Bankruptcy ⚷3114

To determine if debtor-in-possession has provided "adequate assurance" of future performance, as prerequisite to assuming executory contract, court must look to factual conditions, including whether debtor's financial data indicates its ability to generate an income stream sufficient to meet its obligations, general economic outlook in debtor's industry, and presence of guarantee. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

18. Bankruptcy ⚷3787

To the extent that determination of whether debtor provided "adequate assurance" of future performance of contract to be assumed turned upon contested factual disputes, appellate court's review was for clear error only. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

19. Federal Courts ⚷776

District court's interpretation of contract is reviewed *de novo*, and contract and record are reviewed independently and under same standards guiding district court.

20. Federal Courts ⚷776, 874

If interpretation of contract turns on consideration of extrinsic evidence, such as evidence of intent of parties, standard of review is "clear error," but if intent is determined solely from language of contract, then contractual interpretation is pure question of law, and threshold question as to whether extrinsic evidence should be considered in determining intent of parties is itself a question of law and thus reviewable *de novo*.

21. Federal Courts ⚷412.1

In diversity case, Court of Appeals would look to state law for applicable standard of contract interpretation.

22. Contracts ⚷1, 152

Under Louisiana law, contract is the law between parties, and is read for its plain meaning.

23. Contracts ⚷152
Evidence ⚷397(1), 448

Under Louisiana law, where words of contract are clear and explicit and lead to no absurd consequences, contract's meaning and intent of its parties must be sought within four corners of document and cannot be explained or contradicted by extrinsic evidence

24. Contracts ⚷147(2), 176(2)

Under Louisiana law, if court finds contract to be unambiguous, it may construe parties' intent from face of document, without considering extrinsic evidence, and enter judgment as matter of law.

25. Contracts ⚷143(2)

Under Louisiana law, contract is ambiguous when uncertain as to parties' intentions and susceptible to more than one reasonable meaning under the circumstances and after applying established rules of construction.

26. Contracts ⚷143(1, 2, 3)

Under Louisiana law, when words of contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of parties' intent; party may not create an ambiguity where none exists, nor may courts create new contractual obligations where language of written document clearly expresses their intent.

27. Contracts ⚷155

Under Louisiana law, rule of contract construction, that doubts or ambiguities as to meaning of contract must, if not otherwise resolvable, be eliminated by interpreting contract against the party who

prepared it, applies only when there are two equally reasonable interpretations of contractual provision in question.

28. **Contracts** ⟹155

Under Louisiana law, rule of contract construction, that doubts or ambiguities as to meaning of contract must, if not otherwise resolvable, be eliminated by interpreting contract against the party who prepared it, is primarily applied to standard-form or adhesionary contracts.

29. **Contracts** ⟹155

While jurisprudence of Louisiana has established a rule of contractual interpretation which construes ambiguity against party who drafted document in question, neither party is deemed to be the scrivener where initial draft is modified and remodified in series of exchanges between parties to produce an execution draft reflecting give and take between obligor and obligee.

30. **Bankruptcy** ⟹3101, 3114

Cross-default provision in debtor's executory contract to operate pharmacy at hospital, providing that if debtor or any of the other party's corporate affiliates were in default of their obligations under lease or other contract between parties, then this would be regarded as a breach of pharmacy agreement by debtor, could not be interpreted as written, so as to subject debtor to liability for defaults by other party's corporate affiliates; rather, to avoid absurd result, provision had to be interpreted as referring to defaults by debtor's corporate affiliates, so that breach of lease by debtor's affiliate, when it allowed judicial mortgage to be entered against hospital property and mortgagee to foreclose thereon, was incurable default under pharmacy agreement, that precluded debtor's assumption thereof. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

31. **Reformation of Instruments** ⟹1

Under Louisiana law, reformation is equitable remedy which may be used when contract fails to express parties' true intent, either because of mutual mistake or fraud.

32. **Reformation of Instruments** ⟹19(1), 45(1)

To establish the appropriateness of reformation, party that seeks to reform contract must show, by clear and convincing evidence, that agreement, as written, contains mutual mistake and does not comport with parties' original intent.

33. **Contracts** ⟹143.5

Under Louisiana law, every provision of contract must be interpreted in light of contract's other provisions in order to give each provision the meaning suggested by contract as a whole

34. **Contracts** ⟹143.5, 153

Under Louisiana law, contract provisions susceptible to different meanings should be interpreted so as not to neutralize or ignore any provision or treat any provision as mere surplusage and so as to preserve validity of contract.

35. **Contracts** ⟹143(1), 170(1)

Under Louisiana law, doubtful provision in contract must be interpreted in light of the nature of contract, equity, usages, conduct of parties before and after formation of contract, and of other contracts of like nature between same parties.

36. **Bankruptcy** ⟹3101, 3114

Where lease and collateral mortgage to party that provided $40 million of financing for construction of hospital were interrelated with pharmacy agreement pursuant to which debtor ran pharmacy service out of hospital, such that there would have been no pharmacy agreement without lease or loan secured by collateral

mortgage, cross-default provision was enforceable in bankruptcy, such that an incurable breach of lease agreement by debtor's affiliate precluded debtor from assuming pharmacy agreement Bankr. Code, 11 U.S.C.A. § 365(b)(1).

37. Bankruptcy ⇐3101

Although cross-default provisions are inherently suspect, they are not per se invalid in bankruptcy context, and court should carefully scrutinize facts and circumstances surrounding particular transaction to determine whether enforcement of provision would contravene an overriding federal bankruptcy policy and thus impermissibly hamper debtor's reorganization.

38. Bankruptcy ⇐3101, 3114

Federal bankruptcy policy is offended when non-debtor seeks enforcement of cross-default provision in effort to extract priority payments under unrelated agreement, and creditor cannot use protections afforded by bankruptcy statute which requires curing of defaults and adequate assurances of future payment under contract to be assumed in order to maximize its returns by treating unrelated unsecured debt as de facto priority obligation. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

39. Bankruptcy ⇐3114

Where non-debtor party would have been willing, absent existence of the cross-defaulted agreement, to enter into contract that debtor wishes to assume, then cross-default provision should not be enforced, so as to require debtor, as prerequisite to assuming the one contract, to first cure its default under cross-defaulted agreement; however, enforcement of cross-default provision should not be refused where to do so would thwart non-debtor party's bargain. Bankr.Code, 11 U.S.C.A. § 365(b)(1).

40. Bankruptcy ⇐3101

Mere fact that legally separate entities are parties to various agreements does not of itself preclude enforcement of cross-default provision in bankruptcy, and where documents are contemporaneously executed as necessary elements of same transaction, such that there would have been no transaction without each of the other agreements, fact that nominally distinct parties executed these agreements will not preclude enforcement of cross-default provision in favor of party whose economic interests are identical to those of entity that is party to document containing cross-default provision. Bankr.Code, 11 U.S.C.A. § 365.

41. Federal Courts ⇐871

In absence of error of law, Court of Appeals reviews district court's award of damages for clear error only.

42. Federal Courts ⇐871

If award of damages is plausible in light of record, reviewing court should not reverse the award, even if it might have come to different conclusion.

43. Damages ⇐184

While district court may not determine damages by speculation or guess, it will be enough if evidence shows extent of damages as matter of just and reasonable inference, though result may be only approximate.

44. Damages ⇐184

Under Louisiana law, actual damages must be proven; they cannot be speculative or conjectural.

45. Damages ⇐184

Under Louisiana law, while breaching party should not escape liability because of difficulty in finding perfect measure of damages, evidence must furnish data for a reasonably accurate estimate, such that it

appears reasonably evident that amount allowed as contract damages rests upon some certain basis.

46. Damages ⇐190

Under Louisiana law of damages, lost profits must be proven with reasonable certainty and cannot be based on conjecture and speculation.

47. Damages ⇐118

District court's interpretation of the phrase "fee per procedure," as used in section of pharmacy agreement entitling company that provided pharmacy service at hospital to certain prescribed fees on "per procedure" basis, as entitling company to new fee each time a dose of same drug or drug combination was administered from single vial of medicine, was not clearly erroneous but was sufficiently supported by evidence presented in support of company's damages claim.

48. Health ⇐178

Actions on part of hospital's materials management department, in ordering and distributing to doctors and nurses in ancillary departments certain legend drugs for administration to patients on doctors' orders, was a "distribution" and not "dispensing" of such drugs, and did not have to be accomplished under supervision of pharmacist under Louisiana law that was in effect at time; accordingly, hospital's contested practice of ordering and distributing certain legend drugs and kits containing legend drugs did not violate Louisiana pharmacy laws, and would not support cause of action by pharmacy against hospital for circumventing pharmacy's right to fee.

49. Damages ⇐190

Damages award upon pharmacy's circumvention claim against hospital where it had exclusive right to provide pharmaceutical services was not erroneous, as product of mere speculation and conjecture, but was sufficiently supported by evidence presented, including results of audit of patient charts and competing estimates of hospital's and of pharmacy's experts.

50. Health ⇐942

Clause in pharmacy agreement, which provided that company that had exclusive right to provide pharmacy services at hospital would not be entitled to compensation for any drugs and supplies utilized by ancillary departments of hospital in connection with patient-related procedures in which cost of drug was included in charge for the procedure, relieved hospital of any obligation to pay for company's lost profits in connection with contrast media that hospital obtained from another source and used in radiology procedures at hospital, where cost of this contrast media was not separately billed; operation of this provision did not turn on whether charge for drug could be identified, but on whether such an "identifiable" charge was included in charge for patient-related procedure in which drug was used.

51. Health ⇐942

Clause in pharmacy agreement, which generally limited amount of reimbursement which company providing pharmaceutical services at hospital could seek based on drug prices set forth in other party's prime vendor contracts, did not give other party right to pay company for name-brand drugs that it dispensed at hospital, and that it had earlier acquired at or below prices for these same name-brand drugs in prime vendor contracts, based on lower prices at which generic drugs might have been acquired; nothing in pharmacy agreement authorized other party to pay company for generic drugs when company was dispensing physician-requested name-brand drugs and when other party had

never told company to dispense only generics.

52. Health ⇐942

Minimum fee increase provision in pharmacy agreement, which provided for adjustment in minimum fee that was paid to company providing pharmacy services at hospital based on increase/decrease in certain indicators "in the immediately preceding years," did not permit increase in minimum fee based on isolated increase in indicators in a single year, where that increase was not enough to offset decreases from prior years; natural sense of "immediately preceding years" conveys last two or three years, and district court erred in interpreting the plural word "years" as if it were singular.

53. Health ⇐942

Company that provided pharmacy services at hospital was liable to hospital for any overcharges, notwithstanding alleged lack of damages to hospital, which purportedly charged its patients three times the overcharge price and thus actually profited from overcharges by passing them on to patients.

54. Removal of Cases ⇐119

Corporate entity that was never joined as defendant nor served with process could not be subject of adverse judgment, in action that was removed from state court and consolidated with three other proceedings.

55. Judgment ⇐668(3), 707

One is not bound by judgment in personam resulting from litigation in which he is not designated as party or to which he has not been made a party by service of process.

56. Costs ⇐194.34

Chapter 11 debtor and affiliated entity were not entitled to award of attorney fees, pursuant to terms either of lease or Louisiana statute that provides for fee award when transaction is rescinded based upon fraud, once Court of Appeals reversed district court's judgment overturning judicial sale and reinstating lease.

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Sidney Katherine Powell (argued), Powell & Reggio, Dallas, TX, Deborah Pearce Reggio, Powell & Reggio, New Orleans, LA, for Appellees-Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before PATRICK E. HIGGINBOTHAM, DeMOSS and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This appeal brings to us three of four consolidated actions arising from a failed relationship formed to build and manage a hospital and medical office building in Kenner, Louisiana, the latest round in the parties' protracted litigation.

Following a bench trial of the consolidated cases, the district court overturned a judicial sale of the hospital, reinstated various contracts which defined the financing and lease of the hospital, and denied the holder of the hospital mortgage a claim for a deficiency judgment. The court also ruled that, under a Clinical Pharmacy Management Agreement governing the operation of the hospital pharmacy and the flow of drugs to the hospital, Liljeberg

Enterprises, Inc., the hospital pharmacy operator and principal supplier of drugs to the hospital, was due almost $12.5 million and the hospital operators and principal purchasers of the drugs for the hospital were owed $741,879.

In Chapter 11 proceedings, the district court conditionally granted the debtor Liljeberg Enterprises, Inc.'s request to assume the Clinical Pharmacy Management Agreement as an executory contract pursuant to 11 U.S.C. § 365.[1]

We reverse the district court's judgment setting aside the judicial foreclosure of the hospital and declining to award the deficiency due on the mortgage debt, we reverse the district court's order allowing the debtor in the Chapter 11 proceedings to assume the pharmacy agreement, and finally we affirm in part and reverse in part the various awards made under the pharmacy agreement.

I.

First, the dramatis personae. The four consolidated actions involve Lifemark Hospitals of Louisiana, Inc., Lifemark Hospitals, Inc., American Medical International, and Tenet Healthcare Corporation on one side,[2] and Liljeberg Enterprises, Inc. ("Liljeberg Enterprises") and St. Jude Hospital of Kenner, La., L.L.C. ("St.Jude") (collectively the "Liljebergs") on the other.

Liljeberg Enterprises is a corporation whose sole shareholders are John Liljeberg and his brother Robert Liljeberg, both licensed pharmacists. The Liljebergs, through Liljeberg Enterprises, formed a series of corporations and a partnership to own or operate a medical complex consisting of a hospital, a hospital pharmacy, and a medical office building. St. Jude, a wholly-owned subsidiary of Liljeberg Enterprises, owned the St. Jude Hospital ("hospital"), which is now known as Kenner Regional Medical Center. St. Jude Medical Office Building, Ltd. Partnership ("St. Jude Limited Partnership"), of which St. Jude was the general partner, owned the adjacent medical office building. Funding for that building came from Travelers Insurance Company, a loan of $25 million on October 10, 1985, secured by a mortgage on the medical office building and an assignment to Travelers of rents to be paid on leased spaces in the building.

Lifemark Hospitals, Inc. was a national hospital management company that provided financing to St. Jude to build the hospital. Lifemark Hospitals of Louisiana, Inc., a wholly owned subsidiary of Lifemark Hospitals, Inc., entered into an agreement with St. Jude to lease and operate the hospital. American Medical acquired Lifemark Hospitals, Inc. in 1984, and Tenet became the successor to American Medical in 1995.

II.

On August 26, 1981, the Liljebergs obtained a "certificate of need" under Section 1122 of the Social Security Act to build and operate a 300-bed acute care facility in the New Orleans area.[3] This Section

1. Neither party appeals from the district court's judgment in Cause No. 95-2922, denying Liljeberg Enterprises, Inc.'s request for injunctive relief. The district court consolidated Cause No 93-1794 early on with Cause Nos. 93-4249, 94-3993, and 95-2922 for all purposes, but, for ease of reference, we follow the district court and the parties in referring to the various parts of the district court's judgment in the case by the original causes of action numbers.

2. We refer to these parties collectively or individually as "Lifemark" except where further distinction is relevant

3. The 1122 certificate allowed certain capital costs to be passed through to the government.

1122 certificate was the only one available in the New Orleans area and the last one to be granted in Louisiana. Lacking the money to build a hospital, the Liljebergs immediately solicited participation by many companies, including Health Services Acquisition Corporation. The Liljebergs' negotiations with Health Services extended over several months before disintegrating into heated litigation.[4] The Liljebergs began their discussions with Lifemark in the latter part of 1981, under the shadow of the approaching deadline under the Section 1122 certificate of need.

In their negotiations with Lifemark, John Liljeberg was assisted by a team of two attorneys, one of whom was a CPA, an economist, and two pharmacy consultants. John Liljeberg insisted from the outset that, as part of any deal, the Liljebergs had to be given a contract to provide pharmaceutical services to the hospital. On December 21, 1982, the parties signed a letter of intent setting forth the principal terms of their agreement.

The final documents were executed in early 1983, including: (1) a loan agreement, wherein Lifemark Hospitals, Inc. agreed to provide financing of over $44 million to St. Jude for construction of the hospital; (2) a promissory note signed by St. Jude and made payable to Lifemark Hospitals, Inc.; (3) a collateral mortgage, a collateral mortgage note, and a pledge of the collateral mortgage note, all signed by St. Jude to secure the note to Lifemark Hospitals, Inc.; (4) a lease agreement wherein Lifemark Hospitals of Louisiana, Inc. agreed to lease and operate the hospital from St. Jude; and (5) the Clinical Pharmacy Management Agreement ("pharmacy agreement"), signed by Liljeberg Enterprises and Lifemark Hospitals of Louisiana, Inc., wherein Liljeberg Enterprises agreed to provide pharmaceutical services to the hospital. Additionally, the Liljebergs received a cash payment of $2.5 million as called for by the letter of intent.

These agreements were intertwined in at least two ways: (1) St. Jude's note payments and Lifemark's lease payments were offsetting transactions so that their monthly payment was only a bookkeeping entry;[5] and (2) the pharmacy agreement contained a cross-default provision.

A dispute arose between Lifemark and St. Jude over the financing and project management involved in the construction of the hospital. That dispute was settled by written agreement in 1991 after arbitration. As part of the settlement, St. Jude executed a renewal note, renewing and extending the original note. Like the original note, the renewal note was secured by the original collateral mortgage, collateral mortgage note, and pledge of collateral mortgage note. To further secure the renewal note, St. Jude executed a "Collateral Assignment of Basic Rent" ("collateral assignment of rents"), which was recorded, providing Lifemark Hospitals, Inc. a secured interest in rents in the event of a future default by St. Jude.

The hospital, hospital pharmacy, and medical office building became operational in 1985. By March of 1990, St. Jude Limited Partnership had defaulted on its Travelers loan and, in June 1990, Travelers sued St. Jude Limited Partnership and other defendants. The suit, seeking sei-

4. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

5. Under both its original note and a later renewal note, St. Jude had the right to offset its right to receive basic rent against St. Jude's note obligations. St. Jude exercised this option at all relevant times through October 1, 1994.

zure and sale by judicial process of the medical office building, was successful, and the building was sold at public auction on October 18, 1991 to Travelers, the sole bidder.

More protracted litigation ensued, in the course of which a panel of this court commented that the conduct of the Liljebergs constituted "as egregious and unconscionable of bad faith contractual dealings as the members of this panel can recall having encountered."[6] Travelers obtained an amended judgment in December 1992 awarding Travelers both unpaid rents and damages from St. Jude Limited Partnership based on, *inter alia*, a jury verdict finding waste committed by the Liljebergs with respect to the collateral in the medical office building securing the repayment of Travelers's loan to St. Jude Limited Partnership for the construction of the building. When efforts to collect the amended judgment against the partnership failed, Travelers filed a separate action against St. Jude, the general partner of St. Jude Limited Partnership, in which Travelers obtained a summary judgment on July 30, 1993, which this Court affirmed.[7]

On August 12, 1993, Travelers secured a lien on the hospital by filing its $7.8 million judgment against St. Jude. The Travelers lien primed Lifemark's collateral mortgage because Lifemark had not at that time reinscribed its lien.[8] Lifemark reinscribed its collateral mortgage on June 29, 1994.

Within the same time frame, on January 27, 1993, within one month after Travelers obtained its $7.8 million judgment, Liljeberg Enterprises filed for bankruptcy protection. In the course of these bankruptcy proceedings, Liljeberg Enterprises as the debtor in possession, sought the federal district court's permission to assume, that is, continue to operate under, the pharmacy agreement, pursuant to 11 U.S.C. §§ 365 and 1107. Shortly thereafter, on August 11, 1993, within one month after Travelers sought to collect its judgment against St. Jude, St. Jude filed for Chapter 11 bankruptcy protection. The bankruptcy court dismissed that action one year later, finding that St. Jude had filed in bad faith.

On August 30, 1994, Travelers began the process of foreclosing on the hospital. Once again, St. Jude asked the district court to vacate Travelers's writ of execution and to find Travelers's lien inferior to Lifemark's lien. At St. Jude's request, Lifemark filed a memorandum setting forth the facts concerning the ranking of the liens. The court denied St. Jude's motions and allowed the foreclosure sale to proceed.

Prior to the sale, Lifemark Hospitals, Inc. filed a motion in the federal district court before Judge Henry A. Mentz, Jr. seeking permission to bid credits against the value of its collateral mortgage instead of cash at the judicial sale, subject to any obligation to pay the amount of cash neces-

6. *Travelers Ins. Co. v. St Jude Hosp.*, No. 92-9579, 21 F.3d 1107, at 2 (5th Cir Apr 20, 1994) (unpublished per curiam).

7. *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc*, 37 F.3d 193 (5th Cir 1994).

8. Lifemark's collateral mortgage is dated March 15, 1983. In order to preserve the rank of the collateral mortgage, it had to be reinscribed by March 15, 1993. *See* LA CIVIL CODE art. 3328, *accord id.* art. 3369 (repealed by 1992 La Acts 1132). Nearly five months later Travelers filed its judgment lien One effect of Lifemark's failure to reinscribe was that it was not able to foreclose on the hospital following the filing of the Travelers lien without paying the Travelers debt. Lifemark, in fact, ultimately sued its former attorneys for legal malpractice on the basis of this failure to reinscribe.

sary to satisfy the superior judicial mortgage of Travelers. The court granted Lifemark Hospitals, Inc.'s motion.

The United States Marshal's seizure and judicial sale of the hospital occurred on October 28, 1994. Lifemark Hospitals of Louisiana, Inc. was the sole bidder and purchased the hospital for $26 million, or two-thirds of the $37.5 million appraised value as the minimum price prescribed by Louisiana statute. The purchase price was distributed as follows: (1) $7,786,083.33 went to Travelers to satisfy its lien; (2) $18,165,483.74 went to Lifemark Hospitals, Inc. to reduce the deficiency owed on St. Jude's note to Lifemark Hospitals, Inc.; and (3) the balance was applied to costs of the sale. The district court subsequently confirmed the sale. St. Jude appealed the orders of the district court, and this court affirmed, dismissing as moot St. Jude's challenge to the confirmed judicial sale.[9]

As a result, Lifemark became the owner of the hospital, and Lifemark's lease with St. Jude was extinguished as a matter of law under the doctrine of confusion. At the same time, Lifemark accelerated the debt owed by St. Jude under the renewal note, and Lifemark sought to terminate the pharmacy agreement based upon the cross-default provision in that agreement.

III.

Ultimately four lawsuits were consolidated and tried to the bench in the United States District Court for the Eastern District of Louisiana in June and July 1997. The district court entered findings of fact and conclusions of law and a partial judgment on April 26, 2000, later amending the judgment by adding a certification under Federal Rule of Civil Procedure 54(b) on August 1, 2000, three years after the case was tried. The amended judgment included a Rule 54(b) certification for immediate appeal of "all claims other than Liljeberg Enterprises, Inc.'s claim in Cause No. 93-4249 for damages accruing from the commencement date of the trial and continuing through the date of" the amended judgment.

In the first lawsuit, Cause No. 94-3993, Lifemark sued St. Jude to collect the unpaid balance of a promissory note evidencing the debt incurred in building the hospital. St. Jude counterclaimed for damages asserting a variety of lender liability claims. The district court awarded no damages to Lifemark or St. Jude. Rather it set out to undo the transaction and overturned the 1994 confirmed judicial sale of the hospital. This upset was made contingent upon either St. Jude or its parent company Liljeberg Enterprises reimbursing Lifemark the amount that Lifemark had paid to Travelers, the holder of the superior lien and judicial mortgage. The district court also reinstated all of the related commercial instruments as if the judicial sale had never taken place and denied Lifemark's deficiency claim.

In the second suit, Cause No. 93-1794, Liljeberg Enterprises, as the Chapter 11 debtor in possession, sought permission from the bankruptcy court to assume the pharmacy agreement between Lifemark and Liljeberg Enterprises as an executory contract pursuant to Bankruptcy Code section 365. On October 19, 1993, the district court withdrew the reference to bankruptcy court of LEI's motion to assume. The district court, over Lifemark's objection, granted the motion to assume the pharmacy contract.

9. *See Travelers Ins. Co. v. St Jude Hosp of Kenner, La., Inc.*, Nos 94-30636, 94-30639 & 94-30665, 56 F 3d 1386 (5th Cir. May 24, 1995) (unpublished per curiam).

The third suit, Cause No. 93–4249, was filed in Louisiana state court but removed to the federal district court. Here Liljeberg Enterprises claims that Lifemark, acting in bad faith, breached and wrongfully "circumvented" the pharmacy agreement. Lifemark denied the allegations and counterclaimed for overcharges and breaches of the pharmacy agreement.[10] The district court found that Lifemark owed Liljeberg Enterprises $12,432,905.92 for breach of payment due under the pharmacy agreement and that Liljeberg Enterprises owed Lifemark $741,879 in overcharges.

Finally, in the fourth suit, Cause No. 95–2922, Liljeberg Enterprises sought an injunction to prohibit Lifemark from unlawfully dispensing legend drugs at the hospital.[11] The district court denied Liljeberg Enterprises's request.

IV.

Lifemark here attacks judgments in Cause Nos. 94–3993, 93–1794, and 93–4249 on many grounds. In Cause No. 94–3993, Lifemark argues that the district court erred by rescinding the judicial sale of the hospital when this court of appeals decided in prior litigation that St. Jude's challenge to the judicially confirmed sale was moot; that the judgments are flawed by the following erroneous rulings: that Lifemark Hospitals, Inc. had a duty to St. Jude to reinscribe the collateral mortgage, and that Lifemark Hospitals, Inc. had a duty to terminate the Travelers foreclosure; that Lifemark Hospitals, Inc. had a duty to prevent Lifemark Hospitals of Louisiana, Inc. from purchasing the hospital at the foreclosure sale; that Lifemark acted in bad faith or colluded to chill the bidding at the foreclosure sale which proximately caused St. Jude's loss; and that Lifemark Hospitals of Louisiana, Inc. did not properly purchase the hospital at two-thirds of its appraised value. Lifemark also argues that the district court erred in concluding that Lifemark is not entitled to recover on its deficiency claim under the renewal promissory note.

In Cause No. 93–1794, Lifemark argues that the district court erred in allowing Liljeberg Enterprises to assume the pharmacy agreement on several grounds. First, it erred in its ruling that the pharmacy agreement did not terminate by its own terms prior to the district court's order allowing assumption. Second, by failing to properly interpret sections 5.1(e)

10. Lifemark filed many of its breach of contract claims as part of its counterclaim in the bankruptcy cause of action, Cause No. 93–1794. The district court consolidated Cause No. 93–1794 with Cause No. 93–4249 early in the course of this litigation, and, as a result, like the district court's opinion and judgment, this court's opinion treats Lifemark's claims related to LEI's breach of the pharmacy agreement as though they were filed in Cause No. 93–4249

11. Legend drugs are prescription drugs that bear a legend on the label warning that the drug may not be dispensed without a prescription from a duly-authorized practitioner. *See* LA.REV STAT § 37:1164(45) (" 'Prescription drug' or 'legend drug' means a drug that is required by any applicable federal or state law or regulation to be dispensed or delivered pursuant only to a prescription drug order, or is restricted to use by practitioners only."); *id.* § 40:1237(3) (" 'Legend drug' means any drug or drug product bearing on the label of the manufacturer or distributor, as required by the Federal Food and Drug Administration, the statement 'Caution: Federal law prohibits dispensing without prescription ' "); LA ADMIN CODE tit. 46, pt. LIII, § 3501(A) ("Legend Drugs. A legend drug is a medication which must only be dispensed by a pharmacist on the order of a licensed practitioner and shall bear the following notation on the label of a commercial container: 'caution: federal law prohibits dispensing without a prescription' (Ref. R.S. 40:1237, et seq [1982] and U S.C. 21·353(b) [1987]) ")

and 5.1(b) of the pharmacy agreement and section 11.1 of the lease and the fourth and fifth covenants of the mortgage.

In Cause No. 93–4249, Lifemark argues that the district court erred in its interpretation of sections 2.4, 2.6, 4.1, and Exhibit B of the pharmacy agreement and in denying Lifemark's motion to reopen the evidence. Further, Lifemark argues that the district court erred: in awarding damages based upon a procedurally flawed audit; in awarding duplicative damages; in allowing Liljeberg Enterprises to recover costs greater than those allowed by the hospital's prime vendor contract under section 2.4 of the pharmacy agreement; in allowing Liljeberg Enterprises to recover based on unexplained bills; in failing to award damages to Lifemark for Liljeberg Enterprises's overbilling; and in its interpretation of the parties' stipulation as to actual acquisition costs payable under an earlier state court judgment.

Finally, Lifemark argues that the district court erred in awarding any relief against Tenet, a non-party.

On its cross-appeal, in Cause No. 94–3993, Liljeberg Enterprises argues that the district court erred in requiring St. Jude and Liljeberg Enterprises to reimburse Lifemark the $7,834,516.26 it paid to Travelers for the allegedly collusive purchase of the hospital. The Liljebergs also contend on their cross-appeal in Cause Nos. 94–3993, 93–1794, and 93–4249 that Liljeberg Enterprises and St. Jude are entitled to attorneys' fees by the parties' lease agreement and under Louisiana Civil Code articles 1997 and 1958.

V. Cause No. 94–3993

The district court in Cause No. 94–3993 overturned the confirmed 1994 judicial sale of the hospital contingent upon either St. Jude or Liljeberg Enterprises reimbursing Lifemark the approximately $7.8 million that Lifemark paid to Travelers to purchase the hospital at foreclosure. The district court also reinstated the renewal promissory note, collateral mortgage note, pledge of collateral mortgage note, collateral mortgage, hospital lease, and collateral assignment of rents which existed before the judicial sale and held that all rental payments that were due by Lifemark to St. Jude under the lease shall be deemed paid by St. Jude to Lifemark and the renewal promissory note, collateral mortgage note, pledge of collateral mortgage note, and collateral mortgage are deemed current and not in default as of the date of judgment. Finally, the district court denied Lifemark's claim for a deficiency pursuant to the renewal promissory note.

[1, 2] We review *de novo* the district court's legal conclusions, but review its findings of fact for clear error.[12] We have explained that " 'a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,' " and that, "despite an appellate court's conviction that it would have weighed the evidence differently had it been sitting as the trier of fact, it may not reverse a district court's findings when they are based on a plausible account of the evidence considered against the entirety of the record."[13] Accordingly, "when 'two permissible views of the evidence exist, the fact finder's choice between them

12. *Kona Tech Corp. v S. Pac Transp Co.*, 225 F 3d 595, 601 (5th Cir 2000).

13. *NAACP v. Fordice*, 252 F.3d 361, 365 (5th Cir.2001) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S Ct. 1504, 84 L Ed.2d 518 (1985)).

cannot be clearly erroneous.' "[14] Further, "as to mixed questions of law and fact, we review the district court's fact findings for clear error, and its legal conclusions and application of law to fact *de novo* "[15]

A.

[3] The district court premised its decision setting aside the judicial sale of the hospital on a finding that Lifemark breached fiduciary duties and an obligation of good faith owed to St. Jude. It found these obligations in the Louisiana law of pledge. The district court found that Lifemark Hospitals, Inc. became the pledgee of St. Jude by holding the collateral mortgage note and the right to basic rent under the collateral assignment of rents. As pledgee, Lifemark owed fiduciary duties to St. Jude, its pledgor, to protect that collateral, the collateral mortgage note and the right to basic rent under the collateral assignment of rents.

The found breach came when Lifemark failed to timely reinscribe the collateral mortgage and "allowed" Travelers' judgment mortgage to prime the collateral mortgage. The district court also found a breach of a duty to preserve the lease covering the assigned rents as pledgee of the right to basic rent under the collateral assignment of rents. This breach came, it found, when Lifemark Hospitals, Inc. allowed Lifemark Hospitals of Louisiana, Inc. to acquire the hospital. That acquisition extinguished the lease under the doctrine of confusion pursuant to Louisiana Civil Code article 1903 as well as the rental stream assigned to Lifemark Hospitals, Inc.

As the district court explained it, when St. Jude became liable to Travelers for over $7.8 million, specifically $7,834,516.26, and the hospital became subject to Travelers's approximately $7.8 million lien, Lifemark Hospitals, Inc. was obligated to buy out the Travelers lien, to add the Travelers debt to the debt owed by St. Jude to Lifemark Hospitals, Inc. Relatedly, it found an obligation to refrain from having Lifemark Hospitals of Louisiana, Inc. purchase the hospital at the foreclosure sale. All these were found to be duties, all of which Lifemark breached.

[4] In this diversity case, we are controlled by the substantive law of Louisiana. We are to determine and apply its law as we believe the Supreme Court of Louisiana would, looking to the decisions of intermediate Louisiana appellate courts for guidance where the Supreme Court of Louisiana has not spoken clearly to the issue.[16]

We conclude that the foundational principles of the entire set of the district court's rulings are deeply flawed. Such duties are not to be found in Louisiana law.

[5] There is no question but that, under Louisiana law, " 'a trust relationship between the pledgor and pledgee' " carries with it " 'attendant duties to protect the debt or the obligation and the collateral.' "[17] But holding the collateral mortgage note and the right to basic rent under

14. *Id.* (quoting *Anderson*, 470 U.S. at 573, 105 S.Ct. 1504).

15. *Payne v. United States*, 289 F.3d 377, 381 (5th Cir.2002).

16. *See Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 252 (5th Cir.2001); *Hulin v. Fibreboard Corp.*, 178 F 3d 316, 328 (5th Cir 1999).

17. *Trans-Global Alloy Ltd v. First Nat'l Bank of Jefferson Parish*, 583 So.2d 443, 453 (La. 1991) (quoting *In re Pan American Life Ins. Co*, 88 So 2d 410, 415 (La.App 2 Cir.1956)).

the collateral assignment of rents did not create a pledgor-pledgee relationship giving rise to the duties discovered by the district court.

[6] To understand why this is so it is helpful to review the Louisiana law of pledge and collateral mortgages. "The pledge is a contract by which one debtor gives something to his creditor as a security for his debt." [18] The Supreme Court of Louisiana has very recently repeated the Louisiana law of pledge:

> Pledge is an accessory contract by which one debtor gives something to a creditor as security for the debt. Invariably, the thing given as security for the debt is a movable, in which case the contract is more accurately called pawn. A person may give a pledge not only for his own debt, but also for that of another. The pledge secures only that debt or debts contemplated in the contract between the pledgor and pledgee.[19]

A "collateral mortgage" is statutorily defined as "a mortgage that is given to secure a written obligation, such as a collateral mortgage note, negotiable or nonnegotiable instrument, or other written evidence of debt, that is issued, pledged, or otherwise used as security for another obligation." [20] We recently summarized the basic operation of a typical collateral mortgage transaction under Louisiana law:

> In a typical Louisiana collateral mortgage transaction, the borrower contemporaneously executes a promissory note (known as a collateral mortgage note) and an act of mortgage (known as a collateral mortgage). In this latter instrument, the mortgagor acknowledges his indebtedness and states his intent to pledge the collateral mortgage note, which is secured by the collateral mortgage, as security for the advancement of funds. The collateral mortgage note is customly made payable on demand, to "Bearer" or "Myself" or "Any Future Holder," and is "paraphed" for identification with the mortgage. This collateral mortgage package is then delivered by the borrower in pledge to the lender to secure an indebtedness which is usually represented by a separate "hand note."
>
> The pledge of a collateral mortgage note and collateral mortgage to secure a debt is a contract. The pledge secures only the debt or debts contemplated in the act of pledge between the pledgor and the pledgee. A collateral mortgage package may be pledged to secure particular debts, either previously existing or contracted contemporaneously with the pledge, or future loans by the pledgee to the pledgor—or both—up to the limits of the pledge.[21]

18. La Civ Code art. 3133.

19. *Diamond Servs. Corp. v. Benoit*, 780 So.2d 367, 371 (La 2001) (citations and footnote omitted).

20. La Rev Stat § 9:5550(1).

21. *Charrier v. Sec. Nat'l of Or. (In re Charrier)*, 167 F.3d 229, 232–33 (5th Cir.1999) (footnotes omitted). We have also discussed the usual purpose to which collateral mortgages are put: "The collateral mortgage is commonly used with financing in which the maker draws the loan proceeds in stages. The collateral note and mortgage are made for the full amount of the line of credit extended by the lender. This is then pledged as security for a debt, usually represented by a separate hand note. This seemingly fictitious transaction is a Louisiana credit device that lenders use to obtain a lien on property effective on the date the mortgage is executed for advances not yet made, but which the lender may make in the future." *Fed. Sav. & Loan Ins. Corp v. Murray*, 853 F.2d 1251, 1255 n. 1 (5th Cir.1988).

The Supreme Court of Louisiana has made clear that "[t]he collateral mortgage, though now recognized by statute, is a form of conventional mortgage that was developed by Louisiana's practicing lawyers and has long been recognized by Louisiana courts." [22] It "arose out of the need for a special form of mortgage to secure revolving lines of credit and multiple present and future cross-collateralized debts for which there was no provision in the Civil Code." [23]

More specifically, the Supreme Court of Louisiana explained:

> "A mortgage is an accessory right which is granted to the creditor over the property of another as security for the debt. La. Civ.Code arts. 3278, 3284. Mortgages are of three types: conventional, legal and judicial. La. Civ.Code art. 3286. Within the area of conventional mortgages, three different forms of mortgages are recognized by the Louisiana statutes and jurisprudence: an 'ordinary mortgage' (La. Civ.Code arts. 3278, 3290); a mortgage to secure future advances (La. Civ.Code arts. 3292, 3293); and a collateral mortgage. *See Thrift Funds Canal, Inc. v. Foy*, 261 La. 573, 260 So.2d 628 (1972). Unlike the other two forms of conventional mortgages, a collateral mortgage is not a 'pure' mortgage; rather, it is the result of judicial recognition that one can pledge a note secured by a mortgage and use this pledge to secure yet another debt."
>
> "A collateral mortgage indirectly secures a debt via a pledge. A collateral mortgage consists of at least three documents, and takes several steps to complete. First, there is a promissory note, usually called a collateral mortgage note or a 'ne varietur' note. The collateral mortgage note is secured by a mortgage, the so-called collateral mortgage. The mortgage provides the creditor with security in the enforcement of the collateral mortgage note."
>
> "Up to this point, a collateral mortgage appears to be identical to both a mortgage to secure future advances and an ordinary mortgage. But a distinction arises in the collateral mortgage situation because money is not directly advanced on the note that is paraphed for identification with the act of mortgage. Rather, the collateral mortgage note and the mortgage which secures it are *pledged* to secure a debt." [24]

As such, "[b]ecause the mortgagor, after executing the collateral mortgage and the collateral mortgage note, then pledges the collateral mortgage note as security for a debt, usually represented by a separate hand note, the collateral mortgage package combines the security devices of pledge and mortgage." [25]

Synthesizing the law of pledge and on collateral mortgages, the Supreme Court of Louisiana has observed that a "[p]ledge is an accessory contract which secures the performance of an *existing* principal obligation," and "[t]he principal obligation in the collateral mortgage scheme is the actual indebtedness, usually represented by a hand note, and the collateral mortgage note is pledged to secure payment of the principal obligation." [26] The district court and Liljeberg Enterprises make much of

22. *Diamond Servs.*, 780 So 2d at 370 (footnote omitted)

23. *Id* at 371

24. *Id* at 371 (quoting *First Guar. Bank v. Alford*, 366 So.2d 1299, 1302 (La 1978)).

25. *Id.* at 372 (footnote omitted)

26. *Tex. Bank of Beaumont v. Bozorg*, 457 So.2d 667, 671 n. 4 (La.1984).

the fact that the collateral mortgage "package" involves a "pledge," but, under the facts of this case, this is word play.

A collateral mortgage often involves a hand note that is a third party's note made payable to the mortgagor, which note is pledged by the mortgagor to the mortgagee.[27] In such an instance, a pledgor-pledgee relationship with attendant duties—including a statutory duty of reasonable care and fiduciary duties—to protect the rights of the mortgagor in the third party's note against other creditors of the third party may well arise under statute by the virtue of the nature of the pledgor-pledgee relationship.[28]

Here, however, St. Jude executed a collateral mortgage on the hospital site and pledged a collateral mortgage note to Lifemark Hospitals, Inc. to secure the collateral mortgage, which was itself created to secure the promissory note evidencing Lifemark Hospitals, Inc.'s loan to St. Jude for construction of the hospital. There was no third-party obligation involved.[29] In such a case, where the mortgagor has "pledged" to the mortgagee the mortga-

27. *See, e.g., Diamond Servs*, 780 So.2d at 372 ("The dispute in this case centers around the obligation that arises from the making of the collateral mortgage note when that note is pledged to secure the debt of a third party represented by a hand note executed by that third party ")

28. *See, e.g.,* LA REV STAT § 10·9–207(a) ("Duty of care when secured party in possession. Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed."); LA CIV CODE art. 3167 ("The creditor is answerable agreeably to the rules which have been established under the title: Of Conventional Obligations, for the loss or decay of the pledge which may happen through his fault."); *accord* LA REV STAT § 10:9–207(1) ("A secured party must use reasonable care in the custody and preservation of collateral in his possession In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.") (superseded by 2001 La. Acts 128); *cf. Trans-Global,* 583 So.2d at 453 (holding that, in a case not involving a collateral mortgage, the duty of care imposed on a creditor, as the pledgee of a debtor's letter of credit from a third party, was that of prudent administrator such that the creditor could be held liable for the loss or decay of the pledge occurring through its fault)

29. Liljeberg Enterprises argues for first time in its reply brief that Lifemark did not raise in the district court its argument distinguishing between collateral mortgages involving third party notes and those involving hand notes on which the collateral mortgagor is the obligor Ordinarily, we do not consider arguments raised for the first time in a reply brief. *See Price v Roark,* 256 F 3d 364, 368 n 2 (5th Cir.2001). However, St Jude's argument here seeks simply to invoke a rule which we at times invoke *sua sponte.* that arguments not raised in the district court cannot be asserted for the first time on appeal. *See Stokes v. Emerson Elec Co*, 217 F.3d 353, 358 n 19 (5th Cir.2000); *Brown v. Ames,* 201 F 3d 654, 663 (5th Cir.), *cert denied,* 531 U.S 925, 121 S.Ct. 299, 148 L.Ed.2d 240 (2000). However, an argument is not waived on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it. *Brown,* 201 F.3d at 663; *Rogers v. Hartford Life & Accident Ins. Co.,* 167 F.3d 933, 943 n. 8 (5th Cir.1999); *N.Y. Life Ins. Co. v. Brown,* 84 F.3d 137, 141 n. 4 (5th Cir.1996). That is the case here, based on our review of the record. On appeal, Lifemark has certainly refined its argument to distinguish the duties owed by a collateral mortgagee/pledgee in third-party note situations as developed in the case law cited by St. Jude from Lifemark's situation, but Lifemark did sufficiently put before the district court its argument that no duty to reinscribe the collateral mortgage or to prevent the loss of the hospital flowed from its pledgor-pledgee relationship with St. Jude. *See* R. 9076, 9151–57. This was sufficient to permit the district court to rule on the essential argument Lifemark advances on appeal.

gor's own hand note on which the mortgagor is directly obligated to the mortgagee, the mortgagee has a duty to keep the note so that it may be returned to the mortgagor upon payment of the underlying debt to the mortgagee.[30] It is true that the Supreme Court of Louisiana has cited Professor Slovenko's observation that:

> ... [I]n the case of promissory notes, bills of exchange, and other evidences of indebtedness pledged as security, a duty exists on the part of the pledgee to preserve the rights of the pledgor against the obligors in the deposited documents. The pledgee is held responsible if he neglects to have a promissory note, the subject of the pledge, protested for non-payment, and the endorser is discharged in consequence; or, if he neglects to have a mortgage which is pledged to him reinscribed or reregistered in proper time, and it loses its rank and effect.[31]

It is also the case that Professor Slovenko's discussion assumes that a third-party obligation is involved with the pledge, where here it is not. To the contrary, the obligor of the underlying document and the pledgor (and the collateral mortgagor) were one and the same—St. Jude.

Lifemark Hospitals, Inc. loaned money to St. Jude to build a hospital, a loan evidenced by a loan agreement and a promissory note, or hand note, in turn collateralized by the pledge of a collateral mortgage note, itself secured by a collateral mortgage on the hospital site.[32] The extraordinary duty the district court imposed upon Lifemark, who loaned the money to build the hospital and held the mortgage on it to secure its payment, is inexplicable. Whatever duty Lifemark may have owed as the pledgee of the collateral mortgage note, they do not include a requirement that Lifemark reinscribe the mortgage executed in Lifemark's favor to secure a debt owed by St. Jude to Lifemark, in order that the mortgage may retain priority for Lifemark's benefit as pledgee and mortgagee. As Lifemark aptly points out, ordinarily a debtor such as St. Jude is happy to have its creditor fail to record its lien. We reject the assertion

30. *Cf.* Max Nathan, Jr. & Anthony P Dunbar, *The Collateral Mortgage: Logic and Experience*, 49 LA L REV 39, 49 (1988) ("Since a collateral mortgage may be used to secure a specific debt, a debtor who wishes to limit the mortgage to that debt can lawfully do so and the pledge agreement is clearly the proper document in which to manifest such an intent. The risk, of course, is that the ne varietur note, which is negotiable, *may fall into the hands of bona fide third parties* who are unaware of the pledge agreement and are not bound by it. That risk is probably the major drawback to use of the collateral mortgage. *The problem is mitigated by the fact that a pledgee, who accepts a fiduciary duty as such, surely would be liable to a borrower injured in such a situation.* The risk can be further minimized by use of a third-party custodian to hold the ne varietur note, or by use of a safety deposit box with appropriate restrictions." (emphasis added; footnotes omitted)); *cf. also People's Bank v. Cookston*, 142 So 285, 286 (La.App 2 Cir 1932) (holding that the plaintiff, as pledgee of the chattel mortgage note, was "under obligation to keep the pledged property intact, in order that it might be returned when the principal obligation is paid, when it does not proceed on the pledged property").

31. Ralph Slovenko, *Of Pledge*, 33 TUL L.REV 59, 121 (1958) (cited in *Trans-Global*, 583 So 2d at 453).

32. Under a later settlement in 1991, St. Jude executed a renewal note, renewing and extending the original note, and, like the original note, the renewal note was secured by the original collateral mortgage, collateral mortgage note, and pledge of the collateral mortgage note. Along with the execution of the renewal note, St Jude provided Lifemark Hospitals, Inc. with additional security in the form of a collateral assignment of rents, which assignment was recorded.

that Lifemark as the mortgagee here owed a duty to its mortgagor to reinscribe the mortgage, as illustrated in part, indeed, by the very difficulty of describing exactly how not protecting a mortgage's first position, in and of itself, could possibly harm the *mortgagor*.

Nor can this theory explain how it can lie beside the undisputed right of Lifemark Hospitals, Inc. to, "at any time, without notice to anyone, release any part of the Property from the effect of the Mortgage." This right of release is explicitly recited in the collateral mortgage itself. In addition, the renewal note provides that St. Jude "agree[s] to any ... release of any [of the security herefor]." The right of Lifemark to unilaterally release any part of the property from the mortgage is wholly at odds with the district court's discovery of a "duty" to reinscribe the collateral mortgage. It was Lifemark's contracted-for right to retain the collateral mortgage's priority against other creditors, under both the renewal note and the collateral mortgage itself.[33] The grant of a security interest to secure St. Jude's debt was to protect the lender, Lifemark Hospitals, Inc., not the borrower.

Nor did Lifemark as mortgagee have a duty to protect the hospital owner from other creditors asserting their rights against the hospital, as the district court held Lifemark did. It is self-evident that there is a vast difference between a statutory duty to prevent loss or decay of a third party's note evidencing a debt owed to the collateral mortgagor/pledgor in order to preserve against other third parties the collateral mortgagor's rights in the third party's note pledged by it to the collateral mortgagee, and a supposed fiduciary duty on the part of the collateral mortgagee to protect the collateral mortgagor against a third party's exercise of its rights in an entirely different instrument or judgment. This is a mere chimera, existing nowhere in Louisiana law. It was apparently constructed out of whole cloth.

In sum, Lifemark had no duty to timely reinscribe the collateral mortgage, and the district court erred as a matter of law in concluding that Lifemark had a consequential duty to "mitigate" any harm allegedly caused by Lifemark's failure to reinscribe by buying out the Travelers lien and adding the Travelers debt to the debt owed by St. Jude to Lifemark.

[7] As for any duties arising out of Lifemark's holding the right to basic rent under the collateral assignment of rents, Lifemark argues in part that the statutory duty of reasonable care under Louisiana Civil Code article 3167 does not apply to an assignment of rents because such an assignment is not a pledge where Lifemark did not take possession of a corporeal movable or evidence of a credit, such as a note, as required by Louisiana Civil Code article 3152.[34] Lifemark argues that article 3167 imposes only custodial duties on pledgees and that no such duties attend its collateral assignment of rents from St. Jude.

33. *Cf. Commercial Nat'l Bank in Shreveport v. Audubon Meadow P'ship*, 566 So.2d 1136, 1140–41 (La.App. 2 Cir.1990) (holding that, in light of the guaranty agreement's permitting the lending bank to surrender any securities without notice or consent from the guarantor, the bank's alleged negligence in allowing a letter of credit to lapse provided the guarantor with no basis for recovery against the bank)

34. *See* LA. CIV.CODE art. 3152 ("It is essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right.")

This argument, however, does not account for Louisiana Civil Code article 3153, which provides: "But this delivery is only necessary with respect to corporeal things; as to incorporeal rights, such as credits, which are given in pledge, the delivery is merely fictitious and symbolical." [35] An assignment of rents may be a pledge, because "[o]ne may, in fine, pawn incorporeal movables, such as credits and other claims of that nature." [36] Indeed, Louisiana statutes provide that "[c]laims, credits, obligations, and incorporeal rights in general not evidenced by written instrument or muniment of title, shall be subject to pledge, and may be pledged in the same manner as other property" and that "[t]he pledge shall be valid as to all persons without delivery of the claim, credit, obligation, or incorporeal right to the pledgee." [37]

But again, that is beside the point, the duty attributed by the district court to Lifemark as pledgee of the right to basic rent under the collateral assignment of rents did not exist. The recorded collateral assignment of rents simply gave Lifemark a secured right to rents upon default by St. Jude under the renewal note. The collateral assignment of rents specifically provides that Lifemark Hospitals, Inc. "shall not be obligated to perform or discharge nor does [Lifemark Hospitals, Inc.] hereby undertake to perform or discharge any obligation, duty or liability under said Lease." As we observed, the renewal note itself gave Lifemark the right to release any security, including the collateral assignment of rents, under the renewal note. In the face of these contractual provisions, holding the right to basic rent under the collateral assignment of rents imposed no duty upon Lifemark to preserve the lease covering the assigned rents.

We are persuaded that the district court erred as a matter of law in concluding that Lifemark breached any duties by failing to timely reinscribe the collateral mortgage, buy out the Travelers lien, add the Travelers debt to the debt owed by St. Jude to Lifemark Hospitals, Inc., and refrain from having Lifemark Hospitals of Louisiana, Inc. purchase the hospital at the foreclosure sale. In sum, Lifemark did not owe the duties to St. Jude upon which the district court premised its order reversing the judicial sale of the hospital. The district court erred in upsetting the confirmed judicial sale on these grounds.

B.

[8] The district court pointed to its findings of Lifemark's bad faith, collusion, and self-dealing in forcing the judicial sale of the hospital, chilling the bidding at the sale, and purchasing the hospital as an alternative ground for its upset of the judicial sale. The district court relied upon

35. *Id* art 3153.

36. *Id* art. 3155; *see also* LA REV STAT § 9:4401(A) ("Any obligation may be secured by an assignment by a lessor or sublessor of leases or rents, or both leases and rents, pertaining to immovable property Such assignment may be expressed as a conditional or collateral assignment, and may be effected in an act of mortgage, by a separate written instrument of assignment, or by a separate written instrument of pledge, and may be referred to, denominated, or described as a pledge or an assignment, or both.").

37. LA REV STAT §§ 9:4321, 9:4322 (repealed by 2001 La. Acts 128). Although these provisions were repealed in 2001, *see* 2001 La. Acts 128, this repeal cannot be applied retroactively to the facts of this case because these provisions were substantive laws and the legislature did not express its intent to give the repeal of the substantive law retroactive effect, *see Billingsley v. Mitchell*, 676 So.2d 208, 212–13 (La.App. 1 Cir.), *writ denied*, 681 So 2d 1265 (La.1996).

two unpublished district court decisions setting aside a judicial sale. Both were in admiralty and prior to sale confirmation.

That slender reed aside, the district court's findings of a "conspiracy" to wrest control of the hospital and medical office building from St. Jude and Liljeberg Enterprises border on the absurd. We are left with the definite and firm conviction that a mistake has been committed, that the findings are not supported by the evidence and are clearly erroneous.

The district court's "conspiracy theory" conclusion is based, in part, on the view that Liljeberg Enterprises's or St. Jude's losses were caused by Lifemark. Specifically, not reinscribing the collateral mortgage and not buying out the Travelers lien and adding the Travelers debt to the debt owed by St. Jude to Lifemark. These findings turn on the remarkable but largely implicit conclusion, asserted directly by the Liljebergs' counsel at oral argument, that, under Louisiana law, a second mortgagee, which Travelers would have been had the collateral mortgage been timely reinscribed, cannot initiate foreclosure proceedings. The district court and Liljeberg Enterprises offer no statutory or case law support for this proposition, for the simple reason that this is not the law.[38]

The theory that Lifemark proximately caused any loss to Liljeberg Enterprises or St. Jude from the Travelers foreclosure on its judicial mortgage cannot accommodate the undisputed fact that, under Louisiana law, St. Jude could have reinscribed the collateral mortgage itself.[39] A subordinate position for the Travelers judgment is now said to have been critical for St. Jude and its loss the centerpiece of a conspiracy to take the hospital. Yet, St. Jude could have checked the records and protected its own interest. That it could have and did not do so is telling. It rends a large hole in the conspiracy claim and leaves St. Jude's inaction unexplained. This, with the reality we have explained that Lifemark Hospitals, Inc. had no duty to buy out the Travelers lien, no duty to add the Travelers debt to the debt owed by St. Jude to Lifemark Hospitals, Inc., and no duty to prevent the purchase of the hospital at the foreclosure sale by Lifemark Hospitals of Louisiana, Inc.

Even if we were to somehow "explain" all of this by the theory that this foreclosure was part of Lifemark's plan from the beginning, the theory cannot be squared with one large undisputed fact: Liljeberg Enterprises and St. Jude faced the Travelers lien because of Liljeberg Enterprises's and St. Jude's own failed litigation against Travelers, arising out of an independent dispute with Travelers. Any suggestion that Lifemark somehow worked that result is defied by the record. Indeed, a panel of this court described the Liljebergs' con-

38. *See, e.g., First Nat'l Bank of Gonzales v. Morton*, 544 So.2d 5 (La.App. 1 Cir.) (involving a prior successful foreclosure suit brought by a second mortgagee), *writ denied*, 550 So.2d 654 (La.1989); *Keys v Box*, 476 So 2d 1141 (La.App 3 Cir.1985) (involving a foreclosure suit brought by a bank to protect its interest as a second mortgagee), *Guinn v. Houston Fire & Cas. Ins. Co*, 32 So 2d 613 (La.App. 1 Cir 1947) (involving a foreclosure suit instituted by a second mortgagee).

39. *See* LA CIV CODE art. 3333 ("A person may reinscribe a recorded document creating a mortgage or evidencing a privilege by filing with a recorder a signed, written notice of reinscription."); *accord id.* art. 3369(E) ("The effect of the registry ceases in all cases, even against the contracting parties, unless the inscriptions have been renewed within the periods of time above provided in the manner in which they were first made, or by filing a notice of reinscription of mortgage or a written request for reinscription by the mortgagee *or any interested person*, together with a copy of the original act of mortgage." (emphasis added)) (repealed by 1992 La Acts 1132).

duct involved that litigation as "as egregious and unconscionable of bad faith contractual dealings as the members of this panel can recall having encountered."[40] The cases before us only reinforce that panel's observation. The record is clear that any losses by St. Jude and Liljeberg Enterprises were proximately caused by the Liljebergs, who defaulted to Travelers and whose post-default conduct, in part, led to the Travelers judgment and its resulting judicial mortgage and lien on the hospital. The foreclosure of this lien led to the foreclosure of the hospital that the district court order would set aside.

Indeed, despite Liljeberg Enterprises's contention on appeal that Lifemark's efforts to "circumvent" the pharmacy agreement and refusal to renew the medical office building lease caused St. Jude and Liljeberg Enterprises to experience significant shortfalls which foreclosed any possibility of paying the note on the medical office building to Travelers, the district court made no findings of fact that Lifemark's conduct was the cause of the debt to Travelers or St. Jude's inability to pay that debt, which resulted in the judicial mortgage Travelers filed encumbering the hospital property.[41]

With or without such findings, however, the idea that Lifemark deliberately subordinated its mortgage interest to Travelers, knowing it would result in a required payment, *to wit,* approximately $7.8 million, to Travelers at any judicial sale, comes close to being nonsensical. It rests upon the assertion that Louisiana law somehow obligated Lifemark to lend the money to bail the Liljebergs out of their litigation fiasco with Travelers. That is so because, as we will explain, Travelers would most certainly have foreclosed its second mortgage. Although the district court made no such explicit finding, Liljeberg Enterprises argues on appeal that Lifemark deliberately failed to reinscribe its collateral mortgage in order to facilitate the Travelers foreclosure and the judicial sale of the medical office building and the hospital to Lifemark Hospitals of Louisiana, Inc., whereafter Lifemark conspired to manipulate the judicial sale, colluded to minimize the price offered at the judicial sale, and schemed to terminate the lease and St. Jude's right to collect rents from Lifemark.

In answer to the palpable flaws in their theories, the Liljebergs would simply expand the conspiracy. They argue that this court should consider documents from Lifemark's legal malpractice suit against their former attorneys for their attorneys' failure to reinscribe the collateral mortgage and, more specifically, in a footnote in their original brief, the Liljebergs state for the first time that they "challenge the court's denial of their motion to supplement the record with documents from the trial between Lifemark and [its former attorneys]," which "documents clearly show that Defendants and their attorneys conspired to defraud St. Jude/Liljeberg Enterprises out the hospital, the lease, and

40. *Travelers Ins. Co. v. St. Jude Hosp*, No. 92-9579, 21 F.3d 1107, at 2 (5th Cir. Apr 20, 1994) (unpublished per curiam). The panel further noted that "[t]he Liljeberg conduct to which we refer is the antithesis of that mandated in La. Civil Code Ann. art. 1983 ('Contracts must be performed in good faith '), and has contributed to the legal effects described in La. Civil Code Ann. art. 1997 ('An obligor in bad faith is liable for all damages, foreseeable or nor, that are a direct consequence of his failure to perform.')." *Id.* at 2 n. 3.

41. Nor, for that matter, did the district court make findings supporting two other premises of the Liljebergs' arguments on appeal: that Lifemark intentionally or deliberately failed to reinscribe the collateral mortgage or that Lifemark engaged in any fraud on the court or fraud with regard to the judicial sale.

the pharmacy." It tells that this argument was not raised or briefed as a separate issue until the Liljebergs' final reply brief. It is therefore waived.[42] Moreover, the district court ruled in an order dated April 25, 2000 that the Liljebergs' motion to supplement was rendered moot by the court's order and final judgment issuing its findings of fact and conclusions of law, which therefore quite obviously did not rely on the supplemental materials proffered with the motion. Under these circumstances, even if we were to consider this issue, the Liljebergs could not show an abuse of discretion on appeal.[43]

In sum, we conclude that the district court's findings that Lifemark engaged in bad faith, collusion, and self-dealing to force the judicial sale of the hospital, chill the bidding at the sale, and purchase the hospital are clearly erroneous. In the absence of any breach of duty to St. Jude or Liljeberg Enterprises on the part of Lifemark or a Lifemark breach having proximately caused any loss to the Liljebergs resulting from the Travelers lien, there is no bad faith or collusion in Lifemark's decision to bid at the judicial sale or Lifemark's purchase of the hospital at the legally-permitted two-thirds of its appraised value.

The other side of the no-duty coin is that Lifemark was free to act in its own self-interest, including allowing Lifemark, which had the license, to own and operate the hospital, and to escape the burden of the pharmacy agreement, which functioned much like an overriding royalty payment. As Lifemark persuasively argues on appeal, and the record is clear: the various lending and lease transactions and instruments, as agreed to by the Liljebergs and Lifemark, permitted the outcomes which Lifemark sought in Lifemark Hospitals of Louisiana, Inc.'s bidding at the judicial sale as well as Lifemark's decision not to renew the lease on the medical office building.[44] Lifemark Hospitals, Inc. was legally entitled to obtain permission to bid credits, and received a court order granting such permission, to give it the option to bid at the sale should the circumstances warrant. The district court's findings and the Liljebergs' arguments on appeal offer no logical connection between a decision to seek authority to bid credits and the absence, let alone the chilling, of other bids on the hospital property at the judicial sale—the credits represent a debt Lifemark Hospitals, Inc. was owed, so a payment in cash and credits or simply in cash would make no difference for the bottom line in Lifemark's accounting. Moreover, although

42. *See Price*, 256 F.3d at 368 n. 2 (court of appeals does not consider issues raised for the first time in a reply brief); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 179 (5th Cir.2000) (refusing to consider issue that were not raised or adequately briefed in the parties' opening briefs), *cert. denied*, 532 U.S. 1051, 121 S.Ct. 2191, 149 L.Ed 2d 1023 (2001); *Atwood v. Union Carbide Corp.*, 847 F 2d 278, 280 (5th Cir.) ("As we have already noted, issues not briefed, or set forth in the list of issues presented, are waived "), *amended on reh'g on other grounds*, 850 F.2d 1093 (5th Cir.1988)

43. *See Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 360 n. 7 (5th Cir 1999) (standard of review for denial of motion to supplement the record is for abuse of discretion only); *Morales v. Turman*, 562 F.2d 993, 996 (5th Cir. 1977) (same).

Even assuming arguendo that the Liljebergs did not waive this issue on appeal and that we were to conclude that the district court abused its discretion in denying their motion to supplement, the supplemental material would not alter our conclusions on appeal.

44. *Cf. Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297-98 (5th Cir.1997) (under Louisiana law, it is not a breach of the implied covenant of good faith and fair dealing to engage in conduct which is expressly allowed under a contract).

the Liljebergs argue that Lifemark's knowledge that the priority of the lease on the hospital and collateral assignment of rents would deter other bidders at the judicial sale somehow supports their conspiracy theory, it demonstrates quite the opposite. As counsel for Lifemark aptly noted at oral argument, the judicial sale could almost be considered "chill-proof," in that it is hard to imagine anyone bidding $26 million on a property that would, by virtue of the lease and collateral assignment of rents, provide no cash-flow until at least sixteen years later, in 2010.

[9] On the basis of its clearly erroneous "conspiracy theory" findings, the district court erred as a matter of law in disregarding long-standing Louisiana jurisprudence that a judicial sale, once completed, cannot generally be undone.[45] Freed from the district court's clearly erroneous "conspiracy theory" findings, the evidence concerning Lifemark's actions following Travelers's filing its judicial mortgage does not support findings of bad faith, collusion, and self-dealing on the part of Lifemark that would permit the district court to overturn the confirmed judicial sale.[46] Rather, the evidence considered against the entirety of the record shows that Lifemark's actions consisted of commercially reasonable, albeit aggressive, steps in reaction to the Travelers judgment, all of which were within their contractual rights and applicable law.

We have detected several warring premises internal to the Liljebergs' theories. In concluding this section, we mention one more: the Liljebergs attempt to maintain both that Lifemark never intended to perform under the various commercial instruments between the parties and that Lifemark drafted these instruments to *allow* Lifemark to engage in conduct it challenges—declining to renew the lease on the medical office building, purchasing the hospital at a judicial sale, and terminating the pharmacy agreement based on a cross-default provision.

C.

Lifemark argues that the district court erred in denying its claim for a deficiency judgment, a sum of $20,600,060.91 that St. Jude owed Lifemark Hospitals, Inc. under the renewal promissory note after Life-

45. *See generally Boyd v. Farmers-Merchants Bank & Trust Co.*, 433 So.2d 339, 342 (La App. 3 Cir.) ("As a general rule, a judicial sale cannot be attacked once the sale is consummated in the absence of fraud or ill practices."), *writ denied*, 440 So.2d 732 (La.1983).

46. *Compare Acadian Prod Corp. of La. v Savanna Corp.*, 222 La. 617, 63 So 2d 141, 142 (1953) ("Among the requirements for the legal seizure and sale of property in satisfaction of a judgment are to be found . those prohibiting any combination or conspiracy to stifle competition and chill the bidding at a judicial sale."); *Pease v. Gatti*, 202 La. 698, 12 So.2d 684, 690 (1942) ("This court has repeatedly held that, where there is an agreement to stifle competition at judicial sales and where one of the parties to the agreement is a party to the proceeding, the sale may be annulled by the injured party "); *Konen v. Konen*, 165 La. 288, 115 So. 490, 491 (1928) ("Hence the concealment or misrepresentation of facts, amounting to fraud, is not the only cause for annulling a judicial sale, but anything said or done by one who becomes an adjudicatee, for the purpose of preventing competition at the sale, or, in other words, for the purpose of chilling it, which is reasonably capable of doing so, and has that effect, will be sufficient to annul the sale."); *First Nat'l Bank of Abbeville v. Hebert*, 162 La. 703, 111 So. 66, 69 (1926) ("An agreement whereby parties engage not to bid against each other at a public auction, especially where the auction is required or directed by law, as in sales of property under execution, and where one of the parties to the agreement is a party to the proceeding, is a sufficient cause for annulling the sale.").

mark Hospitals of Louisiana, Inc.'s purchase of the hospital at the judicial sale.

The Liljebergs respond that the same bad faith and collusive conduct that tainted the judicial sale also bars any claim for deficiency and that the alleged defaults and acceleration were caused by the bad faith and collusive wrongdoing of Lifemark, which alone is legally responsible. The district court denied Lifemark's deficiency judgment claim based on its decision to overturn the judicial sale, such that "[a]ll rents which would have been paid absent the judicial sale will be deemed paid on the mortgage in favor of [Lifemark Hospitals, Inc.] and the mortgage note shall be deemed current at the time of transfer," and, "[i]nasmuch as this Court has restored the status quo prior to sale and reinstated the collateral mortgage, collateral mortgage note, and note, the claim of [Lifemark Hospitals, Inc.] on the note is disallowed." Having found the district court's findings and conclusions in favor of this order to be in error, and rejected the Liljebergs' arguments on appeal, we must in turn reverse the district court's order denying this claim. As discussed *infra* in connection with the motion to assume the pharmacy agreement, the judicial mortgage and lien on the hospital won in court by Travelers and the judicial sale that followed were defaults under the fourth covenant of the collateral mortgage. These events of default gave Lifemark the contractually-secured right to accelerate the renewal promissory note and immediately recover all amounts and interest due thereunder.[47] We remand to the district court for calculation of the amount of deficiency owed to Lifemark Hospitals, Inc. and for entry of judgment in that amount.

D.

On its cross-appeal, Liljeberg Enterprises argues that the district court erred in requiring St. Jude and Liljeberg Enterprises to reimburse Lifemark the approximately $7.8 million it paid to Travelers. Having reversed the district court's order overturning the judicial sale, we must reverse the order of reimbursement, part of the district court's set-aside of the judicial sale. Because Lifemark will maintain ownership of the hospital pursuant to the confirmed judicial sale, the Liljebergs need not reimburse Lifemark's payment of the Travelers debt made at foreclosure. Liljeberg Enterprises's cross-appeal on this issue is now moot.[48]

47. The fourth covenant of the collateral mortgage provides.

> The Property is to remain mortgaged and hypothecated until the full and final payment of the aforesaid indebtedness in principal and interest, attorney's fees, insurance premiums, costs and expenses, the Mortgagor hereby binding itself, its heirs, successors and assigns not to make a conveyance, mortgage, transfer or sale of the Property until full and final payment of the aforesaid indebtedness including principal and interest, attorney's fees, insurance premiums, costs and expenses, unless the Mortgagee expressly consents to such conveyance or mortgage in writing. The Mortgagor hereby agrees that should the Property be mortgaged, sold or transferred, either with or without the assumption of the aforesaid indebtedness, such sale, transfer or mortgage shall constitute a breach of this contract and the obligations herein set forth, and the Note shall, at the option of the Mortgagee, immediately mature and become due and payable, anything contained herein to the contrary notwithstanding, and it shall be lawful for the Mortgagee to proceed with enforcement of its mortgage as hereinabove set forth.

48. We therefore assume, without deciding, that the Liljebergs did not waive this point of error by failing to raise it before the district court, notwithstanding that the relief they sought in seeking to alter or amend the district court's findings and judgment specifically requested only that the district court "defer the due date for reimbursing Lifemark with

VI. Cause No. 93-1794

The district court concluded in Cause No. 93-1794 that Liljeberg Enterprises, as the debtor in possession in its Chapter 11 bankruptcy proceeding, should be allowed to assume the pharmacy agreement pursuant to 11 U.S.C. § 365. The district court rejected Lifemark's arguments that the pharmacy agreement terminated under its own terms and was therefore not available to be assumed and that Liljeberg Enterprises committed incurable defaults under the pharmacy agreement which, pursuant to 11 U.S.C. § 365(b)(1), precluded an order granting Liljeberg Enterprises's motion to assume.

11 U.S.C. § 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor," but 11 U.S.C. § 1107(a) provides that, "[s]ubject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, ... of a trustee serving in a case under this chapter." Thus, as a debtor in possession, Liljeberg Enterprises was required to satisfy all the requirements of 11 U.S.C. § 365(b)(1) in order to assume the pharmacy agreement as an executory contract under section 365:

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.[49]

A.

[10, 11] As an initial matter, Lifemark argues that the pharmacy agreement was no longer an executory contract subject to assumption. To determine if a contract is executory for purposes of this provision, "the relevant inquiry is whether performance remains due to some extent on both sides," such "that an agreement is executory *if at the time of the bankruptcy filing,* the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party."[50]

Lifemark argues that the district court erred in treating the pharmacy agreement as an executory contract subject to assumption by Liljeberg Enterprises. They

the amount of the Travelers judicial mortgage until after the single business enterprise has paid all the money judgments awarded in favor of Liljeberg Enterprises and St. Jude."

49. 11 U.S.C § 365(b)(1).

50. *Phoenix Exploration, Inc. v. Yaquinto (In re Murexco Petroleum, Inc.),* 15 F.3d 60, 62-63 (5th Cir.1994) (emphasis added); *accord Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins Co*, 83 F.3d 735, 741 (5th Cir.1996); *cf. Phillips v First City, Texas-Tyler, N.A. (In re Phillips),* 966 F.2d 926, 935 (5th Cir.1992) (holding that a partnership agreement does not "remain[] an executory contract after the Final Judgment decreed that [one partner] breached the partnership agreement, awarded [another partner] damages, and ordered [the partnership] dissolved, and after passage of the Final Judgment's 90-day prescription for winding up [the partnership]").

contend that, when Lifemark ceased to lease the hospital on October 28, 1994, the pharmacy agreement terminated by its own terms pursuant to section 5.1(e). It provides: "This Agreement shall be effective as set forth above and shall continue in full force and effect, unless sooner terminated with the first to occur of the following: . (e) LIFEMARK ceases to lease or operate Hospital."

Liljeberg Enterprises filed for Chapter 11 relief on January 27, 1993. Lifemark's lease of the hospital did not end until almost twenty months later-when Travelers foreclosed and Lifemark bought the hospital at the judicial sale. There is no dispute but that throughout this period the pharmacy agreement was in full force and effect and a failure of either party to complete performance would have been a material breach.

Lifemark argues, however, that a line of authority out of the Tenth Circuit provides that "[a] contract that provides for termination on the default of one party may terminate under ordinary principles of contract law even if the defaulting party has filed a petition under the Bankruptcy Act." [51] Although this holding arose under the old Bankruptcy Act,[52] Lifemark argues that it remains valid under the Bankruptcy Code, pointing to a bankruptcy court's conclusion to that effect.[53] That Michigan bankruptcy court reviewed several decisions involving the issue of whether a contract terminated by its own terms or time limits post-petition and concluded that "the issue must be whether termination requires the non-debtor party to undertake some post-petition affirmative act," such that, "[w]hen termination of the contract requires an affirmative act of the non-debtor party, the contract remains executory because such an act is stayed under 11 U.S.C. § 362(a)," but, "[w]hen termination occurs *without any action by the non-debtor party,* the contract is no longer executory and no longer subject to assumption or rejection." [54]

The parties have pointed to no Fifth Circuit decisions treating this issue, and we have located none. The Liljebergs argue that even under this authority the pharmacy agreement did not terminate post-petition where Lifemark not only participated in the alleged defaults, they intentionally precipitated them; that, under the pharmacy agreement and Louisiana law, the pharmacy agreement could not terminate automatically but required Lifemark to place Liljeberg Enterprises in default and obtain judicial dissolution.

[12] We agree and conclude that the district court did not err in concluding that the pharmacy agreement was an executory agreement subject to assumption by Liljeberg Enterprises. Lifemark's affirmative acts—its purchase of the hospital—caused the lease to be extinguished under the doctrine of confusion, which in turn caused any alleged default under section 5.1(e) of the pharmacy agreement. Moreover, Louisiana law provides that, except in limited

51. *Trigg v U.S. Dep't of Interior (In re Trigg),* 630 F.2d 1370, 1374 (10th Cir.1980), *accord Gloria Mfg. Corp v Int'l Ladies' Garment Workers' Union,* 734 F.2d 1020, 1022 (4th Cir.1984)

52. "The Bankruptcy Reform Act of 1978, Pub.L. 95-598, November 6, 1978, 92 Stat. 2549, repealed the former Bankruptcy Act of 1898 and replaced that Act with the Bankruptcy Code, Title 11 of the United States Code, effective October 1, 1979." *Mitsubishi Int'l Corp. v. Clark Pipe & Supply Co., Inc.,* 735 F.2d 160, 162 n. 2 (5th Cir.1984).

53. *Hertzberg v. Loyal Am. Life Ins. Co. (In re B&K Hydraulic Co.),* 106 B.R. 131, 134 (Bankr.E.D.Mich.1989).

54. *Id.* at 135-36 (emphasis added)

circumstances which the district court correctly concluded do not apply here, a contract will not terminate unless the nonbreaching party seeks judicial dissolution of the contract or at least provides notice of the intent to exercise the right to terminate the contract for default, even if the contract explicitly provides for automatic termination.[55] And section 5.1(e) does not do so. Lifemark was required to give Liljeberg Enterprises written notice of termination under section 15 of the pharmacy agreement. In short, terminating the pharmacy agreement for default under section 5.1(e) required an affirmative act of Lifemark. Lifemark gave no notice and did not seek judicial dissolution. The pharmacy agreement remained executory.

B.

[13] Turning then to whether the district court erred in allowing Liljeberg Enterprises to assume the executory pharmacy agreement, under section 365, "[a]n assumed lease or contract will remain in effect through and then after the completion of the reorganization," and "[t]he nondebtor party to the agreement is not released from its duties and must continue to perform; likewise, the debtor must continue to perform or pay for the services or other costs that are not discharged."[56] We have further explained that " '[t]he act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services,' "[57] a determination that assumption of the pharmacy agreement by Liljeberg Enterprises "represented a proper exercise of business judgment."[58]

[14–17] Section 365(b)(1) essentially " 'allows a debtor to "continue in a beneficial contract provided, however, that the other party is made whole at the time of the debtor's assumption of said contract." ' "[59] That is, "[s]ection 365 is intended to provide a means whereby a debtor can force another party to an executory contract to continue to perform under the contract if (1) the debtor can provide adequate assurance that it, too, will continue to perform, and if (2) the debtor can cure any defaults in its past performance."[60] As such, "the debtor party must take full account of the cost to cure all existing defaults owed to the nondebtor party when assessing whether the contract is beneficial to the estate."[61] Further, to determine if the debtor in possession has provided "adequate assurance" of future performance, we have held that courts must look to " 'factual conditions,' " including "consider[ation of] whether the debtor's financial data indicated its ability to generate an income stream sufficient to meet its obligations,

55. *See* LA. CIV. CODE art. 2013 & cmts. (b)-(c), *id.* 2015, cmt. (c); *id.* 2017 & cmt. (b); *id.* 2024; *Mennella v. Kurt E. Schon E.A.I., Ltd.*, 979 F.2d 357, 361 & n. 16 (5th Cir.1992); *Pembroke v. Gulf Oil Corp.*, 454 F.2d 606, 611 (5th Cir.1971).

56. *Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir.), *cert. denied*, 531 U.S. 871, 121 S.Ct. 172, 148 L.Ed.2d 117 (2000).

57. *Id.* (quoting *MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 612 (Bankr.M.D.La.1996)).

58. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir.1985).

59. *Nat'l Gypsum*, 208 F.3d at 505 (quoting *In re Eagle Bus Mfg., Inc.*, 148 B.R. 481, 483 (Bankr.S.D.Tex.1992) (quoting *255 Turnpike Assocs. v. J.W. Mays, Inc. (In re J.W. Mays, Inc.)*, 30 B.R. 769, 772 (Bankr.S.D.N.Y. 1983))).

60. *Richmond*, 762 F.2d at 1310.

61. *Nat'l Gypsum*, 208 F.3d at 505.

the general economic outlook in the debtor's industry, and the presence of a guarantee." [62]

[18] To the extent that such determinations turn on contested factual disputes, and not errors of law, we review only for clear error and not under *de novo* review.[63] Lifemark argues that, pursuant to 11 U.S.C. § 365(b)(1), the district court should have denied Liljeberg Enterprises's motion to assume because Liljeberg Enterprises's transactional and operational defaults under the pharmacy agreement are incurable and because Liljeberg Enterprises cannot provide adequate assurance of future performance.

[19, 20] Lifemark's arguments regarding transactional defaults require interpretation of several contractual documents. "The district court's interpretation of a contract is reviewed de novo," and "[t]he contract and record are reviewed independently and under the same standards that guided the district court." [64] At the same time, "if the interpretation of the contract turns on the consideration of extrinsic evidence, such as evidence of the intent of the parties, the standard of review is clearly erroneous," but, if "intent is determined solely from the language of the contract, then contractual interpretation is purely a question of law," and "[t]he threshold question whether extrinsic evidence should be considered in determining the intent of the parties is itself a question of law and thus reviewable de novo." [65]

[21–26] In this diversity case, we look to Louisiana law for the applicable standard of contract interpretation.[66] "Under Louisiana law, a contract is the law between the parties, and is read for its plain meaning." [67] Thus, "[u]nder Louisiana law, where the words of a contract are clear and explicit and lead to no absurd consequences, the contract's meaning and the intent of its parties must be sought within the four corners of the document and cannot be explained or contradicted by extrinsic evidence," such that, "[i]f a court finds the contract to be unambiguous, it may construe the intent from the face of the document—without considering extrinsic evidence—and enter judgment as a matter of law." [68] Further, " '[u]nder Louisiana law, a contract is ambiguous when it

62. *Richmond*, 762 F.2d at 1310 (quoting *In re Sapolin Paints, Inc.*, 5 B.R. 412, 421 (Bankr. E.D.N.Y.1980)).

63. *See id.* at 1307–09 & n. 4.

64. *St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402, 409 (5th Cir. 2000).

65. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Circle, Inc.*, 915 F.2d 986, 989 (5th Cir. 1990) (per curiam); *see also Gebreyesus v. F.C. Schaffer & Assocs., Inc.*, 204 F.3d 639, 642 (5th Cir.2000) ("Under Louisiana law, the interpretation of a contract and the determination of ambiguities are questions of law. Where a court determines that ambiguity exists and makes factual determinations of intent, we review those factual findings for clear error." (citations omitted)). As the district court correctly noted, the Louisiana Civil Code's contract interpretation provisions were substantially amended by Act 331 of 1984, which was enacted after the pharmacy agreement was entered into on February 10, 1983. However, the cited provisions of the Civil Code and other principles of contract interpretation under Louisiana law cited and applied herein did not substantively change the law and so there are no retroactivity concerns presented by citing these post-Act 331 cases and Code provisions. *Cf. Morris v. Friedman*, 663 So.2d 19, 23–24 (La.1995).

66. *See Exxon Corp. v. Crosby-Mississippi Res., Ltd.*, 154 F.3d 202, 205 (5th Cir.1998).

67. *Nat'l Union*, 915 F.2d at 989 (citation omitted).

68. *Am. Totalisator Co., Inc. v. Fair Grounds Corp.*, 3 F.3d 810, 813 (5th Cir.1993).

is uncertain as to the parties' intentions and susceptible to more than one reasonable meaning under the circumstances and after applying established rules of construction.' "[69] Put another way, "under Louisiana law, 'when the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent,' " and "[t]his established rule of strict construction does not allow the parties to create an ambiguity where none exists and does not authorize courts to create new contractual obligations where the language of the written document clearly expresses the intent of the parties."[70]

[27] The Liljebergs and the district court also rely on the rule that "under Louisiana law doubts or ambiguities as to the meaning of a contract must, if not otherwise resolvable, be eliminated by interpreting the contract against the party who prepared it."[71] The Supreme Court of Louisiana has applied this rule in the context of "an adhesionary contract," noting that "any contradiction or ambiguity should be construed against Titan, the party who drafted the policy," but that "[t]his general rule of construction . only applies when there are two equally reasonable interpretations of the contractual provision in question."[72]

[28] The statutory provision, Louisiana Civil Code article 2056, captioned "Standard-form contracts," provides both that, "[i]n case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text" and that "[a] contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." This language suggests it will primarily be applied to standard-form or adhesionary contracts or, as the Supreme Court of Louisiana has most often recently applied article 2056, to insurance contracts.[73] Neither this court nor the Supreme Court of Louisiana has, however, confined the provision to these types of contracts.[74]

69. *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305, 308 (5th Cir.1998) (quoting *Lloyds of London v Transcon. Gas Pipe Line Corp.*, 101 F.3d 425, 429 (5th Cir.1996)).

70. *Omnitech Int'l, Inc v. Clorox Co.*, 11 F.3d 1316, 1326 (5th Cir 1994) (quoting LA CIV CODE art. 2046).

71. *Amoco Prod. Co. v. Forest Oil Corp.*, 844 F.2d 251, 255 n. 7 (5th Cir.1988); *accord Liljeberg Enters. Inc. v. Lifemark Hosps. of La., Inc.*, 620 So.2d 1331, 1334–35 (La.App. 4 Cir.) ("Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C.2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent LSA-C.C.2046 The words of a contract must be given their generally prevailing meaning. LSA-C.C.2047. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C C.2050. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. LSA-C.C.2056."), *writs denied*, 621 So.2d 818 (La.1993). On appeal, Lifemark does not deny that it drafted the pharmacy agreement. *See id* at 1338 (identifying "the attorney who drafted the agreement for Lifemark").

72. *Lewis v. Hamilton*, 652 So.2d 1327, 1330 (La.1995).

73. *E.g., Succession of Fannaly v. Lafayette Ins. Co.*, 805 So.2d 1134, 1138 (La.2002); *La. Ins. Guar Ass'n v. Interstate Fire & Cas. Co.*, 630 So.2d 759, 764 (La.1994).

74. *See, e g., United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (In re United States Abatement Corp.)*, 79 F.3d 393, 400 (5th Cir 1996) (case involving oil platform maintenance contract); *Huggs, Inc. v LPC Energy, Inc*, 889 F.2d 649, 653 (5th Cir.1989) (case involving mineral lease); *Brown v Drillers, Inc.*, 630 So.2d 741, 754 n.

[29] At the same time, we have held that, "while the jurisprudence of Louisiana has established a rule of contractual interpretation which construes ambiguity against the party drafting the document in question, neither party is deemed to be the scrivener when, as here, the initial draft is modified and remodified in a series of exchanges between the parties to produce an execution draft reflecting give and take between obligor and obligee." [75]

[30] We first must answer whether the judicial lien and foreclosure of the hospital were defaults under the collateral mortgage and lease and, if so, whether they were transactional defaults under the pharmacy agreement's cross-default provision. Section 5.1(b) of the pharmacy agreement provides:

> This Agreement shall be effective as set forth above and shall continue in full force and effect, unless sooner terminated with the first to occur of the following: . (b) Either party shall remain in breach of this Agreement for a continuous, unabated 30-day period after receipt of written notice of such breach from the other party. Should OPERATOR [Liljeberg Enterprises, Inc.]; or any of LIFEMARK's corporate affiliates, be in default of any other contractual agreement with LIFEMARK or any of LIFEMARK's corporate affiliates, including, but not limited to, the lease relating to the Hospital, then OPERATOR [Liljeberg Enterprises, Inc.] shall be in breach of this Agreement.

Section 5.1(b) placed the Liljebergs in breach of the pharmacy agreement by virtue of the default under the fourth covenant of the collateral mortgage through the sale of the hospital. That covenant provides that "[t]he Mortgagor [St. Jude] hereby agrees that should the [hospital] be mortgaged, sold or transferred, either with or without the assumption of the aforesaid indebtedness, such sale, transfer or mortgage shall constitute a breach of this contract and the obligations herein set forth."

Lifemark argues that the judicial mortgage and lien placed on the hospital was also a transactional default under the fourth and fifth covenants of the collateral mortgage. The fourth covenant provides in relevant part, in addition to the previously-quoted language, that "[t]he [hospital] is to remain mortgaged and hypothecated until the full and final payment of the aforesaid indebtedness ... the Mortgagor [St. Jude] hereby binding itself ... not to make a conveyance, mortgage, transfer or sale of the [hospital] until full and final payment of the aforesaid indebtedness ..., unless the Mortgagee [Lifemark Hospitals, Inc.] expressly consents to such conveyance or mortgage in writing." The fifth covenant provides, in pertinent part, that "should there be created or suffered to be created any other lien or charges superior in rank to the lien and mortgage herein granted, ... then and in any of such events, the Note in principal and interest and all other indebtedness secured hereby shall, at the option of the Mortgagee [Lifemark Hospitals, Inc.] shall, at the option of the Mortgagee [Life-

20 (La.1994) ("Applying this rule [Louisiana Civil Code article 2056] in contexts like this one is appropriate in that it recognizes the reality that the releasee is responsible for the broad release language and that any ambiguity should thus be construed against the releasee."), *cf Mott v. ODECO*, 577 F 2d 273, 278 (5th Cir 1978) (case involving master service contract relating to offshore oil-drilling platform) (applying pre-article 2056 rule in Louisiana Civil Code articles 1957 and 1958, which embodied the same general rule of Louisiana jurisprudence)

75. *Shell Offshore, Inc v. Marr*, 916 F.2d 1040, 1046 (5th Cir.1990).

mark Hospitals, Inc.], immediately become due and payable...." Finally, Lifemark argues that the Travelers lien created a default of the lease between St. Jude and Lifemark, which provides in Article 11.1, entitled "Warranty of Peaceable Possession and Title," that "[d]uring the Lease Term, LESSOR [St. Jude] represents and covenants that it will not create nor allow to exist any liens, encumbrances or charges relating to obligations of the LESSOR [St. Jude] affecting the Leased Premises except liens, such as paving, water and sewerage liens, resulting from a special assessment by a Governmental Authority and the Act of Collateral Mortgage ... and any other mortgage instruments now or hereafter executed to secure the [Lifemark Hospitals, Inc.] loan . or otherwise agreed to in writing by [Lifemark Hospitals, Inc.]."

It is important to note that the collateral mortgage was signed by St. Jude and Lifemark Hospitals, Inc., not Liljeberg Enterprises and Lifemark Hospitals of Louisiana, Inc., while the lease of the hospital was signed by St. Jude and Lifemark Hospitals of Louisiana, Inc., not Liljeberg Enterprises and Lifemark Hospitals of Louisiana, Inc. As a result, Lifemark argues on appeal that the first reference to Lifemark in section 5.1(b) of the CPA is a typographical error, and that the provision should read "or any of OPERATOR's corporate affiliates," such that any default of St. Jude, which is an affiliate of the "Operator," Liljeberg Enterprises, is a default under the pharmacy agreement.

[31, 32] The difficulty for Lifemark is that it is required to seek reformation or, to avoid absurdity, reading of the word "OPERATOR'S" into section 5.1(b) for "LIFEMARK'S." Lifemark has never whole-heartedly sought reformation and with good reason. Under Louisiana law, "[r]eformation is an equitable remedy that may be used when a contract between the parties fails to express their true intent, either because of mutual mistake or fraud." [76] Indeed, "[t]o establish the appropriateness of reformation, [Lifemark] had to prove by clear and convincing evidence that the [pharmacy agreement], as written, contained a mutual mistake and did not comport with the parties original intent." [77]

On this appeal, Lifemark stresses that the district court erred in rejecting its interpretation of section 5.1(b). The district court concluded that the language in section 5.1(b) could have been prepared for Liljeberg Enterprises's benefit so that a default by Lifemark or a Lifemark affiliate would have allowed Liljeberg Enterprises to terminate the pharmacy agreement or seek damages. Lifemark replies that this suggested rational basis for the provision's otherwise embarrassing phrasing is not so simple. Rather, this rescue requires a finding that the scriveners made four errors in the provision, instead of the one error that would exist under Lifemark's interpretation. Lifemark's argument, while strong, is not clear and convincing evidence of mutual mistake or fraud in the formation of the pharmacy agreement.

Lifemark also says that John Liljeberg testified that the Travelers lien could cause a default under the pharmacy agreement's cross-default provision. As we read the testimony, Liljeberg did not admit any mutual mistake in the drafting of section 5.1(b) of the pharmacy agreement. Rather he indicated only that his attorney was concerned that the Travelers lien and

76. *Edwards v Your Credit Inc*, 148 F.3d 427, 436 (5th Cir.1998).

77. *Duhon v. Mobil Oil Corp*, 12 F 3d 55, 58 (5th Cir.1994)

foreclosure might sever the pharmacy agreement.

At the same time, "Louisiana courts will not interpret a contract in a way that leads to unreasonable consequences or inequitable or absurd results even when the words used in the contract are fairly explicit." [78] Lifemark argues that the assertion that there was no typographical error in section 5.1(b) of the pharmacy agreement is untenable because it leads to the nonsensical result that, when read literally, section 5.1(b) provides that Liljeberg Enterprises would be in breach if a Lifemark affiliate defaulted under an agreement with another Lifemark affiliate. Lifemark points out that this reading of section 5.1(b) is contrary to its plain language. That provision sets forth a default on "the lease relating to the Hospital" as an example of the type of breach that will trigger the cross-default provision. They note that, under Liljeberg Enterprises's reading, such a breach of the lease could not trigger the cross-default provision because it is not an agreement between Liljeberg Enterprises and a Lifemark affiliate or an agreement between two Lifemark entities.

[33–35] This is a stronger argument for Lifemark's interpretation of section 5.1(b). Particularly so in light of several controlling standards for contract interpretation under Louisiana law: (1) Every provision of the contract must be interpreted in light of the contract's other provisions in order to give each provision the meaning suggested by the contract as a whole; (2) Contract provisions susceptible to different meanings should be interpreted so as not to neutralize or ignore any provision or treat any provision as mere surplusage and so as to preserve the validity of the contract; and (3) "'A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.'" [79] Only if these rules do not resolve the issue of how to interpret the contractual provision at issue should the provision be interpreted against the party that drafted it, which default rule applies, in any event, "only ... when there are two equally reasonable interpretations of the contractual provision in question." [80]

We conclude that Lifemark's interpretation of section 5.1(b), providing that "LIFEMARK'S" should be read as "OPERATOR'S" in the first reference in the provision, is the only construction of the provision which gives it the meaning suggested by the pharmacy agreement as a whole and which does not neutralize or ignore any provision or treat any provision as mere surplusage. In particular, this reading of section 5.1(b) makes sense of the example of the lease of the hospital between St. Jude and Lifemark Hospitals, Inc., which was signed only a month after Liljeberg Enterprises and Lifemark Hospitals of Louisiana, Inc. entered into the pharmacy agreement. In short, reading section 5.1(b) literally leads to absurd results, *inter alia*, that Liljeberg Enterprises would be required to answer for a default by one of Lifemark's corporate affiliates, whereas the interpretation advanced by Lifemark represents the most reasonable interpretation of the provision in question following the established rules of contract interpretation under Louisiana law.

We conclude that the district court erred in finding section 5.1(b) to be unenforcea-

78. *Tex E. Transmission Corp. v. Amerada Hess Corp.*, 145 F 3d 737, 742 (5th Cir.1998)

79. *Id* (quoting LA CIV CODE art 2053).

80. *Lewis*, 652 So.2d at 1330.

ble and therefore severable from the pharmacy agreement pursuant to section 10 and in finding that "[t]he obligations contained in the [pharmacy agreement] are severable from St. Jude's obligations to [Lifemark Hospitals, Inc.] under the mortgage and [Lifemark Hospitals of Louisiana, Inc.] under the lease."

We further hold that the district court clearly erred in finding, largely implicitly, that the Travelers judicial mortgage and the judicial sale of the hospital were not defaults under the fourth covenant of the collateral mortgage. The district court also clearly erred in finding that "[t]he mortgage when viewed in tandem with the lease was incapable of default since the obligations owed by [Lifemark] under the lease would satisfy all of the obligations due by St. Jude to [Lifemark Hospitals, Inc.] under the terms of the financing." Under the express terms of the collateral mortgage, the hospital was not be mortgaged or sold. These events were breaches of the non-financial covenants of the collateral mortgage and the undisputed fact is that the hospital was both mortgaged and sold. It is no answer that the mortgage and sale resulted from Lifemark's actions and not Liljeberg Enterprises's or St. Jude's. The express language of the fourth covenant does not confine its prohibition of sales or mortgages of the hospital to events caused by St. Jude. We have already concluded that the district court clearly erred in finding the superior rank of the Travelers judicial mortgage and the resulting judicial sale of the hospital to have been the result of a breach of fiduciary duties, bad faith, or collusion on the part of Lifemark. Moreover, the district court made no findings that Liljeberg Enterprises had cured or provided adequate assurance that it will promptly cure such a default, nor could the district court have done so on this record.

[36] The Liljebergs, however, attempt to escape the effect of the default under the collateral mortgage by attacking the validity of the cross-default provision of the pharmacy agreement. These efforts are unavailing. The Travelers judgment which gave rise to the judicial mortgage and lien and subsequent judicial sale of the hospital did not occur solely because of Liljeberg Enterprises's financial condition upon the filing of its Chapter 11 bankruptcy petition. To assert that it did ignores the Liljebergs' bad faith conduct, as found by this court, in their dealings with Travelers. Contrary to the Liljebergs' assertion, relegated to a footnote, that the pharmacy agreement's cross-default provision is legally invalid because it impermissibly hinges on Liljeberg Enterprises's financial condition and ability to pay under the other contracts, the cross-default provision does not run afoul of the exceptions to 11 U.S.C. § 365(b)(1)'s requirements provided under sections 365(b)(2)(A) or 365(e)(1)(A).[81]

[37-40] There is non-binding authority from bankruptcy and district courts outside of this circuit, cited by the Liljebergs, for the propositions that cross-default provisions do not integrate otherwise separate transactions or leases and

81. See 11 U.S.C. § 365(b)(2)(A) ("Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—(A) the .. financial condition of the debtor at any time before the closing of the case ...."); *id.* § 365(e)(1)(A) ("Notwithstanding a provision in an executory contract . , an executory contract of the debtor may not be terminated , at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—(A) the financial condition of the debtor at any time before the closing of the case...."). *Compare In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837, 847 (Bankr.C D.Cal.1999), *In re Sambo's Rests , Inc* , 24 B R. 755, 757 (Bankr.C.D.Cal. 1982).

that section 365 prohibits the enforcement of cross-default provisions where enforcement would restrict the debtor's ability to assume an executory contract.[82] We agree with another bankruptcy court which recently synthesized these authorities and concluded that, while "cross-default provisions are inherently suspect," they are not *per se* invalid in the bankruptcy context, and "a court should carefully scrutinize the facts and circumstances surrounding the particular transaction to determine whether enforcement of the provision would contravene an overriding federal bankruptcy policy and thus impermissibly hamper the debtor's reorganization."[83] Before finding that a cross-default provision involving a lease and nonlease agreements, including a note, similar to that here, was enforceable, the bankruptcy court concluded that "[f]ederal bankruptcy policy is offended where the non-debtor party seeks enforcement of a cross-default provision in an effort to extract priority payments under an unrelated agreement," such that "[a] creditor cannot use the protections afforded it by section 365(b) (which requires curing of defaults and adequate assurances of future payments as a precondition to assumption of an executory contract or unexpired lease) in order to maximize its returns by treating unrelated unsecured debt as a *de facto* priority obligation."[84] As such, "where the nondebtor party would have been willing, absent the existence of the cross-defaulted agreement, to enter into a contract that the debtor wishes to assume, the cross-default provision should not be enforced," but "enforcement of a cross-default provision should not be refused where to do so would thwart the nondebtor party's bargain."[85] The court also noted that "[t]he fact that legally separate entities are parties to the various contracts does not of itself preclude enforcement of the cross-default provision" and that, "[w]here documents are contemporaneously executed as necessary elements of the same transaction, such that there would have been no transaction without each of the other agreements, the fact that nominally distinct parties executed the agreements will not preclude enforcement of a cross-default provision in favor of a party whose economic interests are identical to those of the entity that is party to the document containing the cross-default provision."[86]

Here, there is ample support for the conclusion that the lease and collateral mortgage of the hospital are interrelated with the pharmacy agreement and that there would have been no pharmacy agreement without the lease of the hospital or the loan secured by the collateral mortgage. Indeed, the parties agreed in the pre-trial order that St. Jude would not have entered into the lease of the hospital to Lifemark if Lifemark had refused to enter into the pharmacy agreement with Liljeberg Enterprises.[87] It is true that the lease was signed a month after the pharmacy agreement was executed, but section 5.1(b) expressly contemplates "the lease relating to the Hospital" as an instrument

82. *See EBG Midtown S. Corp. v. McLaren/Hart Envtl. Eng'g Corp (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 597 (S.D N.Y.1992); *Braniff, Inc. v. GPA Group PLC (In re Braniff, Inc.)*, 118 B.R. 819, 845 (Bankr M D.Fla 1990); *see also Plitt*, 233 B.R. at 847.

83. *Kopel v. Campanile (In re Kopel)*, 232 B R. 57, 64 (Bankr.E.D.N.Y.1999)

84. *Id.* at 65–66.

85. *Id.* at 66.

86. *Id.* at 67.

87. Pre-Trial Order at 34 ¶ 23 (R. 9212).

covered by the cross-default provision. The parties also agreed that John Liljeberg signed a letter of intent dated December 20, 1982, with Lifemark concerning a proposal to develop St. Jude Hospital.[88] The district court, in considering the effectiveness of an alleged default under pharmacy agreement section 5.1(e), found that "although it is evident that the [pharmacy agreement] was a part of the overall transaction, it is not evident from the documents executed one month after the [pharmacy agreement] that the [pharmacy agreement] was not severable from the remainder of the transaction," such that "a default under the [pharmacy agreement] would not collapse the loan or the Lease." That observation adds nothing. Non-enforcement of the cross-default provision, providing that a default under the collateral mortgage or lease would collapse the pharmacy agreement, would thwart Lifemark's bargain in agreeing to enter into the pharmacy agreement, all a part of the overall transaction to finance the building of the hospital through a loan secured by a collateral mortgage. Any finding, express or implied, to the contrary by the district court is clearly erroneous on the record before us.[89]

C.

In sum, the district court erred in allowing Liljeberg Enterprises to assume the pharmacy agreement pursuant to 11 U.S.C. § 365. Liljeberg Enterprises's assumption of the pharmacy agreement is barred pursuant to 11 U.S.C. § 365(b)(1)(A) by defaults under the fourth covenant of the collateral mortgage in the form of the judicial mortgage placed on and judicial sale of the hospital, which in turn resulted in an incurable default under section 5.1(b) of the pharmacy agreement.[90] We therefore reverse the district court's judgment in Cause No. 93-1794 granting Liljeberg Enterprises's motion to assume the pharmacy agreement.

VII. Cause No. 93-4249

The district court in Cause No. 93-4249 ruled that Lifemark Hospitals of Louisiana, Inc., American Medical, and Tenet are liable to Liljeberg Enterprises for damages in the total amount of $12,432,905.92 for breach of payment due under the pharmacy agreement, specifically for the following: (1) $4,062,396 for Lifemark's failure to reimburse Liljeberg Enterprises its actual acquisition costs for the period August 31, 1989 through June 1, 1993; (2) $700,000 as lost profits for Lifemark's failure to purchase contrast media through the date of trial from Liljeberg Enterprises as required under the pharmacy agreement;[91] (3) $2,023,571 for

88. *Id.* at 32 ¶ 4 (R. 921 0)

89. Likewise, the Liljebergs' unsupported contention in a footnote that principles of estoppel and waiver bar Lifemark's challenge to Liljeberg Enterprises's assumption because Liljeberg Enterprises would not be in bankruptcy were it not for Lifemark's actions is undermined by our conclusion that the district court clearly erred in its findings of bad faith and collusion and by the absence of any findings by the district court (or record evidence) that Lifemark's conduct was the cause of the debt to Travelers or St. Jude's inability to pay that debt let alone Liljeberg Enterprises's Chapter 11 bankruptcy.

90. In light of this conclusion, we need not address Lifemark's additional arguments regarding Liljeberg Enterprises's transaction defaults under the collateral mortgage and lease, operational defaults under the pharmacy agreement, or failure to provide adequate assurance of future performance under the pharmacy agreement.

91. Contrast media is a diagnostic drug for use in, *inter alia*, radiology procedures, which is generally swallowed or injected and which

Lifemark's wrongful disallowance of requested payment to Liljeberg Enterprises due to pricing differences and other items not specifically addressed in the district court's judgment through the date of trial; (4) $103,617 for Lifemark's wrongfully deducting bad debt allowances from its payments on the cost reimbursement portion of Liljeberg Enterprises's billing through the date of trial; (5) $150,275.60 for Lifemark's failure to implement minimum fee increases due to Liljeberg Enterprises under the pharmacy agreement through the date of trial; (6) $54,055 for Lifemark's failure to properly pay Liljeberg Enterprises under the pharmacy agreement for TPN fees and to reimburse Liljeberg Enterprises for chemotherapy kits provided to the nursing staff at the hospital;[92] (7) $281,906.32 for pricing and quantity differences; (8) $57,085 for Lifemark's failure to properly pay Liljeberg Enterprises for nitroglycerin and insulin supplied under the pharmacy agreement; and (9) an additional $5 million as damages through the date of trial. The district court also ruled that Liljeberg Enterprises is liable to Lifemark Hospitals of Louisiana, Inc., American Medical, and Tenet for $741,879, specifically $616,400 for Liljeberg Enterprises's overcharges on piggyback fees under the pharmacy agreement[93] and $125,479 for Liljeberg Enterprises's failure to pay Medicare reimbursement due to Lifemark Hospitals of Louisiana, Inc., American Medical, and Tenet under the pharmacy agreement through the date of trial. The district court denied all other claims by the parties for damages under the pharmacy agreement.

[41, 42] In the absence of an error of law, this court reviews the district court's award of damages for clear error only.[94] "If the award of damages is plausible in light of the record, a reviewing court should not reverse the award even if it might have come to a different conclusion."[95]

[43–46] We have generally held that, "[w]hile the district court may not determine damages by speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[96] Moreover, under Louisiana law, it is well-settled that "[a]ctual damages must be proven; they cannot be speculative or conjectural."[97] Thus, "[w]hile the breaching party should not escape liability because of difficulty in finding a perfect measure of damages, the evidence must furnish data for a reason-

the district court found may come in a kit or may be purchased separately.

92. The district court found that "Total Paterals Nutrition ('TPN') is a combination of a highly caloric dextrose or sugar solution with protein additives prepared using the aseptic technique."

93. The district court found that "[a]n 'IV piggyback' is a small volume of fluid that is used to administer mostly antibiotic . . . medications to patients through an intravenous solution," and "[a]n additive is added to IV piggybacks in 90% of the IV piggybacks dispensed by [Liljeberg Enterprises]."

94. *E. & J. Gallo Winery v. Spider Webs Ltd.*, 286 F.3d 270, 277 (5th Cir.2002); *Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466, 477 (5th Cir.2001).

95. *St. Martin*, 224 F.3d at 410.

96. *Sulzer Carbomedics, Inc. v. Or. Cardio-Devices, Inc.*, 257 F.3d 449, 459–60 (5th Cir. 2001) (internal quotation marks omitted) (quoting *DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 330 (5th Cir.1997) (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir.1974))).

97. *Nat. Harrison Assocs., Inc. v. Gulf States Utils. Co.*, 491 F.2d 578, 587 (5th Cir.1974).

ably accurate estimate of the amount of damages" such that it "appear[s] reasonably evident that the amount allowed rests upon a certain basis."[98] More specifically, "Louisiana law is well-settled that lost profits 'must be proven with reasonable certainty and cannot be based on conjecture and speculation.' "[99]

The district court's findings of breaches of the pharmacy agreement meriting damage awards against Lifemark and many of Lifemark's arguments on appeal turn largely on interpretations of various provisions of the pharmacy agreement, which are generally governed by the standards we have described. On appeal, the Liljebergs seek to go beyond the plain language of the pharmacy agreement on the basis of Lifemark's alleged drafting of the pharmacy agreement in bad faith. The argument is that the contract was made deliberately ambiguous in order to injure Liljeberg Enterprises. Likewise, the district court found ambiguity in almost every relevant provision of the pharmacy agreement which was not preclusively interpreted by the Louisiana state court in a prior case involving these parties.[100] The district court further concluded that, based on testimony that Lifemark entered into the pharmacy agreement with the ultimate motive of terminating rather than abiding by the contract, the pharmacy agreement should be interpreted against Lifemark where the pharmacy agreement is susceptible to more than one interpretation. However, as Lifemark aptly points out on appeal, Liljeberg Enterprises never argued that the contract was fraudulently induced and the record shows that John Liljeberg was fully apprised of the pharmacy agreement's terms and was represented by counsel and pharmacy consultants when he negotiated the agreement and understood the agreement that he signed on behalf of Liljeberg Enterprises. Under these circumstances, in the absence of ambiguity, we look to the clear and explicit language within the four corners of the pharmacy agreement to determine the pharmacy agreement's meaning and the intent of its parties.

On appeal, Lifemark challenges several of the district court's damage awards to Liljeberg Enterprises.[101] We will address each challenge in turn.

A.

Lifemark argues that the district court erred in awarding $5 million for Liljeberg Enterprises's "circumvention claim" based upon Liljeberg Enterprises's theory that Lifemark "circumvented" the pharmacy agreement, and thereby avoided paying Liljeberg Enterprises, by not paying Liljeberg Enterprises for each administered dose of drugs provided by Liljeberg Enterprises and obtaining drugs from other sources. Lifemark contends that these

98. *Id.; accord Mobil Exploration & Producing U.S., Inc. v Cajun Constr. Servs., Inc.*, 45 F.3d 96, 101–02 & nn.18–19 (5th Cir.1995).

99. *Mac Sales, Inc. v. E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 753 (5th Cir.1994) (quoting *Guy T. Williams Realty, Inc. v. Shamrock Constr. Co.*, 564 So.2d 689, 695 (La.App. 5 Cir.), *writ denied*, 569 So.2d 982 (La 1990)).

100. *See Liljeberg Enters. Inc. v Lifemark Hosps. of La., Inc.*, 620 So 2d 1331 (La.App. 4 Cir.), *writs denied*, 621 So.2d 818 (La 1993). Neither party challenges on appeal the district court's determination of issue preclusion.

101. Lifemark does not appeal the district court's awards of $103,617 for bad debt deductions and $54,055 for chemotherapy kits and TPN fees, nor the district court's failure to award $753,952 for Liljeberg Enterprises's denial of Medicaid reimbursements. Likewise, the Liljebergs do not appeal the order to repay $616,400 for I.V. piggyback fee overcharges and $125,479 for Medicare reimbursement denials.

claims fail because they are based upon erroneous interpretations of sections 2.6 and 4.1 of the pharmacy agreement and because, in any event, by relying solely on a procedurally flawed audit of patient charts, Liljeberg Enterprises failed to adequately prove damages. Lifemark also contends that the $5 million award for "circumvention" overlaps impermissibly with the $700,000 award for lost profits on contrast media (based upon Liljeberg Enterprises's argument under section 2.6(a)) and the $57,085 award for insulin and nitroglycerin underpayments (based upon Liljeberg Enterprises's argument under section 4.1).[102]

The provisions of the pharmacy agreement at issue here are sections 2.6 and 4.1 and Exhibit B. Section 2.6(a) provides:

> OPERATOR [Liljeberg Enterprises, Inc.] shall not provide, nor be entitled to any compensation, for the following:
>
> (a) all drugs and supplies utilized by the ancillary departments of the Hospital in preparation for, during, or immediately following departmental patient related procedures, except those patient identifiable charges in which the cost of the drug is not included in a fee or charge for that procedure. Ancillary departments shall include, but not be limited to, radiology, anesthesiology, and clinical labs . . .

Section 4.1 provides in pertinent part:

> (a) As compensation for those pharmaceutical services provided by OPERATOR [Liljeberg Enterprises, Inc.] as specified above, and for pharmaceuticals and intravenous solutions furnished hereunder to inpatients or emergency room patients, LIFEMARK shall pay to OPERATOR [Liljeberg Enterprises, Inc.] the fee per procedure as shown on Exhibit B, which is attached hereto and incorporated herein for all purposes less 5% of such total of the fees per procedure as allowance, for bad debt. The allowance for bad debt shall be reviewed after each fiscal year of the Hospital and changed to reflect the actual percentage of uncollectable accounts for the preceding fiscal year of the Hospital.

Exhibit B, in turn, provides:

> LIFEMARK shall reimburse the OPERATOR [Liljeberg Enterprises, Inc.] the greater of (i) the minimum fee set forth below or (ii) a fee equal to 1.35 times cost as identified by invoice.

Drug Category	Minimum Fee	
Orals		
Solid	$ .53	
Liquid	.63	
CII Controlled Drug	56	
Suppositories	53	
Parenterals		
Per Dose	2.80	
CII Controlled Drug	3.00	
Partial Fill I.V.'s (Piggybacks)	5.25	(includes cost of solution)
Miscellaneous		
Opthalmics, Externals, Otics, etc.	1.40	

> Fees for items or categories not identified above shall be established in a manner consistent with the development schedule.
>
> LIFEMARK shall reimburse the OPERATOR [Liljeberg Enterprises, Inc.] a flat fee for handling the following items:

I.V. Handling fee for Non-Additive, large volume parenterals	$ 1.00
I V. Additive Fee	1.70

i.

[47] Lifemark argues that the district court erroneously interpreted section

102. *See Nat'l Tea Co. v. Plymouth Rubber Co., Inc.*, 663 So 2d 801, 811 (La App 5 Cir.1995) (holding that "the allowance of a double recovery in a contractual situation, in which the damages are fixed, is inappropriate").

4.1(a)'s provision for "the fee per procedure as shown on Exhibit B" to mean that Liljeberg Enterprises was entitled to a new fee each time a dose of the same drug or drug combination was administered by a nurse or physician, even if Liljeberg Enterprises performed no new pharmaceutical service. Lifemark contends that section 4.1(a)'s "fee per procedure" provision is unambiguous and simply means that Liljeberg Enterprises is entitled to a single fee for each drug dispensed by Liljeberg Enterprises's pharmacy, irrespective of whether a nurse or doctor later administers a dose or doses of the drug in a multistep process.

The state court's preclusive holding establishes that, under section 4.1(a), Liljeberg Enterprises is entitled to receive reimbursement for actual acquisition costs in addition to the "fee per procedure" set forth in Exhibit B.[103] The question left unanswered by the state court decision, however, and squarely presented in this case is whether "fee per procedure" should be understood to authorize Liljeberg Enterprises to receive a fee per drug dispensed or pharmaceutical service provided by Liljeberg Enterprises's pharmacy or a fee per administered dose, as the district court found. The district court concluded that the phrase "per procedure" is ambiguous and therefore turned to extrinsic evidence.

This conclusion is correct if the parties' intent as to the meaning of this provision of section 4.1(a) is uncertain and this provision is susceptible to more than one reasonable meaning under the circumstances and after applying established rules of construction.[104] The term "procedure" is nowhere defined in the pharmacy agreement and is, in fact, used in several different contexts within this contract, including "departmental patient related procedures" and "the Hospital's policies and procedures." Lifemark argues that the per-administered-dose meaning is not reasonable because it would compensate Liljeberg Enterprises for services performed by other hospital employees or departments, such as nurses administering medication, and not simply for services Liljeberg Enterprises actually performed. As support for this argument, Lifemark notes that section 4.1(a) provides that the "fee for procedure" shall be paid "[a]s compensation for those pharmaceutical services provided by [Liljeberg Enterprises] as specified above, and for pharmaceuticals and intravenous solutions furnished hereunder to inpatients or emergency room patients." Section 2.4 provides that "pharmaceutical services" includes "without limitation, drugs, medicines, and intravenous solutions." Even the most expansive, reasonable meaning attributable to "pharmaceutical services" under the pharmacy agreement would not include services performed by other hospital employees or departments within the scope of "pharmaceutical services provided by [Liljeberg Enterprises]."

However, section 4.1(a) also provides that the "fee per procedure" shall be paid "for pharmaceuticals and intravenous solutions furnished hereunder to inpatients or emergency room patients." In light of this language, the ordinary meaning of "procedure" could reasonably encompass either meaning attributed by the parties to "fee per procedure." Moreover, the district court's interpretation of "fee per procedure" does not neutralize or ignore or treat as mere surplusage any other provision of the pharmacy agreement. Under these circumstances, we conclude that the

103. *Liljeberg Enters.*, 620 So 2d at 1335–36

104. *See Davis Oil*, 145 F.3d at 308

district court did not err in concluding that the phrase "fee per procedure" in section 4.1(a) is ambiguous and looking to extrinsic evidence.

Having found ambiguity exists in section 4.1(a), we review the district court's factual determinations of intent for clear error only.[105] Lifemark argues that compensation per dose administered results in grossly excessive charges. Additionally, Lifemark notes that the district court interpreted the "fee per procedure" phrase to apply differently to heparin flush kits and contends that there is no reasoned basis for interpreting "per procedure" differently according to the type of drug dispensed when the pharmacy's involvement is the same.[106] However, Lifemark offers no persuasive argument on appeal that there is clear error in the district court's finding, based on witness testimony, that the parties intended for Liljeberg Enterprises to be compensated for each unit administered with respect to the administration of multiple units of medication or multiple administrations of medication from single vials of medicine. We therefore conclude that the district court's interpretation of section 4.1(a)is correct.[107] The district court's additional finding that heparin flush kits are distinguishable because allowing Liljeberg Enterprises compensation for each step in the process and each legend drug item contained in a kit would involve multiple reimbursement for a single, one-time process of administering the kit is consistent with the district court's general finding and is also not clearly erroneous.

ii.

[48] Turning to section 2.6(a) of the pharmacy agreement, Lifemark argues that the district court erred in ruling that Lifemark was required to compensate Liljeberg Enterprises for certain bulk drugs, such as contrast media and surgery kits, which Lifemark purchased directly from drug wholesalers and which were sent to ancillary departments of the hospital for administration by doctors or nurses.[108] According to Lifemark, the district court held that compensation was due Liljeberg Enterprises because section 2.6(a)'s excluding compensation to Liljeberg Enterprises for these drugs was illegal and was superceded by the Tenet policy manual. The argument is that the district court included this unspecified compensation in its $5 million award to Liljeberg Enterprises.

The district court's actual findings and conclusions on this matter are somewhat different, however, and hinge on the following propositions. Liljeberg Enterprises was the exclusive, licensed hospital pharmacy for the hospital, and the parties intended that Liljeberg Enterprises would

105. *See Gebreyesus*, 204 F 3d at 642.

106. The district court's unchallenged factual finding was that "[a] 'heparin flush kit' consists of three separate items that are administered at one time and are in essence a single procedure or dose."

107. Lifemark also argues that the district court erred in failing to award Lifemark $51,771 as reimbursement for overpayments for multiple doses of nitroglycerin and insulin, where Liljeberg Enterprises charged multiple fees for the pharmacy's single act of dispensing these medications, and, based on the same reasoning, Lifemark contends that the district court erred in awarding $57,085 for Lifemark's alleged underpayments to Liljeberg Enterprises for nitroglycerin and insulin supplied under the pharmacy agreement. On the basis of our conclusion that the district court's interpretation of "fee for procedure" in section 4.1(a) is not in error, we reject these points of error as well.

108. Surgery kits contain a combination of legend drugs such as Lidocaine and non-legend supplies used during surgical procedures.

have the exclusive right to furnish all drugs to all departments at the hospital except for specific exclusions set forth in section 2.6. Louisiana and federal law do not require that kits which include legend drugs be purchased from Liljeberg Enterprises, but the law does require that Liljeberg Enterprises oversee the storage and dispensing of these items. However, Tenet policy requires that the hospital pharmacy procure, store, distribute, and control all pharmaceuticals used within the hospital,[109] and the pharmacy agreement requires that all drugs to be administered to patients at the hospital be purchased from Liljeberg Enterprises, other than those drugs for which a specific exclusion exists under the pharmacy agreement, *e.g.*, pursuant to section 2.6. Thus, Lifemark should have involved Liljeberg Enterprises in procuring, storing, and dispensing any drugs or kits which required the intervention of a licensed pharmacist under applicable law. Lifemark failed to do so in ordering legend drugs or kits containing legend drugs from sources other than Liljeberg Enterprises, including by use of Liljeberg Enterprises's pharmacy permit without Liljeberg Enterprises's permission,[110] and by storing and dispensing legend drugs through the hospital's Materials Management Department, bypassing the hospital pharmacy, in contravention of the pharmacy agreement.

Thus, the district court did not conclude that section 2.6(a) is illegal *per se*. Nor did it conclude that Liljeberg Enterprises was required by state or federal law to purchase all drugs or kits containing legend drugs for use in the ancillary departments of the hospital in preparation for, during, or immediately following departmental patient related procedures. Rather, it decided that, where state and federal law requires Liljeberg Enterprises's involvement with legend drugs used by the ancillary departments of the hospital, section 2 6(a) must not be read to bar Liljeberg Enterprises from entitlement to compensation under the pharmacy agreement.

Lifemark argues, however, that where section 2.6(a) states that Liljeberg Enterprises will neither "provide" nor be compensated for drugs used in ancillary departments, including legend drugs, but does not prohibit Liljeberg Enterprises from providing oversight or other services which the court has found to be necessary, section 2.6(a) is entirely consistent with the district court's finding that Lifemark could lawfully purchase legend drugs. Lifemark also argues that there is no evidence of illegality; that a Louisiana Board of Pharmacy inspector found no violations where the drugs were distributed on doctors' orders and the administration of the drugs was ultimately reviewed by the hospital pharmacy.[111] Lifemark contends that

109. The district court found that Tenet's Pharmacy Policy & Procedure Manual gave Liljeberg Enterprises, as the hospital's pharmacy department, the responsibility to store, control, and distribute all drugs, including non-legend drugs, for use in ancillary departments, resting on the manual's general statement that the general purpose of the pharmacy department is the procurement, distribution, and control of all pharmaceuticals used within the hospital

110. There is no dispute that only Liljeberg Enterprises possessed the relevant hospital pharmacy permit for the hospital required under Louisiana law.

111. Lifemark concedes that an inspector for the Louisiana Department of Health and Hospitals testified that he concluded that legend drugs were being stored and dispensed from the Materials Management Department without the supervision of a pharmacist, but notes that he also admitted that his normal job responsibility was to inspect hospitals for federal reimbursements and that he would defer to Louisiana Board of Pharmacy on the interpretation and enforcement of Louisiana pharmacy laws

the district court erred in discounting this evidence (along with testimony that, even if it is against the letter of the law, many hospitals store and dispense pharmaceuticals out of ancillary departments), because, in the view of the district court, the Board's non-action against Lifemark appeared to be the result of the Board's desire to stay out of a contract dispute between two private entities and "because the exercise of discretion by the Board of Pharmacy cannot abrogate black letter law."

Finally, Lifemark argues that the district court erred in refusing to reopen the record to allow evidence from a trial in another lawsuit filed by Liljeberg Enterprises's former pharmacy director James Witchen against Lifemark Hospitals of Louisiana, Inc., a Lifemark employee, Tenet, and Liljeberg Enterprises.[112] This evidence showed that the Louisiana Board of Pharmacy found that Lifemark's handling of legend drugs was not a violation of pharmacy laws. Lifemark argues that this refusal works an injustice to it and constitutes an abuse of discretion.[113]

We conclude that the district court erred in concluding that section 2.6(a) denies Liljeberg Enterprises compensation for its required involvement in the procuring or purchasing and distribution, as opposed to the dispensing, of the legend drugs or kits. However, the district court did not err insofar as it concluded that Liljeberg Enterprises should have been involved with the storage of the legend drugs or kits at issue and compensated accordingly under the pharmacy agreement.

The district court's conclusion turns on whether applicable state or federal law required Liljeberg Enterprises to purchase, procure, store, distribute, or dispense legend drugs or kits containing legend drugs, which would prohibit a reading of section 2.6(a) to exclude compensation to Liljeberg Enterprises for rendering these services to "provide" such drugs for use by the ancillary departments of the hospital.[114]

Turning first to federal law, neither the district court nor the Liljebergs point to any relevant statutes, and we have found none, which prohibit the hospital's practice of the Materials Management Department's ordering, storing, and distributing legend drugs, which are not "controlled substances," to doctors or nurses in the ancillary departments of the hospital to administer to patients on doctors' or-

112. Witchen's suit stemmed from Lifemark's request, pursuant to its rights under the pharmacy agreement, that Liljeberg Enterprises remove Witchen as pharmacy director

113. The standard for deciding whether the district court erred in denying a motion to reopen is well-settled:

> We review for abuse of discretion a district court's ruling on a party's motion to reopen its case for the presentation of additional evidence. The court's decision "will not be disturbed in the absence of a showing that it has worked an injustice in the cause." Among the factors the trial court should examine in deciding whether to allow a reopening are the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party.

Garcia v Woman's Hosp. of Tex., 97 F.3d 810, 814 (5th Cir.1996) (citations omitted; quoting *Gas Ridge, Inc. v. Suburban Agric. Props., Inc.*, 150 F.2d 363, 366 (5th Cir.1945)).

114. Section 2.6(a) provides that Liljeberg Enterprises "shall not *provide, nor be entitled to any compensation*, for ... (a) all drugs and supplies utilized by the ancillary departments of the Hospital in preparation for, during, or immediately following departmental patient related procedures, except those patient identifiable charges in which the cost of the drug is not included in a fee or charge for that procedure " (emphasis added).

ders.[115] Furthermore, although the district court found that American Medical and Tenet used Liljeberg Enterprises's pharmacy permit without Liljeberg Enterprises's permission to order drugs, the court made no further findings that these drugs were controlled substances for which 21 U.S.C. § 822 requires registration with the United States Attorney General, and the record does not support a finding that Liljeberg Enterprises's "circumvention claim" involves any legend drugs which are controlled substances.

This issue presents a classic *Erie* question as to what state law requires, which we review *de novo*.[116] The competing views of officials from the Louisiana Board of Pharmacy and the Louisiana Department of Health and Hospitals on the question of what Louisiana law required as to the procurement or purchasing, storage, and dispensing or distributing of legend drugs at the hospital are of no moment in this analysis and entitled to no deference. Although the regulations upon which the district court relied were promulgated by the Board of Pharmacy of the Louisiana Department of Health and Hospitals, the views upon which the parties rely are not the sort of final decision of a state agency embodying the agency's interpretation of its own regulations to which Louisiana courts will give deference.[117] For this reason, the district court was entirely within its discretion in denying Lifemark's motion to supplement the record with evidence that the Louisiana Board of Pharmacy rejected Liljeberg Enterprises's complaints to the Board that Lifemark's hospital departments were dispensing drugs in violation of state pharmacy laws and that the Board rejected the complaints because it failed to find any violation of the pharmacy laws.

In concluding that "[t]he law only requires that [Liljeberg Enterprises] oversee the storage and dispensing of [items containing legend drugs]," the district court discussed only regulations promulgated by the Board of Pharmacy of the Louisiana Department of Health and Hospitals which govern "hospital pharmacies."[118] These regulations, however, do not specifically require the hospital pharmacy or pharmacist-in-charge to be involved in the purchasing, procurement, or distribution of legend drugs to doctors or nurses in the ancillary departments of the hospital to administer to patients on doctors' orders.[119] Our review of Louisiana law con-

115. *See* 21 U.S.C. § 353(b)(1)(ii) (requiring that certain drugs be dispensed only "upon a written prescription of a practitioner licensed by law to administer such drug"); *id.* § 822 (governing persons required to register with the United States Attorney General in order to dispense any "controlled substance").

116. *See Salve Regina Coll. v Russell*, 499 U.S 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)

117. *Cf. Matter of Recovery I, Inc.*, 635 So.2d 690, 697 (La.App. 1 Cir.), *writ denied*, 639 So.2d 1169 (La.1994); *cf. also Laidlaw Envtl. Servs., Inc v. La. Pub. Serv. Comm'n*, 752 So.2d 748, 751 (La.1999) (noting that the Louisiana Public Service Commission is entitled to deference in its interpretations of its own rules and regulations but not in its interpretation of statutes and judicial decisions).

118. *See* LA ADMIN CODE tit. 46, pt. LIII, § 2501; *id.* § 2503, *id.* § 2507(B); *id* § 2513; *id.* § 2519(A); *id.* § 2523(A).

119. *See id.* § 2501 ("A hospital pharmacy is a pharmacy department located in a hospital facility licensed under R.S. 40:2000 et seq., [1986] by the Louisiana Department of Health and Hospitals. Hospital pharmacy represents an inpatient primary care treatment modality pharmacy."); *id* § 2503(A) ("A hospital pharmacy permit shall be required to operate a pharmacy for possession, dispensing, and delivering legend prescription orders to patients in a hospital."); *id* § 2511(A) ("Hospital dispensing is the

vinces us that the Materials Management Department's "distributing" legend drugs to doctors or nurses in the ancillary departments of the hospital to "administer" to patients on doctors' orders constituted "distribution" and was not "dispensing," as the district court described it. Louisiana law in effect at the relevant time did not require that this work be supervised or done by a pharmacist.[120] Neither the district court nor Liljeberg Enterprises point us to any other controlling Louisiana law then in force that would prohibit the role of the Materials Management Department in ordering and distributing the drugs and kits at issue, and we have located no Louisiana case law or statute in effect at the relevant time which would do so.

The Louisiana legislature later changed the law to require just what the district court found to be the law at the time of Lifemark's alleged "circumvention" pursuant to the various hospital pharmacy regulations. The Louisiana legislature in 1999, after the events which allegedly gave rise to Liljeberg Enterprises's "circumvention claim," enacted Louisiana Revised Statutes § 37:1224(F). This section provided that "[a]ll procurement, delivery, dispensing, and distribution of federal legend and con-

issuance of one or more unit doses of medication in a suitable container, by a pharmacist, properly labeled for subsequent administration . "), *id.* § 2513 ("Prescription legend drugs may be dispensed from the hospital pharmacy only upon orders of a licensed medical practitioner."); *id.* § 2517(A) ("All drugs dispensed by a hospital pharmacy, intended for use within the facility, shall be dispensed in appropriate containers and adequately labeled as to identify patient name, room number, trade mark, chemical or generic name, and strength of the medication."); *id.* § 2519(A) ("Drugs may be dispensed and administered only upon the prescription orders of licensed authorized prescribers."); *id.* § 2523(A) ("The hospital pharmacy shall be under the direct control and supervision of a pharmacy director who is a Louisiana licensed pharmacist, serves as pharmacist-in-charge and is competent in the specialized functions of a hospital pharmacy located in a primary care treatment modality."); *id.* § 2529(A)(1) ("The annual hospital pharmacy inspection review shall verify the following 1. Dispensed Drugs. Prescription orders are dispensed exclusively by licensed pharmacists to inpatients."); *accord id.* § 3501(A) ("Legend Drugs. A legend drug is a medication which must only be dispensed by a pharmacist on the order of a licensed practitioner and shall bear the following notation on the label of a commercial container: 'caution: federal law prohibits dispensing without a prescription' (Ref. R.S. 40:1237, et seq. [1982] and R.S. 21:353(b) [1987]."); *id.* § 3501(A)(1) ("Dispensing. Legend drugs shall be dispensed only by a licensed Louisiana pharmacist."); *id.* § 3501(A)(3) ("Possession. Legend drugs shall be procured and possessed by a pharmacy permittee for legitimate dispensing by a pharmacist in the course of the practice of pharmacy, unless otherwise provided by law.").

120. It is important to distinguish between "dispensing," "administering," "delivering," and "distributing" drugs. Under Louisiana law, "'[a]dminister' or 'administration' means the direct application of a drug to the body of a patient or research subject by injection, inhalation, ingestion, or any other means." LA REV STAT § 37:1164(1), *accord id.* § 40:961(2). "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer of a drug or device from one person to another, whether or not for a consideration." *Id.* § 37:1164(8); *accord id.* § 40:961(10). On the other hand, "'[d]ispense' or 'dispensing' means the interpretation, evaluation, and implementation of a prescription drug order, including the preparation and delivery of a drug or device to a patient or patient's agent in a suitable container appropriately labeled for subsequent administration to, or use by, a patient," such that "'[d]ispense' necessarily includes a transfer of possession of a drug or device to the patient or the patient's agent." *Id.* § 37:1164(10); *accord id.* § 40:961(13). Finally, "'[d]istribute' or 'distribution' means the delivery of a drug or device other than by administering or dispensing." *Id.* § 37:1164(11); *accord id* § 40:961(14)

trolled drugs that are purchased for and administered to patients inside a hospital licensed under R.S. 40:2100, et seq. shall be procured, delivered, dispensed, and distributed under the direction of the pharmacist-in-charge of that hospital." [121] The legislature explicitly noted in Act 767, in which it enacted section 37:1224(F), that section "37:1224(F) is all new law." [122] Yet, because the Legislature did not expressly provide for this new substantive law to apply retroactively, section 37:1224(F) is not applicable to this case.[123]

Regulations from the Board of Pharmacy Louisiana Department of Health in force at the relevant time, however, provided that "[l]egend drugs shall be stored in a licensed pharmacy under the immediate control and responsibility of a pharmacist." [124] On appeal, Lifemark does not challenge the district court's finding that "Materials Management is merely a department of the hospital, is not a pharmacy and is not under the control or direction of a licensed pharmacist." [125] Lifemark instead points us to the testimony of the Louisiana Board of Pharmacy inspector that a sanitary permit issued by the Louisiana Department of Health and Hospitals to Lifemark gave the hospital the authority to hold and store prescription drugs outside of the hospital pharmacy. But Lifemark points us to no controlling Louisiana law which codifies or confirms this authority, and our own research has located none.

On the basis of our review of Louisiana law in force at the time of the events giving rise to the Liljebergs' "circumvention claim," we believe the Supreme Court of Louisiana would conclude that Lifemark's contested practice of ordering and distributing certain legend drugs and kits containing legend drugs did not violate the Louisiana pharmacy laws. This conclusion is bolstered by the legislature's later enactment of section 37:1224(F) as "new law." At the same tine, we are persuaded that the Supreme Court of Louisiana would conclude that governing state regulations required the involvement of the hospital pharmacy in the storage of legend drugs and kits containing legend drugs.

Accordingly, without any basis in state or federal requirements, the district court erred as a matter of law in expanding the scope of the pharmacy agreement through Tenet's policy manual to provide for a requirement that Liljeberg Enterprises be involved in the purchasing, procurement, or distribution of the legend drugs or kits containing legend drugs at issue.[126] Indeed, the law between the parties-section 2.6(a) of the pharmacy agreement-provides to the contrary.

The district court thus erred in awarding $5 million in damages on the basis, in part, that Lifemark "circumvented" Liljeberg Enterprises's hospital pharmacy and thereby denied compensation to Liljeberg Enterprises. Lifemark did not violate fed-

121. La Rev Stat § 37:1224(F) (repealed by 2000 La. Acts 83) Section 37:1224(F) was repealed the year after its enactment. *See* 2000 La. Acts 83.

122. *See* 1999 La. Acts 767

123. *See id.; see generally Jacobs v. City of Bunkie*, 737 So.2d 14, 20 (La.1999).

124. La Admin Code tit. 46, pt LIII, § 3501(A)(4).

125. The district court also found that Liljeberg Enterprises "and its pharmacy director have recently been given the ability to supervise and oversee the storage of the kits containing legend drugs."

126. *See Nat'l Union*, 915 F 2d at 989 ("Under Louisiana law, a contract is the law between the parties, and is read for its plain meaning." (citation omitted)).

eral or Louisiana law by purchasing certain bulk drugs, such as contrast media and surgery kits, directly from drug wholesalers and distributing them to ancillary departments of the hospital for administration by doctors and nurses, but the hospital's storage of these drugs and kits outside of the hospital pharmacy contravened governing state regulations.

iii.

Lifemark argues that, notwithstanding its challenges to the district court's interpretations of sections 4.1(a) and 2.6(a) of the pharmacy agreement in favor of Liljeberg Enterprises's "circumvention claim," the $5 million award cannot stand because Liljeberg Enterprises failed to adequately prove damages awarded in reliance on a procedurally flawed audit of patient charts. Moreover, Lifemark argues that the $5 million award for Liljeberg Enterprises's "circumvention claim" is duplicative, in part, of the $700,000 award for lost profits on contrast media, which we address below, and the $57,085 award for insulin and nitroglycerin underpayments, which we affirm.

a.

[49] Lifemark argues that, rather than even attempting to prove actual, itemized damages, Liljeberg Enterprises performed an audit of a small percentage of patient charts from which it asked a mathematics professor to extrapolate a damage figure. The district court rejected the professor's figure, finding "that the [Liljeberg Enterprises] methodology to price the calculation of damages pursuant to its chart audit to be inflated." However, despite Lifemark's assertion that the district court found the chart audit to be unreliable, the only flaw the district court found in the audit was its "charging the full price of the drug plus the fee for each administration of a drug when, in fact, a multiple administration of a drug would have carried no separate acquisition cost," while the district court also found that Lifemark's claim "that 40% of all of the patients receive no drugs is also . without foundation." On the basis of these findings, the district court found that "the correct figure is somewhere between [Lifemark expert] Dr. Haworth's $3,000,000 and a significant discount off the [Liljeberg Enterprises] expert's figure," which was at least $12.8 million, and accordingly found "that $5,000,000 is the proper figure."

The district court was presented with conflicting testimony and evidence as to the validity of the chart audit and the accuracy of its methodology. On appeal, Lifemark argues that the district court should have credited the testimony of its experts over the testimony and evidence offered by Liljeberg Enterprises in support of the audit. On the record before us, the district court was entitled to weigh the conflicting testimony and credit Liljeberg Enterprises's chart audit as the basis for a reasonably accurate estimate of the amount of damages, with modifications, and, in so doing, the district court did not base its award on mere speculation or conjecture.[127] It is well-settled that the district court is only required to determine the extent of the damages as a matter of just and reasonable inference and that the result need only be approximate. The basis for the district court's award, while it is decidedly not "a perfect measure of dam-

127. *See Theriot v. United States*, 245 F.3d 388, 395 (5th Cir.1998) (noting that, when the district court's finding is based on its decision to credit the testimony of one witness over that of another, that finding, if not internally inconsistent, can virtually never be clear error); *accord Justiss Oil Co., Inc. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1067 (5th Cir.1996).

ages," nevertheless meets these criteria on the record before us.

b.

Additionally, according to Lifemark, the $5 million award overlaps with two more specific damage awards for non-payments for contrast media and underpayments for insulin and nitroglycerin. This is because Liljeberg Enterprises's pharmacy director admitted that both these claims were a part of Liljeberg Enterprises's "circumvention claim." Additionally, the district court's $5 million award was based on the chart audit; that Liljeberg Enterprises's expert accepted the chart in calculating damages for claimed underpayments or non-payments for contrast media, insulin, and nitroglycerin. That is, Liljeberg Enterprises did not back the overlapping charges out of the audit.

It is unclear whether the district court's $5 million figure took account of non-payments for contrast media or underpayments for insulin and nitroglycerin. However, because the district court made specific awards with separate stated reasons as to each of these claimed underpayments, we must conclude that they were not included in the $5 million award, in the absence of more compelling evidence from Lifemark of duplicative awards.

iv.

We conclude that the district court erred, in part, in awarding $5 million on Liljeberg Enterprises's "circumvention claim" on the basis of its interpretation of section 2.6(a) of the pharmacy agreement. We cannot on the record before us quantify how much of the $5 million award was for Liljeberg Enterprises's "circumvention claim" under section 2.6(a), which we reverse in part, as distinguished from its claim under section 4.1(a), which we affirm. We therefore vacate the district court's $5 million award to Liljeberg Enterprises and remand to the district court for a redetermination of damages for Liljeberg Enterprises's "circumvention claim."

B.

[50] Lifemark also argues that, because contrast media was not separately identifiable on patients' bills, Liljeberg Enterprises is not entitled to the $700,000 award for lost profits on contrast media under section 2.6(a) of the pharmacy agreement. Lifemark argues that the district court erred in relying upon an exception in section 2.6(a), which excludes "patient identifiable charges in which the cost of the drug is . . . included in a fee or a charge for that procedure," to justify a $700,000 award.

The district court found that Liljeberg Enterprises originally supplied contrast media to the hospital, which was included as a separate item on the bill of a patient, but that American Medical later decided to include contrast media in what it urges are unidentifiable costs in a single procedure. The district court found that American Medical began including the contrast media cost within a single procedure in order to avoid having to purchase this item from Liljeberg Enterprises. The contention is that the pharmacy agreement allowed American Medical to purchase items and legend drugs from other sources "where the cost for the drug is not identifiable from the cost of the procedure." However, the district court concluded that, from American Medical's master price list or "charge master," it can identify the cost of contrast media by comparing the listed costs for procedures with and without contrast media and so, "for purposes of the [pharmacy agreement], it is an identifiable cost."

Lifemark argues that American Medical stopped billing contrast media as a separate item to each patient and began including them in bills for radiology procedures. Lifemark argues that it negotiated a favorable contract with a new vendor, which allowed it to bill for contrast media in this fashion, a practice that saved patients up to $400 per procedure. The argument continues that, pursuant to section 2.6(a) of the pharmacy agreement, American Medical stopped paying Liljeberg Enterprises for contrast media because, under its new practice, these drugs were "patient identifiable charges in which the cost of the drug is .. included in a fee or charge for that procedure."

Section 2.6(a) provides that Liljeberg Enterprises "shall not provide, nor be entitled to any compensation, for ... (a) all drugs and supplies utilized by the ancillary departments of the Hospital [including, but not limited to, radiology] in preparation for, during, or immediately following departmental patient related procedures," including "those patient identifiable charges in which the cost of the drug is ... included in a fee or charge for that procedure."

The operation of this provision does not turn, as the district court concluded, on whether the charge for the drug can be identified, *i.e.*, is "identifiable," for each patient, but rather on whether such an "identifiable" charge is included in the fee or charge for the departmental patient related procedure in which the drug is used. The district court made no finding that the charges for the cost of contract media were not included in the charges for radiation procedures, but simply concluded that American Medical contravened the terms and spirit of the pharmacy agreement.

Section 2.6(a) is clear, and American Medical operated well within its terms. The district court erred in its implicit conclusion that American Medical breached the pharmacy agreement in bad faith. We reverse the district court's award of $700,000 to Liljeberg Enterprises as lost profits for Lifemark's failure to purchase contrast media through the date of trial from Liljeberg Enterprises as required under the pharmacy agreement

C.

[51] Lifemark argues that the district court erred in awarding Liljeberg Enterprises $2,023,571, which represents costs incurred in excess of limits set by their contract. The argument is that the award is based on an erroneous conclusion that Lifemark improperly limited reimbursement for acquired drugs to prices set forth in Lifemark's prime vendor contracts; that this finding is erroneous because the limit is found in section 2.4 of the pharmacy agreement. Section 2.4 provides:

> OPERATOR [Liljeberg Enterprises, Inc.] agrees to obtain from LIFEMARK Pharmacy all of Hospital's inpatient (including emergency room patients) requirements for pharmaceutical services, including, without limitation, drugs, medicines, and intravenous solutions, to the extent LIFEMARK Pharmacy can provide same. LIFEMARK Pharmacy shall supply these items at cost. Nothing in this Agreement shall prevent OPERATOR [Liljeberg Enterprises, Inc.] from acquiring those items from another supplier if i) the cost for those items is less than what LIFEMARK Pharmacy would charge and ii) the quality of those items is equal to or superior to those supplied by LIFEMARK Pharmacy.

The district court concluded that, under section 2.4, Liljeberg Enterprises agreed to obtain all hospital inpatient requirements from Lifemark Pharmacy, which was obligated to supply the items at cost; that, Liljeberg Enterprises could purchase

such required items from a vendor other than Lifemark Pharmacy only if Lifemark Pharmacy could not supply an item or if the item was less expensive elsewhere and the quality was equal or superior to that supplied by Lifemark Pharmacy. The district court also found, however, that "Lifemark Pharmacy" did not exist at any time after the hospital opened and that Liljeberg Enterprises never purchased any drugs from "Lifemark Pharmacy" but instead purchased drugs under buying contracts from Bergan Brunswig and from Spark Drug. Finally, the district court found that Liljeberg Enterprises was paying six percent less for drugs than if it would have under purchasing contracts between drug manufacturers and wholesalers and American Medical and later Tenet.

The district court found that, where Liljeberg Enterprises's actual acquisition costs for drugs which it did not obtain through Lifemark's prime vendor contracts was greater than the amount shown for those drugs on the prime vendor contracts, Lifemark had deducted the difference between the amounts from its payments to Liljeberg Enterprises under the pharmacy agreement. At trial, Lifemark's expert witness Dr. Albert Richard applied the same approach to argue that Liljeberg Enterprises had wrongfully billed in excess of $600,000 based on the difference between Liljeberg Enterprises's actual acquisition costs and the amounts shown on Lifemark's prime vendor contracts. The district court rejected Dr. Richards's argument and found that Lifemark's contract administrator had wrongfully deducted amounts from Liljeberg Enterprises's bills on the basis of this approach. The district court found that Lifemark's approach failed to compare the National Drug Code ("NDC") number [128] in Lifemark's prime vendor contract to the NDC number of the drugs actually supplied by Liljeberg Enterprises. Instead, payments were based on the lowest price possible for the type of drug supplied without regard to differences in generic versus name-brand drugs and in strength, quantity, bioequivalency, and bioavailability.

Lifemark first argues that American Medical and later Tenet are the successors to "Lifemark Pharmacy" for purposes of the pharmacy agreement. According to Lifemark, because American Medical purchased Lifemark in 1984, before the pharmacy opened, pricing was established by a prime vendor contract negotiated by American Medical on behalf of all American Medical-owned hospitals. This provided sources in bulk with favorable pricing, and Tenet later followed the same protocol.

Lifemark also argues that it was entitled under section 2.4 to pay Liljeberg Enterprises only the price for generic drugs, otherwise equivalent with regard to strength, bioequivalency, and bioavailability. It points out that Liljeberg Enterprises could have purchased its drugs at the lower prices under the prime vendor contracts by becoming a member of Tenet's group purchasing organization or by purchasing generic or other drugs from outside vendors at the lower prices; that Liljeberg Enterprises instead chose to purchase and bill Lifemark for the more expensive name-brand drugs, thereby expanding its profits under the cost-plus contract. Liljeberg Enterprises responds that nothing in the pharmacy agreement authorized American Medical or Tenet to

128. The district court found that "[a] coding system, implemented by NDC whereby each drug is given a code number, allows the identification of the drug manufacturer, its strengths and its quantity and, thus, is a means of identifying the cost of the drug pursuant to purchasing contracts."

pay Liljeberg Enterprises for generic drugs when Liljeberg Enterprises was dispensing physician-requested name-brand drugs and that Lifemark never told Liljeberg Enterprises to dispense only generics.

We conclude that the district court did not err in its interpretation of section 2.4. Like the parties, whose past practice under the pharmacy agreement includes Liljeberg Enterprises's purchasing drugs under Lifemark's prime vendor contracts negotiated by American Medical, we substitute American Medical/Tenet for "LIFEMARK Pharmacy," so that the comparison for purposes of the phrase "less than what LIFEMARK Pharmacy would charge" looks to Lifemark's prime vendor contracts. However, the provision that Liljeberg Enterprises could obtain drugs from other suppliers so long as "the cost for those items is less than what LIFEMARK Pharmacy would charge" does not in itself contemplate that, while American Medical/Tenet would charge one price for requested name-brand drugs under the prime vendor contracts, Lifemark can pay Liljeberg Enterprises only the cost of generic equivalents under the prime vendor contracts.

On appeal, Lifemark does not challenge the finding that Liljeberg Enterprises paid the same or less for name-brand drugs than if it would have paid for the same *name-brand* drugs under Lifemark's prime vendor contracts, which Lifemark simply describes as providing "favorable bulk prices." [129] Instead, Lifemark complains that Liljeberg Enterprises should have been purchasing only generic drugs or purchasing in bulk under its prime vendor contracts. Nothing in section 2.4 entitles Lifemark to insist on such purchases by Liljeberg Enterprises in the absence of the availability from the prime vendor contracts of lower prices for the same drugs. It is no answer that the pharmacy agreement requires the purchase of the lowest priced drugs and makes no exceptions for name-brand drugs where the term "items" in section 2.4 reasonably encompasses, in the context of the pharmacy agreement, both name-brand and generic drugs, depending on the order which Liljeberg Enterprises was called upon to fill.

We find no error in the district court's interpretation of section 2.4 or its findings supporting its award of $2,023,571 for Lifemark's wrongful disallowance of requested payment due to pricing differences.

D

[52] Lifemark argues that the district court misread the minimum fee increase provision of the pharmacy agreement, section 4.1(c). This led to its finding that Lifemark should have increased the minimum fee in 1995 and its award of $150,275.60. Section 4.1(c) of the pharmacy agreement provides:

> LIFEMARK agrees that OPERATOR's [Liljeberg Enterprises, Inc.'s] minimum fee expressed in Exhibit B shall be increased annually by the lesser of (i) the percentage increase in the Department's revenue per patient day and (ii) the percentage increase in the Hospital Market Basket Index, as published by the American Hospital Association, or ap-

129. Lifemark does challenge the specific finding that Liljeberg Enterprises is paying six percent less than Tenet's bulk prices on the basis that the supporting testimony for this finding referred only to the price Liljeberg Enterprises was paying at the time of trial However, Lifemark points to no evidence that would show clear error in the district court's broader finding that the prices for name-brand drugs under Lifemark's prime vendor contracts are not lower than the prices Liljeberg Enterprises was paying for the same name-brand drugs.

propriate successor index (the "Index"); provided however, that in any year in which there is either no change or a percentage decrease pursuant to subsection (i) or (ii) above, the minimum fee shall not be changed and provided, further, that the calculations in any year pursuant to subsection (i) and (ii) above shall be adjusted for any decrease, if any, in the immediately preceding years. The percentage calculated pursuant to subsection (i) above shall be a fraction, the numerator of which is the revenue per patient day for the year just ended and the denominator of which is the revenue per patient day for the prior year. The percentage calculated pursuant to subsection (ii) above shall be a fraction, the numerator of which is the most recently published Index and the denominator of which is the last published Index immediately prior to the beginning of the most recently concluded 12-month period of this subsection Agreement. The first adjustment shall be made as of the first day of the thirteenth (13th) month of the term of this Agreement and shall be based solely upon subsection (ii) above, and subsequent adjustments shall be made on each annual anniversary date thereafter.

The district court found that Liljeberg Enterprises receives 33% of its revenue from minimum fee items under the pharmacy agreement and that, for the period September 1, 1995 through May 31, 1997, Liljeberg Enterprises received $2,447,485.35 from minimum fee revenue; that this amount was paid by Lifemark based upon Lifemark's mistaken belief that no increase in the minimum fee was due under the terms of the pharmacy agreement. The district court concluded that under the pharmacy agreement a 6.14% increase in the minimum fee should have been paid to Liljeberg Enterprises, an additional $150,275.60 for the period September 1, 1995 through May 31, 1997. These findings are based on the district court's conclusion that, under section 4.1(c), the term "immediately preceding years" requires, as Liljeberg Enterprises claims, that the minimum fee for any year is to be calculated based upon the immediate preceding year and not, as Lifemark claims, upon the highest percentage for any prior year.

Lifemark's only argument here is that reading the word "years" as singular and not plural led the district court to erroneously conclude that a minimum fee increase should be allowed when there is a net increase based upon a single year's growth on the heels of several years of losses. Lifemark contends that this interpretation flies in the face of common sense as well as the language of the pharmacy agreement, which calls for the netting of decreases in previous years against any increases in the current year's revenue. Lifemark asserts that it is undisputed that pharmacy revenue per patient day declined during the years 1992–1994 and that, although Liljeberg Enterprises increased its per-patient revenue in 1995, a cumulative decrease remained, such that the minimum fee increase provision was not triggered.

We conclude that the district court erred in its interpretation of section 4.1(c).[130] The pharmacy agreement nowhere explic-

130. We are not persuaded by the Liljebergs' argument that this issue is controlled by the Louisiana state court decision's preclusive holdings. *See Liljeberg Enters.*, 620 So.2d at 1340 (holding only that the trial court erred in determining that the starting date for the escalation of the minimum fees was March 1, 1984, whereas "any adjustments in the minimum fees should have begun thirteen months from August 25, 1985, the date St. Jude's Hospital began operations").

itly mentions "netting" or aggregating prior years' percentage decreases or changes. Yet every provision of the pharmacy agreement must be interpreted in light of the contract's other provisions, to give each provision the meaning suggested by the contract as a whole and to avoid neutralizing, ignoring, or treating as mere surplusage any provision.

Section 4.1(c) calls for an increase in the minimum fee based on the lesser of the percentage increase in the pharmacy's revenue per patient day and the percentage increase in the Hospital Market Basket Index so long as (1) there was a percentage increase in both the pharmacy's revenue per patient day and the Hospital Market Basket Index, *i.e.*, neither of these indices experienced either "no change or a percentage decrease," (2) "provided, further, that the calculations in any year pursuant to subsection (i) and (ii) above shall be adjusted for any decrease, if any, in the immediately preceding years." The district court apparently read this provision to provide for an increase in minimum fees by the lesser of the percentage increase in the pharmacy's revenue per patient day and the percentage increase in the Hospital Market Basket Index that year, so long as there was no percentage decrease in the "immediately preceding year." Lifemark would read the provision to prohibit a minimum fee increase until there is no net percentage decrease when the current year's percentage increase is added to the percentage decreases in some unspecified number of preceding years.

The district court's interpretation gives no effect to the phrase "the calculations in any year pursuant to subsection (i) and (ii) above *shall be adjusted for*" and, without any explanation or apparent finding of ambiguity, reads "immediately preceding years" as singular and not plural. Looking to the meaning of this phrase in section 4.1(c) suggested by the contract as a whole, we note that the "calculations" at issue are important for determining whether there is an increase, a decrease, or no change as a matter of percentages. The most reasonable understanding of "adjusting" the calculations "for any decrease, if any, in the immediately preceding years" is to offset any percentage increase in the current year by the net "decrease, if any, in the immediately preceding years." The natural sense of "immediately preceding years" conveys the last two or three years, in order to give effect to both the phrases "immediately preceding" and "years."

Accordingly, we conclude that the district court erred in its interpretation of section 4.1(c). As such, we reverse the district court's award of $150,275.60 to Liljeberg Enterprises for Lifemark's failure to implement minimum fee increases due to Liljeberg Enterprises under the pharmacy agreement through the date of trial.

E.

Lifemark argues that the district court erred in awarding Liljeberg Enterprises $281,906.32 based upon its finding that the HPI reports [131] failed to reflect drug prices and frequencies submitted in reports generated by Liljeberg Enterprises. Lifemark asserts that this finding is clearly erroneous because it is predicated on a fundamental misunderstanding of the parties' record-keeping and billing procedures and because it overlooks Liljeberg Enterprises's failure to provide documentation to support the accuracy of the prices and quantities it submitted.

131. HPI rates represented the prices at which Liljeberg Enterprises billed Lifemark for pharmaceuticals, and HPI rates were located on the monthly "hospital pharmacy billing" report, or "HPI report."

The district court found that Lifemark improperly entered cost data into its computer, "deleted administered doses dispensed by Liljeberg Enterprises without any known reason from [Liljeberg Enterprises's] daily and monthly disks," and generated inaccurate HPI reports which incorrectly reflected the drug prices and frequencies dispensed by Liljeberg Enterprises, and that the HPI reports also failed to take into account floor stock. The district court further found that there was no evidence that the drugs at issue in Liljeberg Enterprises's claim for underpayments due to Lifemark's incorrect pricing and quantity differences between January 1989 and May 31, 1997 were not provided by Liljeberg Enterprises and that the evidence in the record revealed that floor stock items were not accounted for by Lifemark.

Reviewing these factual findings for clear error only, we find that this damage award is based on a plausible account of the evidence considered against the entirety of the record. Lifemark points out that Liljeberg Enterprises's own pharmacy director clearly testified that the daily disks provided by the Liljeberg Enterprises pharmacy to Lifemark contained only the quantity that the pharmacy dispensed, not the doses administered by the hospital's doctors and nurses, such that it was not possible that Lifemark's computers deleted *administered* doses dispensed by Liljeberg Enterprises from Liljeberg Enterprises's daily disks. At the same time, Lifemark does not deny that the HPI reports often indicated that the actual cost of acquisition of a drug to be zero and did not always account for so-called floor stock. The district court heard conflicting testimony as to whether Lifemark adequately paid Liljeberg Enterprises for this floor stock and the zero entries on the HPI reports, and it was entitled to credit Liljeberg Enterprises's account of the evidence. Lifemark's citation to isolated testimony favorable to its position on each of these fact findings does not show clear error.

We affirm the district court's award of $281,906.32 to Liljeberg Enterprises for pricing and quantity differences.

F.

Lifemark argues that district court miscalculated the actual acquisition costs payable under the judgment of the Louisiana state court of appeal in a prior case between Liljeberg Enterprises and Lifemark involving the pharmacy agreement. According to Lifemark, Liljeberg Enterprises and Lifemark stipulated that they would "split the difference" between their experts' numbers, which was $3,575,748 by Lifemark's expert and $4,062,396 by Liljeberg Enterprises's expert. Accordingly, Lifemark contends that the district court should have awarded $3,819,072, not $4,062,396, which was the number given by Liljeberg Enterprises's expert.

Lifemark acknowledges that it owes Liljeberg Enterprises for actual acquisition cost for drugs for the period August 1989 through June 1993 pursuant to the preclusive state court judgment,[132] but argues that the district court erred in finding that "[t]he parties have stipulated that the actual acquisition cost billed by [Liljeberg Enterprises] for the period is $4,062,396.00." Liljeberg Enterprises suggests that the record indicates that Lifemark's and Liljeberg Enterprises's experts originally did split at $4,062,396, but that

132. *See Liljeberg Enters Inc. v Lifemark Hosps. of La., Inc.*, 620 So.2d 1331 (La.App. 4 Cir.), *writs denied*, 621 So.2d 818 (La.1993).

Lifemark's expert later tried to lower that figure.

The record reflects that the parties stipulated at trial that the amount of this award should be fixed at the mid-point between the sum determined by Liljeberg Enterprises's expert and the sum determined by Lifemark's expert. Liljeberg Enterprises's expert's number was undisputedly $4,062,396. The number provided by Dr. Richard, Lifemark's damages expert, began at $3,990,953, and at trial he testified that the average of these figures would be $4,026,675. However, he then discussed several adjustments off this number and presented a figure of $3,575,748, which Lifemark now urges on appeal to provide an average of $3,819,072.

Based on the parties' stipulation, we conclude that the district court clearly erred in not splitting the difference between Dr. Richard's original figure of $3,990,953 and Liljeberg Enterprises's figure of $4,062,396. We must reduce this award to $4,026,675.

G.

Lifemark argues that the district court erred by not awarding Lifemark $2,585,138 in reimbursement of Liljeberg Enterprises's overcharges based on Liljeberg Enterprises's submission each month of a lump sum bill that was inexplicably higher than and inconsistent with the daily record of patient billing that Liljeberg Enterprises provided to Lifemark. According to Lifemark, the evidence at trial showed that this claim included (1) $184,000 overbilled to Lifemark based upon claimed frequencies of drugs dispensed; (2) $1,497,078 for thousands of unexplained $3.05 "admixture fees," overcharges relating to I.V.s, for which Lifemark should have been awarded $880,678, after a credit of $616,400 for the amount awarded to Lifemark for overcharges relating to I.V. handling fees for piggybacks;[133] (3) $885,644 which Liljeberg Enterprises overcharged Lifemark for heparin flush kits, which the district court found but refused to award on the basis that Lifemark passed the overcharges onto patients and suffered no loss; and (4) $634,816 in overcharges resulting from Liljeberg Enterprises's submission of incorrect pricing information from September 1, 1989 through April 30, 1993 on Liljeberg Enterprises's bills based upon HPI reports using pricing information from Liljeberg Enterprises's add/change/delete forms.

i.

First, Lifemark argues that it presented uncontroverted evidence that Liljeberg Enterprises, in adjusting the bills to Lifemark to reflect the frequencies of drugs dispensed, only adjusted the bills when the numbers favored Liljeberg Enterprises and failed to adjust the bills when the numbers favored Lifemark, which resulted in an overbilling which Dr. Richard estimated as at least $184,000. Liljeberg Enterprises points to no evidence to the contrary, but argues that the $184,000 Lifemark claims is based on frequencies of drugs which the hospital alone handled and was responsible for and which, assuming Lifemark dispensed these drugs in violation of the pharmacy agreement, more likely than not would increase, not decrease, Liljeberg Enterprises's damages if an accounting were made of the compensation owed for these drugs under the pharmacy agreement.

133. The district court found that "[a] 'handling fee' is a charge imposed on a large volume patental ('LVP') that is handled by a pharmacist" and that "[a]n 'admixture' is the result of additives being placed in an intravenous solution," where "[e]ach additive to a solution is performed as a separate procedure."

The district court made no relevant findings as to this claim and did not explicitly deny it, and, as Lifemark aptly observes, Liljeberg Enterprises's response is a non-answer. We conclude that the failure to award this sum is clearly erroneous. The record evidence submitted by Lifemark leaves us with the firm and definite conviction that the only plausible account of the evidence considered against the entirety of the record is that Liljeberg Enterprises systematically overcharged Lifemark by failing to correct drug frequency reports when the preliminary frequency shown on Lifemark's HPI report exceeded the frequency shown on Liljeberg Enterprises's pharmacy charge report.[134]

The evidence is that Dr. Richard testified that $184,000 is a reasonable estimate of the amount of the aggregate overcharges. We are given no conflicting evidence and modify the judgment to award Lifemark $184,000 in damages on this claim.

ii.

Second, Lifemark contends that, when Liljeberg Enterprises's bills were scrutinized at trial, Liljeberg Enterprises was unable to explain thousands of $3.05 "admixture fees" relating to I.V.s and argues that the district court clearly erred in failing to award damages based on Dr. Richard's calculation of reimbursement of the total overcharge for these unexplained fees, $1,497,078. Lifemark contends that, notwithstanding the unexplained "admixture" charges and the discrepancies in the pharmacy's reporting of the charges, Lifemark was billed these charges thousands of times each month for several years and paid them. The district court made no relevant findings as to this claim and did not explicitly deny it.

On the record before us, we cannot conclude that the district court clearly erred in failing to award damages to Lifemark for these overcharges. The district court awarded Lifemark $616,400 for Liljeberg Enterprises's overcharges on I.V piggyback fees under the pharmacy agreement, which Liljeberg Enterprises has not appealed, and the number offered by Dr. Richard was $1,497,078 in gross overcharges for I.V. handling and admixture fees. Lifemark seeks an award of $880,678 after applying a credit of $616,400 for the amount awarded for overcharges relating to I.V. handling fees for piggybacks.

The record before us, however, does not allow us to arrive at a reasonably accurate estimate of the amount of damages for any overcharges for the I.V. "admixture" fees disaggregated from Dr. Richard's estimate of the gross overcharges for I.V. handling and admixture fees. Accordingly, we affirm the district court's decision to deny Lifemark an award on this claim.

iii.

[53] Third, Lifemark argues that the district court erred by finding that "[Liljeberg Enterprises] has in fact overcharged [Lifemark] for [Heparin flush kits]" but then refusing to reimburse Lifemark for the $885,644 overcharge due to its conclusion that Lifemark passed the overcharge onto patients and suffered no loss. Lifemark contends that this latter finding was based upon a misreading of the testimony of Steven Faucheaux, Lifemark's administrative pharmacist. According to Lifemark, the district court found that Faucheaux testified that Lifemark billed its

134. Liljeberg Enterprises also implies that the denial of these damages was appropriate because Lifemark readily billed its patients on the basis of the numbers in the HPI reports. This pass-through argument, addressed more fully below, is wholly unpersuasive.

patients based upon Liljeberg Enterprises's "overcharge price and multiplied that cost times three," when, in fact, Faucheaux explicitly denied basing patient charges on Liljeberg Enterprises's "overcharge prices" and instead explained that "patient rates are from a totally separate mechanism" and that Lifemark "uses the actual wholesale price of the drug" to bill patients. Moreover, Lifemark argues that, even if the overcharges were passed on, Lifemark was entitled to realize the benefit of its bargain by paying the lower costs to Liljeberg Enterprises, citing Louisiana Civil Code article 1995.[135]

The district court found that Lifemark, American Medical, and Tenet bill the hospital's patients a set markup from the price charged by Liljeberg Enterprises for each drug, including a triple markup for heparin flush kits. The court then concluded that, although Liljeberg Enterprises in fact overcharged Lifemark for heparin flush kits, Liljeberg Enterprises is not liable for damages because Lifemark suffered no loss when it charged its patients three times the overcharge price for the loss and so actually profited from the overcharge by passing it on to patients.

Regardless of whether Lifemark tripled the charges from Liljeberg Enterprises in billing its patients, we concluded that the district court's "pass-through" reasoning is without merit. Even if Lifemark recouped the overcharge payments many times over, Liljeberg Enterprises remains liable for the amount it overcharged Lifemark in the first instance in breach of the pharmacy agreement.[136] Neither the district court nor Liljeberg Enterprises has presented any authority to the contrary. Under Louisiana law, Lifemark suffered a loss as a matter of law by overpaying Liljeberg Enterprises based on Liljeberg Enterprises's systematic overcharges for heparin flush kits.

Based on the evidence presented by Lifemark, including the expert report of Dr. Richard, the district court clearly erred as a matter of law in failing to award Lifemark $885,644 for the heparin flush kit overcharges. We modify the judgment to provide the award to Lifemark of $885,644 in damages on this claim.

iv.

Fourth and finally, Lifemark argues that the district court erred by failing to award Lifemark $634,816 based on overcharges resulting from Liljeberg Enterprises's submission of incorrect pricing information from September 1, 1989 through April 30, 1993. Lifemark contends that, although during that time period, Liljeberg Enterprises's bills were based solely upon HPI reports, which were generated by the hospital's computers, the pricing information, the "HPI rate," came directly from Liljeberg Enterprises's add/change/delete forms, on which, in several instances, Liljeberg Enterprises submitted the wrong HPI rate.

We cannot find clear error in the rejection of this claim. The evidence presented by Lifemark does not leave us with a definite and firm conviction that the district court was mistaken in denying the claim. The claim was based on Dr. Richard's extrapolation of a 60–item sample that Lifemark wrongfully paid $634,816 as a result of Liljeberg Enterprises's errors

135. LA CIV CODE art 1995 ("Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived ").

136. *Cf S. Pac Co v. Darnell–Taenzer Lumber Co*, 245 U.S. 531, 534–35, 38 S.Ct. 186, 62 L.Ed. 451 (1918); *Hughes Communications Galaxy, Inc. v. United States*, 38 Fed. Cl. 578, 580–82 (1997)

in using the HPI rate. Unlike the evidence regarding the systematic frequency billing discrepancies which overwhelmingly ran in Liljeberg Enterprises's favor, the evidence here simply shows that some HPI rates drawn from Liljeberg Enterprises's add/change/delete forms were incorrect and Lifemark failed to notice and correct the error based on the information provided by Liljeberg Enterprises in the first instance.

We therefore affirm the district court's denial of an award to Lifemark on this claim.

VIII. Judgment against Tenet

[54] Lifemark argues that, because Tenet was not sued by Liljeberg Enterprises or St. Jude, it was error for the district court to enter judgment against it. The district court made no finding of jurisdiction over Tenet nor any ruling formally adding Tenet as a party to this consolidated case, and a review of the district court's docket sheet confirms that, to this day, Tenet is not a party in this case and has never been joined as a defendant or served with process

[55] "It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." [137] The Liljebergs' reliance on case law regarding successor liability and collateral estoppel is misplaced. The issue is jurisdiction over a non-party to the actions, not liability for a party already properly joined and served. We conclude that the district court erred in entering judgment against Tenet, a non-party in this case, and we must vacate the judgment in its entirety as against Tenet.

IX Attorneys' Fees

[56] On their cross-appeal, the Liljebergs argue that Liljeberg Enterprises and St. Jude are entitled to attorneys' fees under the parties' lease agreement and under Civil Code articles 1997 and 1958. On the record before us and based on our rulings on this appeal, Liljeberg Enterprises and St. Jude have no basis for a claim for attorneys' fees.

First, we have reversed the district court's judgment overturning the judicial sale and reinstating, *inter alia*, the lease between St. Jude and Lifemark. Accordingly, even assuming the claim has not been waived, as Lifemark claims, there is no basis to award St. Jude fees under section 17.1 of the lease.

Second, Louisiana Civil Code article 1958 provides that "[t]he party against whom rescission is granted because of fraud is liable for damages and attorney fees." Again, however, even assuming this provision would apply to this case based on the district court's findings of fact and conclusions of law and that this claim has not been waived, we have reversed the district court's judgment which overturned the judicial sale and ordered rescission of the hospital.

Finally, Louisiana Civil Code article 1997 provides that "[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." There is conflicting authority as to whether this provision authorizes the award of attorneys' fees for a bad faith breach of contract.[138]

137. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct 1562, 23 L.Ed 2d 129 (1969); *accord Waffenschmidt v MacKay*, 763 F 2d 711, 718 (5th Cir.1985), *E.B. Elliott Adver. Co. v. Metro Dade County*, 425 F 2d 1141, 1148 (5th Cir 1970)

138. *See Newport Ltd. v Sears, Roebuck & Co*, No Civ A 86-2319, 1995 WL 688799, at *4-

However, we need not decide this unsettled issue because the Liljebergs failed to raise article 1997 as a basis for attorneys' fees in the district court and have therefore waived any claim to attorneys' fees.[139] We are not persuaded that our refusal to consider this claim for the first time on appeal would work a miscarriage of justice.

X.

To summarize our holdings,(i) we reverse the district court's judgment in Cause No. 94-3993 overturning the judicial sale of the hospital and reinstating various commercial instruments relating to the financing and lease of the hospital and remand for calculation of the amount of, and entry of judgment on, the past due deficiency owed to Lifemark Hospitals, Inc. on the renewal promissory note and interest due thereunder; (ii) we reverse the judgment in Cause No. 93-1794 granting Liljeberg Enterprises's motion to assume the pharmacy contract; (iii) in Cause No. 93-4249, we affirm the district court's damage awards to Liljeberg Enterprises of $2,023,571 for Lifemark's wrongful disallowance of requested payment due to pricing differences and $281,906.32 for pricing and quantity differences; (iv) we reverse the district court's award to Liljeberg Enterprises of $700,000 as lost profits for Lifemark's failure to purchase contrast media from Liljeberg Enterprises and $150,275.60 for Lifemark's failure to implement minimum fee increases due to Liljeberg Enterprises under the pharmacy agreement through the date of trial; (v) we modify the district court's award of $4,062,396 for Lifemark's failure to reimburse Liljeberg Enterprises its actual acquisition costs for the period August 31, 1989 through June 1, 1993 to $4,026,675; (vi) we vacate the district court's $5 million award to Liljeberg Enterprises and remand to the district court for a redetermination of damages for Liljeberg Enterprises's "circumvention claim"; (vii) we conclude that the district court clearly erred in failing to award Lifemark $184,000 in overbillings by Liljeberg Enterprises based upon claimed frequencies of drugs dispensed and $885,644 for the heparin flush kit overcharges, and we award Lifemark damages in these amounts; (viii) we reverse the district court's judgment against Tenet, a non-party to this case, and (ix) we conclude that Lifemark's other points of error on appeal and the Liljebergs' points of error on their cross-appeal are without merit.[140]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART.

PRIMERICA LIFE INSURANCE CO.; et al., Plaintiffs,

*8 (E.D.La. Nov.21, 1995)

139. *See N Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir.1996) (holding that the Court of Appeals will not consider an issue that a party fails to raise in the district court absent extraordinary circumstances, which exist only when the issue is a pure question of law and a miscarriage of justice would result from the failure to consider it)

140. As a final housekeeping matter, the Liljebergs' motion to strike Lifemark's reply brief's cross-index, which has been carried with the case, is meritless and is denied. The inclusion of the index is not prohibited by any rule, and it did not cause the reply brief to exceed the word count mandated by Federal Rule of Appellate Procedure 32.

Attachment Seven

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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IV

111TH CONGRESS
2D SESSION

H. RES. 1031

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

IN THE HOUSE OF REPRESENTATIVES

JANUARY 21, 2010

Mr. CONYERS (for himself, Mr. SMITH of Texas, Mr. SCHIFF, Mr. GOODLATTE, Ms. JACKSON LEE of Texas, Mr. SENSENBRENNER, Mr. DELAHUNT, Mr. DANIEL E. LUNGREN of California, Mr. COHEN, Mr. FORBES, Mr. JOHNSON of Georgia, Mr. GOHMERT, Mr. PIERLUISI, and Mr. GONZALEZ) submitted the following resolution; which was referred to the Committee on the Judiciary.

RESOLUTION

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

1 *Resolved,* That G. Thomas Porteous, Jr., a judge of
2 the United States District Court for the Eastern District
3 of Louisiana, is impeached for high crimes and mis-
4 demeanors, and that the following articles of impeachment
5 be exhibited to the Senate:

6 Articles of impeachment exhibited by the House of
7 Representatives of the United States of America in the

name of itself and all of the people of the United States of America, against G. Thomas Porteous, Jr., a judge in the United States District Court for the Eastern District of Louisiana, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

G. Thomas Porteous, Jr., while a Federal judge of the United States District Court for the Eastern District of Louisiana, engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge, as follows:

Judge Porteous, while presiding as a United States district judge in Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg. In denying the motion to recuse, and in contravention of clear canons of judicial ethics, Judge Porteous failed to disclose that beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, he engaged in a corrupt scheme with attorneys, Jacob Amato, Jr., and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of

1 the curatorship fees which had been paid to the firm. Dur-
2 ing the period of this scheme, the fees received by Amato
3 & Creely amounted to approximately $40,000, and the
4 amounts paid by Amato & Creely to Judge Porteous
5 amounted to approximately $20,000.

6 Judge Porteous also made intentionally misleading
7 statements at the recusal hearing intended to minimize the
8 extent of his personal relationship with the two attorneys.
9 In so doing, and in failing to disclose to Lifemark and
10 its counsel the true circumstances of his relationship with
11 the Amato & Creely law firm, Judge Porteous deprived
12 the Fifth Circuit Court of Appeals of critical information
13 for its review of a petition for a writ of mandamus, which
14 sought to overrule Judge Porteous's denial of the recusal
15 motion. His conduct deprived the parties and the public
16 of the right to the honest services of his office.

17 Judge Porteous also engaged in corrupt conduct after
18 the Lifemark v. Liljeberg bench trial, and while he had
19 the case under advisement, in that he solicited and accept-
20 ed things of value from both Amato and his law partner
21 Creely, including a payment of thousands of dollars in
22 cash. Thereafter, and without disclosing his corrupt rela-
23 tionship with the attorneys of Amato & Creely PLC or
24 his receipt from them of cash and other things of value,
25 Judge Porteous ruled in favor of their client, Liljeberg.

By virtue of this corrupt relationship and his conduct as a Federal judge, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE II

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail bondsman Louis M. Marcotte, III, and his sister Lori Marcotte. As part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as re-

quested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge). In addition, both while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench.

Accordingly, Judge G. Thomas Porteous, Jr., has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.

ARTICLE III

Beginning in or about March 2001 and continuing through about July 2004, while a Federal judge in the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., engaged in a pattern of conduct inconsistent with the trust and confidence placed in him as a Federal judge by knowingly and intentionally making material false statements and representa-

tions under penalty of perjury related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case. Judge Porteous did so by—

(1) using a false name and a post office box address to conceal his identity as the debtor in the case;

(2) concealing assets;

(3) concealing preferential payments to certain creditors;

(4) concealing gambling losses and other gambling debts; and

(5) incurring new debts while the case was pending, in violation of the bankruptcy court's order.

In doing so, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE IV

In 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Inves-

tigation in order to obtain the office of United States District Court Judge. These false statements included the following:

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

(2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.

(3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees", Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable in-

formation that may affect [his] nomination". Judge Porteous signed that questionnaire by swearing that "the information provided in this statement is, to the best of my knowledge, true and accurate".

However, in truth and in fact, as Judge Porteous then well knew, each of these answers was materially false because Judge Porteous had engaged in a corrupt relationship with the law firm Amato & Creely, whereby Judge Porteous appointed Creely as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm and also had engaged in a corrupt relationship with Louis and Lori Marcotte, whereby Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate and the public of information that would have had a material impact on his confirmation.

1 Wherefore, Judge G. Thomas Porteous, Jr., is guilty
2 of high crimes and misdemeanors and should be removed
3 from office.

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Attachment Eight

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF LOUISIANA

3 FEDERAL GRAND JURY

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8 In the Matter Of: *

9 UNITED STATES OF AMERICA *

10 VERSUS * NO. 12-03-83

11 GABRIEL THOMAS PORTEOUS *

12 * * * * * * * * * * * * * * * * *

13 * * * * *

14

15 TESTIMONY OF:

16 RONALD BODENHEIMER

17 in its entirety taken before the Federal Grand Jury on Thursday, the 22nd day of April, 2004.

18

19 * * * * *

20 APPEARANCES:

21 NOAH BOOKBINDER
DANIEL PETALAS

22 United States Department of Justice
Public Integrity Section

23 Washington, D.C.

24 And the Ladies and Gentlemen of the Grand Jury

25

1 me tell you, let me give you some pointers about
2 being a judge. Number one, you'll never be known
3 as Ronnie again. You'll be judge for the rest of,
4 your life. Number two, you'll never have to buy
5 lunch again OK. There will always be somebody to
6 take you to lunch. And number three, always wash
7 your rear end so the attorneys have a clean place
8 to kiss."
9 Q. Was there a time when Judge Porteous,
10 when he said those things to you, were there other
11 people around?
12 A. Yes. There was a bunch of, there was a
13 group of lawyers around talking. And it was said,
14 you know, in jest because everybody was laughing.
15 Q. Was there a time when he pulled you aside
16 to talk to you individually?
17 A. Yes. It wasn't straight from there, but
18 a little while later he and I ended up alone and
19 that's when he told me that -- he says, "Look.
20 Let me just tell you something." He says, "I know
21 you really don't like Louis Marcotte," because
22 Louis Marcotte -- and I hate to sound prejudice,
23 but he had the ponytail in the back and he just
24 looked like a Miami Vice dope dealer. And there
25 was always rumors about him fooling around with

1 cocaine. So I distanced myself from him.
2 Porteous knew it. And he says, "I know you got
3 this bad taste in your mouth for him. I know that
4 you've heard these rumors about him and cocaine."
5 He said, "Let me tell you. It's not true. He's a
6 good guy. You can trust him. If you got problems
7 with bonds go see him. He'll never steer you
8 wrong. He'll never get you hurt."
9 Q. Did he -- did Judge Porteous say anything
10 to you in that conversation about splitting bonds?
11 About that being a reason to talk to Mr. Marcotte?
12 A. Yeah. Well, actually, when I was still a
13 DA is when splitting the bonds things first
14 occurred. Porteous was the one who -- I use the
15 term invented it because I think of a better --
16 well, he started using that split bond kind of
17 thing.
18 Q. Could you explain to the grand jury very
19 briefly how split bonds worked, what that meant.
20 A. Yeah. You know, before Porteous, a split
21 bond -- you know, almost all bonds were either
22 cash or commercial. Sometimes you had people who
23 would come in and would have some property. And
24 even before Porteous it wasn't uncommon to split a
25 bond. But it was split this way: A guy comes in.

1 things that he did for you?
2 A. You know, you know, at first, you know,
3 when this all happened I said I didn't do anything
4 for him I didn't do for anybody else. But then
5 thinking about it and you examine your conscience
6 I did. I mean, you know, here's a guy that bought
7 you lunch last night and he shows up the next
8 morning and he wants a bond. You know, as much as
9 you try to say, "I did the right thing and I never
10 did anything illegal," the fact that you were out
11 to dinner last night with the guy makes a
12 difference, you know. And so I started thinking
13 about it and I said, "Yeah, you know, I did give
14 the guy actually something that I shouldn't have
15 and I was wrong for that."
16 Q. Did Judge Porteous' initial conversation
17 with you about Louis Marcotte and then the fact
18 that he went to those lunches, did that contribute
19 to the kind of relationship that you developed
20 with Louis Marcotte where you took things from him
21 and you did things for him?
22 A. Well, that's a hard question to answer.
23 I mean, Porteous never said, "Hey, Ronnie, you
24 know, he's gonna do things for you, you know, you
25 can take things from him cause --" he never told

1 me that. But the fact that he -- that, you know
2 -- I probably would have been a lot more
3 distrustful of Louis Marcotte in general if
4 Porteous hadn't, you know, even vouched for him.
5 I was Judge Chehardy's DA too and when
6 she vouched for him that meant something. But it
7 really didn't mean as much coming from Chehardy as
8 it did from Porteous because I just respected him.
9 I mean, not that I didn't respect Judge Chehardy,
10 but I respected Judge Porteous a whole lot more.
11 Q. Did the fact that Judge Porteous seemed
12 comfortable accepting these kind of -- these sort
13 of long and expensive lunches from Louis Marcotte
14 make you feel comfortable accepting those and
15 other things from him?
16 A. Yeah. I thought if Louis was doing
17 anything illegal Porteous wouldn't have anything
18 to do with him.
19 BY MR. BOOKBINDER: Does the grand jury
20 have any questions for the witness?
21 BY GRAND JUROR 13:
22 Q. I'm really not familiar with the
23 protocol, but is it common for judges and bail
24 bondsmen to have lunch together or whatever? Is
25 that a common practice?

Attachment Nine

Written Statement of

Michael J. Gerhardt,

Samuel Ashe Distinguished Professor of Constitutional Law, UNC-Chapel Hill School of Law

Committee on the Judiciary Task Force on the

Possible Impeachment of Judge G. Thomas Porteous, Jr.

December 15, 2009

Introduction and Overview

I appreciate the invitation to appear today before the House Committee on the Judiciary Task Force pertaining to the possible impeachment of Judge Porteous. I have long been interested in constitutional issues relating to the federal impeachment process. I have written a book and several articles on the federal impeachment process, worked as a special consultant to the National Commission on Judicial Discipline and Removal, consulted with many members of Congress on past impeachment proceedings, and testified during President Clinton's impeachment proceedings as a joint witness in the special hearing held by the House Judiciary Committee on the history of impeachment. I have also long had been interested in the quality and composition of the federal judiciary; I have, among other things, written a book and several articles on the appointments process, testified in confirmation hearings, consulted with the Senate and the White House on several judicial nominations, and served recently as Special Counsel to Senator Leahy and the Judiciary Committee on the nomination of Sonia Sotomayor to the Supreme Court. It is an honor and privilege to participate in today's hearing in my personal capacity as a constitutional law professor.

In this Statement, I focus on four issues of particular concern to the Task Force. These issues are (1) whether a federal judge may be impeached, convicted, and removed from office for misconduct that is not indictable; (2) whether a federal judge may be impeached, convicted, and removed from office for misconduct committed prior to becoming a federal judge; (3) whether an impeachment proceeding is a criminal proceeding such that it would be covered by the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council; and (4) which if any impeachment precedents are useful for guiding the Task Force's deliberations.

I have previously written about and given substantial thought to each of these questions. First, there has long been widespread consensus among impeachment scholars and members of Congress that impeachable offenses are not restricted to indictable offenses but rather are political crimes. Political crimes are injuries to the Republic and breaches of the public trust that are not restricted to either indictable offenses or only the abuses of an office's formal powers or duties. Second, any egregious misconduct not disclosed prior to election or appointment to an office from which one may be impeached and removed is likely to qualify as a "high crime or misdemeanor." While murder would be one obvious example of such misconduct, it is not the only one. Another example is lying to or defrauding the Senate in order to be approved as a federal judge. Such misconduct is not only serious but also obviously connected to the status (and responsibilities) of being a federal judge. Such misconduct plainly erodes the essential, indispensable integrity without which a federal judge is unable to do his job. Third, an impeachment proceeding is not a criminal proceeding but rather a unique, political proceeding. Thus, the current proceedings are not affected -- or restricted in any way -- by Judge Porteous' immunity agreement. Last but not least, the current proceedings are not affected, or deterred, in any way by the fact that there are no precedents directly on point. The fact that the charges made against Judge Porteous are different than those made against the officials who have been impeached and convicted says much more about the extent of his misconduct than it does about anything else. In any event, the charges made against Judge Porteous have enough in common with the grounds on which two other judges were impeached, convicted, and removed.

Consequently, I do not believe that any of these issues present any reasons whatsoever to keep the Task Force from moving forward in its impeachment proceedings against Judge Porteous.

I.

I understand that one matter of interest to Task Force members is whether the scope of impeachable offenses is restricted to indictable offenses – offenses that are statutorily prohibited as felonies and that the punish for the breach of which includes a substantial loss liberty. This question is not new; both constitutional scholars and members of Congress have extensively the question throughout the history of this nation. I will not review the literature here. It should suffice to say that the overwhelming weight of authority supports construing the phrase "Treason, Bribery, or other high Crimes or Misdemeanors" in Article II is not restricted to indictable crimes.

First, the language and examples that the framers and ratifiers used to describe the scope of impeachable offenses reflect their common understanding that the terms "high Crimes or Misdemeanors" in Article II refers to what the framer's generation understood to be "political crimes." They expressed their understanding of "political crimes" through such terms or phrases as "great offences against" or injuries to the Republic," abuses of authority, and breaches of the public trust. Almost all their examples were of misdeeds that were not liable at law, such as a president's entering into an unlawful treaty that benefitted foreign but not American interests. To the framers and ratifiers, the criterion for determining whether an offense was impeachable was not whether it had been proscribed through a specific criminal statute but rather the extent and nature of its injury to the State, abuse of power, or breach of the public trust.

Second, the most prominent, post-ratification commentators agreed that the scope of impeachable offenses were not limited to indictable crimes. Alexander Hamilton, James Wilson, and Joseph Story each explained that the offenses for which people could be impeached, convicted, and removed from office were political crimes. Hamilton the constitutional grounds for removal as consisting of "those offences which proceed from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[1] Wilson referred to such offenses as "political crimes and misdemeanors,"[2] while Story opined that impeachable offenses were "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."[3] Both Hamilton and Story believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation or codification. Story emphasized that no statute would be able to codify the range of misconduct that could qualify as impeachable, because "political offences are so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impractical, if it were not almost absurd to attempt it."[4] Story suggested that subsequent generations would have to define impeachable offenses on a case-by-case basis rather than through criminal statutes.

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[1]Alexander Hamilton, Federalist No. 65, The Federalist Papers 396 (Rossiter, ed. 1961).
[2]James Wilson, 1 The Works of James Wilson 426 (McCloskey ed. 1967).
[3]Joseph Story, Commentaries on the Constitution section 788, at 256 (Nowak & Rotunda 1987).
[4] Id, section 405, at 287.

If we turn, as Story suggested, to the practice of impeachment in order to determine the kinds of offenses for which people may be impeached, convicted, and removed from office, a clear pattern emerges: Of the 16 men impeached by the House of Representatives, only five have been impeached on grounds constituting an indictable offense, and one of those was Alcee Hastings, who had been formally acquitted of bribery prior to his impeachment. The House articles of impeachment against the nine others include misconduct that did not constitute indictable offenses, at least at the time that they were approved. Of the seven men (all federal judges) actually removed from office by the Senate, four were charged with and convicted of misconduct that did not constitute any indictable offenses. These four were Judges Pickering (public drunkenness and blasphemy); West Humphreys (supporting the Confederacy and failing to fulfill his duties as a federal judge); Robert Archibald (obtaining contracts for himself from persons appearing before his court and for adjudicating cases in which he had a financial interest or received a payment – offenses that were not indictable at the time); and Halsted Ritter (bringing "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein . . ."). The other three judges who have been removed from office – Harry Claiborne, Alcee Hastings, and Walter Nixon – were each charged with indictable crimes. Hence, the pattern of convictions indicates that impeachable offenses include, but are not limited to, certain indictable crimes. The common theme in these cases is not committing felonies but rather engaging in misconduct that is incompatible with being a federal judge and depriving the judge of the integrity required in order to maintain public confidence in his continuing to exercise the powers of an Article III judge. A felony might qualify as a political crime but a political crime does not have to be a felony.

II.

Another issue of interest to the Task Force is whether a federal judge may only be impeached, convicted, and removed for abusing their official constitutional responsibilities. What follows from this argument is that no federal judge may be impeached, convicted, or removed for misconduct committed prior to becoming a judge, because such misconduct is not, after all, among his current duties or responsibilities.

To appreciate why this argument and the premise on which it rests (that federal judges are only impeachable for their abuses of official duties) are mistaken, one should consider how the Constitution treats each of the following three kinds of misconduct. The first is misconduct that is committed prior to becoming a federal judge and that is both inconsequential and unknown (or undisclosed) at the time of a judge's confirmation proceeding. The second is misconduct that is known at the time the judge is confirmed. The third is misconduct that is egregious but not known at the time of the judge's confirmation proceedings.

I believe the Constitution clearly permits impeachment in the third circumstance but not necessarily in either of the other two. In the first circumstance, we are not dealing with misconduct that is consequential or serious; it is, by definition, unimportant, innocuous, or trivial. As such, it is the kind of misbehavior (if one wants to use that term), which no one would expect a nominee to disclose or that would, if disclosed, make any difference to the outcome. Moreover, something inconsequential is not a political crime. To be sure, some judgment might be required to determine whether something is inconsequential, but I have supposed that in this first scenario everyone would agree that the misconduct is not serious enough to be a breach of

the public trust, an injury to the State, or an abuse of power. Hence, it does not matter if it is known or not at the time of the judge's confirmation.

The second kind of misconduct is likely not to be impeachable, because the proper authority – the Senate – effectively ratifies the misconduct at the time it decides to confirm the judge. It does not matter, in this scenario, whether the misconduct is serious or inconsequential because the Senate has had the opportunity to assess its magnitude and relevance to its confirmation decision. By confirming the judge, the Senate has effectively ratified the previous misconduct or signaled that it does not regard the earlier misconduct as disqualifying.

The third kind of misconduct is different than either of the first two kinds. This third kind is egregious and not known at the time of confirmation. Such misconduct is, in other words, likely to be of sufficient gravity that it is an impeachable offense. It does not matter whether the conduct has any formal relationship to a judge's specific duties; it is bad behavior that by itself demonstrates a level of moral depravity and bad judgment that it is completely incompatible with the responsibilities of a judge. If we add to the facts that the nominee lied to the Senate about this bad misconduct, then the nominee has not only done something morally reprehensible but he has also engaged in misconduct that directly undermines the integrity of the confirmation process itself.

Say, for instance, that the offense was murder – it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process. The fact that a nominee would suppress or not bring this misconduct to light to either the President who is considering his nomination or the Senate which is considering his confirmation makes the misconduct all the more reprehensible. It clearly reflects such poor judgment and complete lack of regard for the Senate that it is an offence against the State and a breach of the public trust.

My understanding is that Judge Porteous has been charged with misconduct that falls into this third circumstance, and treating such misconduct as impeachable is consistent with the language of Article II. The latter provides that an impeachable official may be impeached, convicted, and removed from an office for certain kinds of misconduct; however; it does not say *when* the misconduct must have been committed. To be sure, the framers deliberately designed the impeachment process to distinguish it from the British system in which private citizens were subject to impeachment. It seems to follow that the misconduct of a private citizen – or someone who is not an impeachable official in the federal constitutional sense – is, at the time it was done, an impeachable offense. It might even seem odd to allow the Congress to transform such misbehavior later into an impeachable offense simply because the person's status changes later. Yet, this is not odd, if we recognize that once a person becomes a federal judge, he is plainly subject to the clause, which says, quite explicitly, that he may be impeached, convicted, and removed for "Treason, Bribery, or other high Crimes or Misdemeanors." The critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function as an Article III job. In Judge Porteous' case, the Task Force does not have to be concerned about whether some misconduct committed to his becoming a judge may, on its own,

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

In my book on impeachment, I had considered the question of whether a judge or some other impeachable official might be impeached for misconduct committed prior to assuming his current office. I wrote that there might be some difficult cases but "it is easy to imagine instances in which impeachable offenses could be based on present misconduct consisting of fraudulent suppression or misrepresentation of prior misconduct. Particularly in cases in which an elected or confirmed official has lied or committed a serious act of wrongdoing to get into [his] present position, the misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the present officeholder entered office and the integrity of that official to remain in office."[5] I continue to stand by this analysis. Judge Porteous' misconduct fits squarely into this analysis. There is no question that his defrauding the Senate undermined the integrity of his confirmation process and deprives him of the essential, indispensable integrity that he needs in order to continue to function as a federal district judge.

III.

Another concern of the Task Force might be that the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council bars using in these proceedings any of his testimony before that body or any evidence derived from that testimony. The agreement expressly immunizes Judge Porteous from having used against him in any "criminal" proceeding either the testimony he gave to the Fifth Circuit Council or any evidence derived from such testimony. Some members of the Task Force might wonder whether an impeachment proceeding is essentially the same as a criminal proceeding and thus none of Judge Porteous' prior testimony, or any evidence derived from it, should be used in the instant impeachment proceedings.

The problem is that an impeachment proceeding is NOT the same as a criminal proceeding. In fact, the framers designed the impeachment process as a unique, political proceeding. In his classic treatise on impeachment, the late Charles Black stressed this point,[6] as do I in prior writings.

The uniqueness of an impeachment proceeding is evident in both the language and structure of the Constitution. As I suggested over a decade ago, "[The Constitution expressly limits the punishments for impeachment [and conviction] to removal and disqualification from office, punishments that are unavailable in any other proceeding in our legal system. In addition, the Constitution does not entitle the target of an impeachment the right to a jury or to counsel; the president may not pardon a person convicted by impeachment (whereas he is able to pardon any other convicted official); the federal rules of evidence do not apply in an impeachment trial;

[5] Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 108 (2d edition 2000).

[6] See Charles Black, Impeachment: A Handbook 17 (1973).

and a conviction does not require unanimous agreement among the senators sitting in judgment."[7] Other critical differences are that the case is not tried before a jury of one's peers or a judge and the burden of proof is unique. In his classic treatise on impeachment, the late Charles Black explained that the unique, "hybrid" nature of an impeachment trial required that the burden of proof be unique (and thus not be the same as the standard of beyond a reasonable doubt that is required in criminal trials).[8] Indeed, the unique structure of the Senate has made it practically impossible for it to have a uniform burden of proof; instead, the Senate has long taken the (unique) "position that each senator should follow whatever burden of proof he or she thinks is best."[9] Indeed, tbe Senate has never approved this conception of impeachment and, in the late 1980s, flatly rejected the argument that impeachment proceedings are the same as criminal trials. A few years later, the National Commission on Judicial Discipline and Removal reached the same conclusion that impeachment proceeding are unique, political proceedings and are not structurally, or meant to be, the same as criminal trials.

IV.

A final issue raised in the present proceedings is whether there are any prior impeachment proceedings – any precedents – that would be useful guides to the Task Force. One argument that might be made on behalf of Judge Porteous is that he should not be impeached because no one has ever before been impeached, convicted, and removed in like circumstances. But, the fact that there are no precedents directing on point is of no consequence. There is no preeedent of impeaching an official for murder, but this would not, I am sure, prevent the House and the Senate from considering such miseonduct to be an impeachable offense and to proceed accordingly. The fact that the House has not proceeded before against a judge on grounds similar to those on which it is proceeding against Judge Porteous says much more about tbe nature and extent of his misconduct than it does about anything else. To refrain from acting would create a precedent that would be bad for the Congress and for the federal judiciary, since it would not only suggest a permissible level of corruption for federal judges but also provide an incentive for judicial nominees to refrain from disclosing bad behavior to the Senate.

Nevertheless, there are two impeachments that have some things in common with the instant case. In the first, the House impeached and the Senate convicted and removed Robert Archibald from office because of misconduct he had committed as a member of the Commerce Court whole he was serving as a judge on the Third Circuit. As David Kyvig explains in his important, recent treatise on impeachment, "None of the judge's conduct, if carried out by a private businessman, would have been indictable, but his use of judicial influence for personal gain provoked outrage. Among other things, Archibald had written letters on Commerce Court stationary encouraging the sale or lease of property on favorable terms to third parties who, in turn, rewarded the judge, their silent partner. In another instance, Archibald clandestinely corresponded with an appellant's attorney in a railroad case before his court, asked the lawyer for his opinion on the case, and then supported the successful appeal, all of which violated judicial ethics."[10] As Professor Charles Geyh suggests in his testimony to the Task Force, Judge

[7] Gerhardt, supra note 5, at 112.
[8] See Black, supra note 6, at 17.
[9] Gerhardt, supra note 5, at 113.
[10] David E. Kyvig, The Age of Impeachment: American Constitutional Culture since 1960 31 (2008).

Porteous is guilty of several ethical violations, which, as the Archibald case shows, may properly serve as the basis for impeachment, conviction, and removal.

In the second case, Halsted Ritter was impeached by the House and convicted and removed from his judgeship in 1936 by the Senate. As Kyvig explains, "Ritter was convicted and removed from office . . . for taking a kickback of fees in a resort-hotel bankruptcy case, for evading income tax, and for continuing to practice law after going on the bench. All the alleged misconduct dated from the first year of Ritter's judgeship."[11] The Senate did not convict Ritter on any specific charge of misconduct but rather, as Kyvig further notes, "voted 56-28 for an article that collected all the previous charges into one summary article that charged Ritter with bringing his court into 'scandal and disrepute, to the prejudice of said court, and public confidence in the administration of justice.' By the margin of a single vote, the Senate convicted and removed him from the federal bench. Notably, Senator Sherman Minton of Indiana, later named to the federal appellate bench by Franklin Roosevelt and elevated to the Supreme Court by Harry Truman, voted to acquit Ritter on all six of the substantive articles and to convict on the omnibus article."[12] The pattern of Judge Porteous' misbehavior,[13] which extends over a longer period than Judge Ritter's, has, at the very least, undermined confidence that he has the requisite integrity and moral authority to continue to function as a federal judge. As demonstrated in both the Archibald and Ritter convictions, the integrity of the courts is ultimately the responsibility of the Congress to ensure and maintain through its impeachment authority.

Conclusion

The issues before the Task Force are among the most serious that the House of Representatives must consider in the discharge of its constitutional responsibilities, and I am mindful of what is at stake in these proceedings. I do not take lightly the responsibility that the Task Force has placed in me as a witness in these proceedings. There is nothing more important to our system of justice than a judge's integrity, and the loss of this integrity, as is abundantly apparent in the instant proceedings, provides as sound a basis for the exercise of the awesome impeachment authority as any I know. The constitutional issues before the Task Force are straightforward: A federal judge may be impeached, convicted, and removed for non-indictable offenses and ethical lapses, including defrauding the Senate in the confirmation proceedings to occupy the office he now holds. Consequently, this Task Force is acting well within its constitutional responsibilities to recommend the impeachment of Judge Porteous.

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[11] Id. at Id. at 32-33.

[12] Id. at 33.

[13] For a good description of the pattern and seriousness of Judge Porteous' misconduct, see Report and Recommendations of the Judicial Conference Committee on Judicial Conduct and Disability 33 (June 2008) ("In the Committee's view, the various acts must be viewed as a whole and the applicable laws and Canons as a coordinated scheme. A judge's soliciting and receiving cash and things of value from lawyers appearing before the judge is so obviously a questionable practice that it is subject to numerous substantive, disclosure, and ethical regulations. Were it not so regulated, judges could ask for and take money from lawyers, sit on cases involving those lawyers, and deny any impropriety. Those who would claim otherwise would be left with the burden of proving the judge's and lawyer's contrary states of mind.").

Attachment Ten

Testimony Before the House Committee on the Judiciary Task Force to Consider the Possible Impeachment of Judge G. Thomas Porteous, Jr.
December 15, 2009

By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I have been writing and teaching about the Constitution for a quarter century. Among other things, I have written extensively on the specific topic of impeachment. It is a solemn privilege to address this body on the weighty matter before you. In preparation for today's hearing, I have reviewed various materials presented to me by Special Impeachment Counsel Alan I. Baron. Based on these materials and my current understanding of the underlying facts, I believe that the impeachment of Judge G. Thomas Porteous, Jr. is clearly warranted, and I see no valid legal or constitutional objection to impeachment in these circumstances. I have five points to make.

First, there is no good reason to believe—no sound argument from the Constitution's specific text or general structure, no persuasive argument from the history of the Founding, no valid argument grounded in the precedents set by previous impeachment proceedings, no convincing argument from common sense or the American tradition of fair play—that only offenses punishable under the criminal code merit impeachment. As I explained in my 2005 book, *America's Constitution: A Biography*:

> In context, the words "high . . . Misdemeanors" most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal. Under the Articles of Confederation, the states mutually pledged to extradite those charged with any "high misdemeanor," and in that setting the phrase apparently meant only indictable crimes. The Constitution used the phrase in a wholly different context, in which adjudication would occur in a political body lacking general criminal jurisdiction or special criminal-law competence. Early drafts in Philadelphia had provided for impeachment

> in noncriminal cases of "mal-practice or neglect of duty" and more general "corruption." During the ratification process, leading Federalists hypothesized various noncriminal actions that might rise to the level of high misdemeanors warranting impeachment, such as summoning only friendly senators into special session or "giving false information to the Senate." In the First Congress, Madison contended that if a president abused his removal powers by "wanton removal of meritorious officers" he would be "impeachable . . . for such an act of mal-administration."[1] Consistent with these public expositions of the text, House members in the early 1800s impeached a pair of judges for misbehavior on the bench that fell short of criminality. The Senate convicted one (John Pickering) of intoxication and indecency, and acquitted the other (Samuel Chase) of egregious bias and other judicial improprieties.[2]
>
> An impeachment standard transcending criminal-law technicalities made good structural sense. A president who ran off on a frolic in the middle of a national crisis demanding his urgent attention might break no criminal law, yet such gross dereliction of duty imperiling the national security and betraying the national trust might well rise to the level of disqualifying misconduct. (Page 200).

Second, and related, the procedural rules applicable in ordinary criminal cases do not necessarily apply to impeachment trials. For example, the Senate, sitting as a trial jury of sorts, need not be unanimous to convict, and the rules for recusal are quite different from those in an ordinary criminal trial. Also, House and Senate members may properly vote to impeach and convict even if in their minds the evidence of guilt does not rise to the level of proof beyond reasonable doubt. For similar reasons, I believe that the Fifth Amendment Self-Incrimination Clause—a clause that applies to ordinary criminal cases—should not apply in all respects to an impeachment trial, which is only quasi-criminal. Thus, reliable derivative fruits of compelled testimony should be admissible in an impeachment trial even if these fruits would ordinarily be barred from an ordinary criminal case; and perhaps even the compelled testimony itself should be admissible, as it would be admissible in a standard civil case. Also, unlike petit jurors in an ordinary criminal case involving a nontestifying defendant, Senators should be allowed to draw

adverse inferences against an impeachment defendant who refuses to answer questions—as may trial jurors in a typical civil case where the defendant declines to take the stand.

The underlying reasoning here is simple. Ordinary criminal cases place the defendant's bodily liberty at risk. Indeed, in a capital case, a defendant's very life hangs in the balance. But an impeachment defendant does not face any threat to life or limb in an impeachment proceeding, even if he is being impeached for treason itself. Thus, impeachment procedures need not be as tenderly protective of defendants because impeachment defendants face fewer punitive sanctions than ordinary criminal defendants. In the case of Judge Porteous, it is not even clear that removal from office would truly "punish" him by depriving him of anything that was ever *rightfully* his. Rather, removal from office would simply undo an ill-gotten gain, by ending a federal judgeship that he never should have received—and never would have received but for the falsehoods and frauds that he perpetrated when being vetted for this position.

Third, it is a gross mistake to believe that federal officers may be impeached only for misconduct committed while in office, or (even more strictly) only for misconduct that they committed in their capacity as federal officers.[3] The text of the Constitution contains no such requirement, and constitutional structure and common sense demonstrate the absurdity of this position. The Constitution explicitly mentions treason and bribery as impeachable offenses. Both offenses can be committed by someone prior to commencing federal office. Indeed, imagine for a moment an officer who procures his very office by bribing his way into it. By definition, the bribery here occurred prior to the commencement of officeholding, but surely this fact should not immunize the briber from impeachment and removal. Had the bribery not occurred, the person would never

have been an officer in the first place. As I put the point in my 2005 book, "In the case of [an officer] who did not take bribes but gave them—paying men to vote for him—the bribery would undermine the very legitimacy of the election that brought him to office."

What is true of bribery is also true of fraud: A person who procures his judgeship by lying to the President and the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.

Fourth, not all evasive or incomplete or even downright false statements in the nomination and confirmation process deserve to be viewed as "high" misdemeanors equivalent to bribery. Here, as elsewhere, judgment is required, and the Congress is perfectly positioned to exercise that judgment. As I explained in 2005: "The House and Senate, comprising America's most distinguished and accountable statesmen, would make the key decisions. Acting under the American people's watchful eye, these leaders would have strong incentives to set the bar at the right level. If they defined virtually anything as a 'high' misdemeanor, they and their friends would likely fail the test, which could one day return to haunt them. If, instead, they ignored plain evidence of gross [executive or judicial] malignance, the apparent political corruption and back-scratching might well disgust the voters, who could register popular outrage at the next election."

In the case of Judge Porteous, as I understand the facts, I would stress that he gave *emphatically false* answers to *direct* (albeit broad) questions; that his emphatic falsehoods concealed *gross* prior *misconduct* as a *judge* in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power; that this nomination-and-confirmation-process fraud and falsehood was part of a *much larger pattern of fraud and falsehood* that began much

earlier (in state court) and continued much later (as evidenced by the frauds and falsehoods he perpetrated on counsel Mole in the *Liljeberg* case); and that had Porteous told the truth in his confirmation process it is *absolutely inconceivable* that he would have been confirmed and commissioned as a federal judge.

Fifth, the House and Senate need not worry in this case about undoing the People's verdict on Election Day—a concern that properly informs presidential impeachment cases. Here, Porteous is a judge because *the Senators themselves* voted to make him one—and they did so under false pretenses. Simply put, he lied to them. This House should give the other body, which voted to place Porteous in a position of power over his fellow citizens, the opportunity to revote and remove Porteous from power now that it is clear that he won the earlier vote by foul, fraud, and falsehood—that is, by high misdemeanor. As I suggested before, removal in this case would not be harsh punishment, but rather would simply be disgorgement of wrongful gain and prevention of foreseeable future misconduct given the gross pattern that has been demonstrated here.

Every day that a fraudster continues to claim the title of a federal judge and to draw his federal salary is an affront to his fellow citizens and taxpayers, to say nothing of the parties unfortunate enough to come before him. The mere fact that criminal prosecution of Porteous might not be warranted should not mean that he should therefore escape the scrutiny and verdict of an impeachment court. I am reminded of the bank robber who managed to fool the judge into acquitting him. "That's great, your honor," the defendant blurted out. "Does this mean I can keep the money?"

Thank you, Mr. Chair.

[1] *Farrand's Records*, 1:88, 230 ; 2:132, 186; *Elliot's Debates*, 3:500 (Madison); 4:126-27 (Iredell); *Annals*, 1:517 (Madison, June 17, 1789)

[2] Although it has been suggested that Judge Pickering was charged with the technical crime of blasphemy, see Raoul Berger, *Impeachment*, 60 n. (summarizing the position taken by attorney Simon Rifkind), the word "blasphemy" nowhere appeared in the articles of impeachment. *Annals*, 13:318-22 (January 4, 1804).

[3] Judge Dennis repeatedly makes this mistake and the mistake is fatal to his entire analysis. See In Re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980 (Dennis, Circuit Judge, joined by Melancon Hartfield and Brady, District Judges, concurring in part and dissenting in part) at 3 (Constitution "requires a showing that the subject judge abused or violated the constitutional judicial power entrusted to him"); id at 22 ("impeachable high crimes and misdemeanors are limited to abuses or violations of constitutional judicial power").

Attachment Eleven

TESTIMONY OF CHARLES G. GEYH
ON H. RES. 1448 (2008), INQUIRING INTO THE IMPEACHMENT OF
DISTRICT JUDGE G. THOMAS PORTEOUS

December 15, 2009

My name is Charles G. Geyh (pronounced "Jay"). I am the Associate Dean for Research and the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. I am the co-author of over forty books, book chapters and articles on judicial conduct, ethics, independence, accountability, and administration, including the treatise "Judicial Conduct and Ethics" (4th Ed. 2007) (with Alfini, Lubet & Shaman); the book "When Courts & Congress Collide: The Struggle for Control of America's Judicial System" (2006); and the forthcoming monograph "Judicial Disqualification: An Analysis of Federal Law" (2d Edition, Federal Judicial Center, forthcoming 2010). I have previously served as Reporter to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct; Director of and Consultant to the American Bar Association's Judicial Disqualification Project; Assistant Special Counsel to the Pennsylvania House of Representatives, on the Impeachment and Removal of Pennsylvania Supreme Court Justice Rolf Larsen; consultant to the National Commission on Judicial Discipline and Removal; and counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Administration of Justice (under Subcommittee Chairman Robert W. Kastenmeier). The views expressed in my testimony today are my own, and not necessarily those of the organizations with which I am or have been affiliated.

My testimony today will be directed at the ethical implications of Judge Porteous's alleged conduct, with a focus on the Code of Conduct for United States Judges. The analysis of judicial ethics is context dependent - whether a judge did or did not run afoul of an ethical directive will almost always turn on the facts surrounding that judge's conduct. In preparation for my testimony today, I have reviewed the following materials: the House Judiciary Committee's Impeachment Task Force hearing transcripts from November 17 and December 8, 2009; the Report and Recommendations of the Judicial Conference Committee on Judicial Conduct and Disability, dated June, 2008 and forwarded to the House of Representatives on June 18, 2008; the Report by the Special Investigatory Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit, together with accompanying exhibits and a concurring/dissenting Report, dated November 20, 2007; and an undated Hearing Memorandum to the House Judiciary Committee's Impeachment Task Force prepared in anticipation of its November 17, 2009 hearing. My analysis of Judge Porteous's conduct is based on information derived from these materials. I do not, however, presume to make my own findings of fact concerning Judge Porteous's conduct. Whenever possible, therefore, I have predicated my ethics analysis upon facts as found and summarized by the Judicial Conference in its June, 2008 Report. Although the findings of fact in the Judicial Conference Report impress me as consistent with testimony in the hearing record, I draw

no conclusions in that regard. Accordingly, my testimony throughout refers to the judge's "alleged" conduct.

The Porteous matter is complicated, spanning many years and featuring a number of episodes. I will orient my testimony around those episodes, beginning with the most problematic. In so doing, however, it is critically important not to lose the forest for the trees. As egregious as the judge's alleged conduct was in several episodes viewed in isolation, the whole exceeds the sum of its parts. Taken together, the actions that Judge Porteous is reported to have taken as a state and federal judge reflect a cynical and contorted view of judicial service as an opportunity to be exploited; of judicial power as a thing to be abused for personal gain; and of legal and ethical constraints on judicial conduct as obstacles to be circumvented. Measured against the directive of the first canon in the Code of Conduct - the canon articulating a judge's primary ethical duty - that he "uphold the integrity and independence of the judiciary," such conduct represents a grave and extreme abrogation of the judge's ethical responsibilities.

The Liljeberg Case and its Antecedents

Judge Porteous's reported conduct in the *Liljeberg* case raises ethical concerns of the most extreme sort, and culminated years of problematic behavior. To fully appreciate the severity of his ethical transgressions in *Liljeberg*, however, it is necessary to review the history of his relationship with the lawyers who represented the parties in that case, and the ethical problems that arose in the course of that relationship.

Conduct as a State Judge

Attorneys Jacob Amato and Leonard Levinson (who represented defendant in *Liljeberg*) and Donald Gardner (who represented plaintiff) each testified that they were longtime friends of Judge Porteous, and that during his years as a state judge, they took Judge Porteous to lunch innumerable times - often at expensive restaurants. Rarely, if ever, did Judge Porteous pay for his meals. Codes of conduct permit judges to accept "social hospitality" without running afoul of restrictions on the gifts judges may receive,[1] and friends and former colleagues who take each other to lunch can be a conventional form of social hospitality. This, however, was not ordinary "social hospitality." These lawyers reportedly paid Judge Porteous's lunch bills countless times for years with no meaningful reciprocation by the judge. Moreover, this one-way payment practice appears to be what Judge Porteous wanted and expected: Former state judge Ronald Bodenheimer testified that when Bodenheimer became a judge, Porteous told him that, once a judge, he would "never have to buy lunch again. . . There will always be somebody to take you to lunch." In other words, Judge Porteous was trading on his position as a judge in contravention of the ethical principle that a judge should not "lend

[1] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §3 ("'Gift' . . does not include (a) social hospitality based on personal relationships;" *see also*, ABA Model Code of Judicial Conduct (Hereafter "Model Code") Rule 3.13(B)(3) (exempting "ordinary social hospitality").

the prestige of judicial office to advance the private interests of the judge."[2] Similarly, Amato's partner, Robert Creely, testified that he took Porteous on numerous, all expense-paid-hunting and fishing trips during his years as a state judge, which further exceeds traditional notions of "social hospitality," and lends additional support to the suspicion that Judge Porteous was exploiting his station for personal gain.[3]

In addition to meals and trips, the Judicial Conference Report noted that "much of the available evidence concerns Judge Porteous's solicitation and receipt of cash payments from a law firm, Amato & Creely [which was] . . . a relationship begun when Judge Porteous was a state court judge." According to Amato and Creely, Judge Porteous solicited tens of thousands of dollars from them over a period of years. These lawyers testified that they were good friends of the judge and were simply acting out of a desire to help a friend who was in a seemingly constant state of financial distress, and not because they were seeking or receiving favors. It is possible to credit this testimony completely and still conclude that Amato and Creely would not have shown such magnanimity to Porteous were he not a judge. Judges are important and powerful people in their communities, and it is understandable that lawyers would want to remain in their good graces, which is why ethics rules limit the gifts judges can receive and prohibit judges from exploiting their positions for personal gain.

Even more troubling, however, the Judicial Conference Report states that when the firm "indicated to Judge Porteous that it was unhappy with having to bear the expense of repeated payments to him . . . Judge Porteous frequently appointed the firm to curatorship proceedings and, at Judge Porteous's suggestion, received in return a portion of the fees paid." Such conduct is unethical in the extreme. Code of Conduct Canon 3B3 states that "a judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism and favoritism."[4] While Judge Porteous clearly exhibited favoritism in his assignment of curatorships, he did so less for the benefit of friends than himself. His conduct thus entailed a gross abuse of judicial power that manifested a fundamental disregard for core ethical directives that a judge "should avoid impropriety and the appearance of impropriety in all activities;" "should uphold the integrity . . . of the judiciary" and should not abuse the prestige of his office for personal gain.[5]

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[2] Code of Conduct for United States Judges, Canon 2B (2009) (hereafter "Code of Conduct(2009)");. State rules are comparable. ABA Model Code of Judicial Conduct, Rule 1.3 (2007) (hereafter "Model Code". The Code of Conduct for United States Judges was substantially revised in July, 2009. The Judicial Conference Report evaluated Judge Porteous's conduct with reference to predecessor Code. Differences between the two Codes do not affect the analysis of Judge Porteous's conduct, but in my testimony, I cite to both

[3] The extent to which these meals and trips were offered at times when the lawyers at issue had matters pending before Judge Porteous is unclear, for which reason I have not factored that concern into the analysis here, although it is highly relevant later, in *Liljeberg*.

[4] The predecessor Code is comparable, providing that "A judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism." Code of Conduct for United States Judges, Canon 3B4 (2008) (hereafter "Code of Conduct (predecessor)." See ABA Model Code, Rule 2 13.

[5] Code of Conduct Canons 1, 2 (2009); *See also*, Model Code, Canon 1

Although the Judicial Conference Report discussed Judge Porteous's conduct as a state judge to provide context, it did not factor such conduct into its recommendation that "consideration of impeachment may be warranted." It seems clear to me, however, that Congress is well within its rights to consider such conduct when evaluating Judge Porteous's continuing fitness to serve. By way of an extreme example, suppose that a federal judge is found to have committed a multiple homicide while a state judge ten years earlier. It is difficult to imagine that such conduct would be off limits in an impeachment inquiry simply because it predated the judge's ascension to the federal bench. Without getting into standards for impeachment (which other witnesses will address), the better question is whether the judge's conduct as a state judge affects his fitness to serve as a federal judge. In state court systems, for example, it is relatively well settled that a judge's conduct in a prior term, in a different judicial office, or even in private practice, may be the subject of judicial conduct proceedings.[6]

Conduct as a federal judge

The Judicial Conference Report states:

> It is undisputed that Judge Porteous solicited and received cash and other things of value from law firms and attorneys who appeared before him in litigation. These included, at a minimum, cash payments, numerous lunches, payments for travel, meals, and hotel rooms in Las Vegas, and payments for the expenses of a congressional externship for Judge Porteous's son.

These meals, trips and payments that Judge Porteous received from Amato, Levinson , Gardner and Creely continue a course of conduct begun when he was a state judge, and raise the same ethical problems detailed above. They likewise implicate an additional provision in the Code of Conduct for United States Judges, which provides that "A judge should refrain from financial and business dealings that . . . exploit the judicial position."[7] The *Liljeberg* case, however, added a new dimension because in that case three of these same lawyers appeared before Judge Porteous as counsel in a major piece of commercial litigation. Of particular interest is the appearance of attorneys Jacob Amato and Leonard Levenson, who were retained as counsel for defendant under unusual circumstances described in the Judicial Conference Report:

> [H]is [Judge Porteous's] friends Jacob Amato and Lenny Levenson appeared as counsel after the case was assigned to him. Amato had given money to Judge Porteous. Levenson had helped pay Judge Porteous's son's living expenses during an externship in Washington, D.C. and had treated Judge Porteous to lunch while he had matters pending before Judge Porteous. Although Amato and Levenson did not typically practice in federal court or frequently handle complex litigation, they were brought into Liljeberg with an 11% contingency fee to represent a client seeking a judgment of $110 million. Moreover, they

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[6] JAMES ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN, & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS §§1 08, 1 09 (4th Ed. 2007) (hereafter ALFINI et al.)

[7] Code of Conduct, Canon 4D1(2009); Code of Conduct, Canon 5C1 (predecessor).

> had joined the case 39 months after it was originally filed just two months before it was to go to trial.

After Amato and Levenson appeared as counsel for the defendant, plaintiff moved to disqualify Judge Porteous, who denied the motion, explaining that "Courts have held that a judge need not disqualify himself just because a friend, even a close friend, appears as a lawyer." Shortly thereafter, plaintiff retained Donald Gardner as counsel, because as co-counsel for plaintiff testified, Gardner was another friend of Judge Porteous, whose presence in the case would "level the playing field."

Assuming these to be the facts, it is clear that Judge Porteous should have disqualified himself. Under the federal judicial disqualification statute and the Code of Conduct for United States Judges, a judge shall disqualify himself from any proceeding in which the judge's "impartiality might reasonably be questioned."[8] It is a standard that must be assessed from the perspective of an objective lay person fully informed of the circumstances. Under this approach, courts have held that judges need not disqualify themselves simply because a good friend represents a party before the court: a reasonable person would recognize that in a collegial legal community a judge will know most if not all of the lawyers who appear before him, many of whom will be friends and acquaintances from law school and practice. But Amato and Levenson were more than friends: they were long-time benefactors upon whom Porteous had depended for tens of thousands of dollars in quick cash, meals and other favors over many years. Receiving payments and favors of this sort from lawyers who appear before the judge is not ordinary "social hospitality" in any sense of the phrase, and constitutes clear grounds for disqualification.[9] Moreover, the need to disqualify was made even more manifest by the circumstances in which these long-time patrons of the judge were retained, being brought in at the eleventh hour to try a massive case before Judge Porteous in a non-jury trial on a matter outside of the lawyers' normal practice area. Taken together, this confluence of events gives rise to the unshakable suspicion that Judge Porteous was subject to favoritism and could not be counted upon to remain impartial.

Disqualification is both a matter of procedure (hence its inclusion in title 28 of the U.S. Code) and a matter of ethics (hence its inclusion in the Code of Conduct). Ordinarily, when a judge erroneously declines to disqualify himself, the appropriate remedy is a procedural one: reversal. A much more serious problem arises, however, when non-disqualification is willful:

> It has been held that a judge will be subject to discipline for incorrectly failing to disqualify himself only where the failure was willful. The test is an objective one, and therefore a willful failure to disqualify may be present even though a judge states on the record that that he or she does not believe that disqualification is necessary.[10]

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[8] 28 U.S.C. §455(a); Code of Conduct, Canon 3C1.
[9] ALFINI et al., *supra* note 7, at §7.15A (4th Ed. 2007)
[10] ALFINI et al, *supra* note 7, at §4.01.

In this case, the facts as reported lead to the conclusion that Judge Porteous's failure to disqualify was willful. First, Judge Porteous was well aware of undisclosed information that made the need for him to disqualify himself obvious - so obvious that his failure to recuse cannot be attributed to an honest mistake. Second, the judge's statements during the disqualification proceedings were calculatedly misleading. Judge Porteous acknowledged his friendship with Amato and Levenson, without disclosing any of the details that made that "friendship" problematic. He conceded that he had "gone along to lunch" with them without revealing that he had done so countless times, that the lawyers always (or nearly always) paid, and that he had received much more from them than free meals. And when plaintiff's counsel alleged that Amato and Levenson had contributed to the judge's election campaigns, Porteous replied that "[t]he first time I ran, 1984, I think is the only time when they gave me money" - a statement he made with full knowledge that he had solicited many thousands of dollars from Amato over the years for other purposes. The cumulative effect of these statements supports the conclusion that Judge Porteous was willfully concealing information that would have revealed the need for him to disqualify himself. Such conduct is a gross and inexcusable violation of judicial ethics.

The Judicial Conference Report then states that "[a]fter denying the motion [to disqualify], and while a bench verdict was pending, Judge Porteous solicited cash from Amato," delivered "in an envelope picked up at Amato and Creely's office by Judge Porteous's secretary." The Report notes "Creely told Judge Porteous that this was not 'appropriate,'" because he "felt this practice was too 'blatant.'" Even if we credit assertions that the cash was solicited and accepted as a favor, not a bribe, Judge Porteous's misconduct here was of the gravest sort. The current Code of Conduct for United States Judges provides that "A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations."[11] The applicable regulations define "gift" to include gratuities, favors, loans or "similar item(s) having monetary value" and provide that "[a] judicial officer shall not solicit a gift from any person who is seeking official action from or doing business with the court . . . served by the judicial officer."[12] The judge who solicits or receives money from a lawyer who has an important case pending before the court, creates the taint of corruption that the Judicial Conference's gift regulations are designed to prevent; it is thus unsurprising that ethics rules universally condemn the practice.[13] That Judge Porteous was told at the time that the payment was inappropriate, and did not report the payment as a gift, corroborates the view that he intentionally concealed a known impropriety.

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[11] Code of Conduct Canon 4D(4) (2009).

[12] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §§3, 4. *See also*, Code of Conduct, Canon 5C4 (predecessor).

[13] RICHARD C. FLAMM, JUDICIAL DISQUALIFICATION §9.1 (2d Ed. 2007) ("The practice of judges accepting gifts or favors from those who appear before them implicates fundamental policy concerns. Therefore, parties are usually not permitted to give such gifts and judges are not allowed to receive them."); JAMES ALFINI, et al, *supra* note 7, at §7.15A ("Courts tend to look with considerable skepticism at any gifts, favors, or favorable business deals that judges receive from lawyers who appear before them ")

Having improperly solicited thousands of dollars from a lawyer while he was representing a party in a case pending before him, the need for Judge Porteous to disqualify himself was even more plain, rendering his erroneous failure to withdraw more obviously willful. It is utterly inconceivable that a reasonable person would not question the impartiality of a judge who solicited thousands of dollars from a lawyer in a pending matter.[14] That Judge Porteous subsequently decided the case in favor of the defendant and was later reversed in resounding terms only heightens the suspicions that the disqualification and gift rules aim to dispel. If the ethical duty to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" means anything, it means that conduct of this kind is unacceptable.

The Bankruptcy Proceeding

Judge Porteous filed for bankruptcy in 2001, when he was a sitting federal district judge. The Judicial Conference Report summarizes his conduct in connection with the bankruptcy proceeding as follows:

> Judge Porteous filed for bankruptcy under a false name. In sworn court documents, he understated his income, overstated his expenses, and failed to disclose gambling losses and an anticipated tax refund. Likewise, he failed to disclose the existence of various financial accounts, including a credit card. By using this credit card and by taking our markers at various casinos, he continued to accumulate debt in violation of court orders. Finally, he failed to report payments routed through his secretary's checking account to preferred creditors. As a result of the foregoing, his creditors incurred unwarranted losses and he was enriched.

The Judicial Conference report concludes that his conduct violated federal perjury and bankruptcy fraud statutes. The alleged conduct likewise violates the judiciary's core ethical principles. Codes of conduct direct judges to "respect and comply with the law"[15] for obvious and compelling reasons: If we are to trust our judges to honor their oaths to uphold and apply the law in the courtroom, it is critical that they abide by the laws they have sworn to uphold. Unsurprisingly, then, criminal conduct, including fraud, has long been recognized as an extremely serious ethical lapse.[16]

One can argue whether violations of law that do not culminate in a criminal conviction technically qualify as a breach of the ethical duty to "follow the law," but it is settled that such conduct runs afoul of even more elemental norms. The legitimacy of the judiciary as an institution depends on preserving public confidence in the courts. Public confidence in the courts turns on judges behaving honorably on *and* off the bench.

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[14] In the federal system, disqualification has been ordered where the risk of favoritism was far more attenuated *See, e.g., Pepsico v. McMillen*, 764 F 2d 458 (7th Cir 1985) (Reversing refusal to disqualify where the judge—anonymously and through a recruiter—was exploring future job opportunities with law firms representing parties in a pending case).

[15] Code of Conduct Canon 2A (2009); Code of Conduct Canon 2A (predecessor), ABA Model Code Rule 1.1.

[16] ALFINI et al., *supra* note 7, at §10.04A.

Accordingly, judges are admonished to "avoid impropriety and the appearance of impropriety in all activities" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[17] We therefore explain in our treatise, that "regardless of whether unprosecuted criminal conduct qualifies as a failure to comply with the law, within the meaning of the codes of conduct, it clearly runs afoul of the more general directives that judges must avoid the appearance of impropriety and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[18]

The Judge's Relationship With Bail Bondsmen

Deposition records and related documents indicate that over a period of years, starting when he was a state judge, Judge Porteous was given things of value from bail bondsmen Louis Marcotte and his sister, Lori Marcotte. They paid for numerous meals at high-end restaurants, paid for the judge's home repairs, paid for his car repairs, and took Judge Porteous (and his secretary) to Las Vegas. In return, Judge Porteous set bonds at the Marcottes' request so as to permit them to maximize their profits; he set aside felony convictions of employees; he helped them form relationships (particularly with other judges) that would assist them in their business; and he interceded on their behalf with other judges before whom the Marcottes had civil litigation pending.

Unlike the relationship between Judge Porteous and attorneys Amato, Creely, Levenson and Gardner, his relationship with the Marcottes was unobscured by longstanding friendships. Rather, as described immediately above, this was a business relationship featuring quid pro quo. Corruption of this magnitude is not addressed in codes of conduct explicitly: A judge's ethical duty not to accept bribes, or take money or other favors in exchange for judicial or administrative action, quite literally goes without saying. As previously discussed, there are strict rules against judges soliciting or accepting favors from lawyers, parties, or others with whom the courts do business: Gift regulations for federal judges prohibit them from "solicit[ing] a gift from any person who is seeking official action from or doing business with the court," and likewise prohibit them from accepting gifts from such persons, subject to exceptions that are inapplicable here.[19] State ethics codes are similar.[20] As an ethical matter, however, the situation becomes "most egregious" when a judge receives improper "gifts" from interested individuals in exchange for official action, which are not really gifts or favors, but bribes and kickbacks .[21] For ethical lapses this extreme, the violations cut to the quick of the core directives that judges must "uphold the integrity and independence of the judiciary;"

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[17] Code of Conduct Canon 2 and 2A(2009); Code of Conduct Canon 2 and 2A(predecessor); Model Code, Canon 1, Rules 1 1, 1.2.

[18] ALFINI et al , *supra* note 7, at §10.04A

[19] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §§4, 5.

[20] Model Code, Rule 3.13.

[21] Alfini et al, *supra* note 7, at §7.15B ("A recurring problem is the acceptance of gifts and loans from persons who come before the judge, such as bail bondsmen and receivers. In the most egregious cases, of course, these are not gifts, but kickbacks or bribes.")

"avoid impropriety;" and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[22]

After Porteous became a federal judge, Marcotte testified that he continued to include him at expense-paid lunches with state judges. Marcotte did so, he explained, because "whenever I brought Porteous to the table, I brought strength;" "other judges respected him and they listened to him when he talked;" and "he could tell them how great the bail bond business is." If true, such conduct is an almost textbook violation of the ethical duty not to "lend the prestige of judicial office to advance the private interest of the judge or others."[23]

Financial Disclosure

In its report, the Judicial Conference found:

> Judge Porteous's annual financial disclosure forms repeatedly made false statements that were material to the integrity of the office. It is undisputed that Judge Porteous solicited and received things of value from attorneys appearing in litigation before him. It is also undisputed that none of these benefits were listed as "Income," "Gifts," "Loans," or "Liabilities" on his financial disclosure forms, which he signed and attested to as accurate under oath.

To the extent Judge Porteous's conduct violated perjury laws, it likewise signals a violation of his ethical duties to follow the law, to avoid impropriety, and to uphold the integrity and independence of the judiciary, previously discussed in connection with his allegedly false statements under oath in the bankruptcy proceeding.[24] In addition, however, federal judges are under an independent ethical duty to "report the value of any gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States."[25]

By itself, filing incomplete or inaccurate gift disclosure forms is highly undesirable, but can be attributed to simple carelessness or lack of time. To that extent, the ethical implications of such conduct are modest. When, however, failure to disclose is - as the Judicial Conference found here - a means for the judge to conceal the receipt of improper gifts and favors, the ethical implications become much more serious. Such conduct violates not just the duty to report gifts as required by applicable codes and regulations, but also the duty to avoid impropriety and to act at all times in a manner that promotes the integrity of the judiciary. It may be noted that the Model Code of Judicial Conduct defines "integrity" in terms of "probity" and "honesty," which underscores why

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[22] Code of Conduct Canons 1, 2 & 2A (2009); Code of Conduct Canons 1, 2 & 2A (predecessor); Model Code, Canon 1; Rule 1.2.
[23] Code of Conduct, Canon 2B (2009); Code of Conduct, Canon 2B (predecessor); Model Code, Rule 1.3.
[24] Code of Conduct, Canons 1, 2 & 2A (2009); Code of Conduct, Canons 1, 2, & 2A (predecessor).
[25] Code of Conduct, Canon 5C6 (predecessor). The current Code is to the same effect. *See* Code of Conduct, Canon 4H3 (2009).

deliberate disregard of reporting requirements to conceal improper gifts undermines judicial integrity.[26]

Hunting Trips and Meals from Oil Rig Companies

The evidentiary record reflects that Judge Porteous was assigned a number of cases in which two oil rig companies - Rowan Companies and Diamond Offshore - were litigants. Diamond and Rowan leased or owned hunting facilities in Texas, and both invited Judge Porteous on all-expense-paid hunting trips to their facilities. Diamond invited Judge Porteous in 2000, 2001, 2003, 2005, 2006, and 2007. The invitation from Diamond came at the suggestion of Judge Porteous's friend, attorney Richard Chopin, who frequently represented Diamond. Rowan invited Judge Porteous to attend hunting trips in 2002, 2004 and 2006. The invitation was extended by Rowan Vice-President Bill Hedrick who had met Judge Porteous on a different social hunting trip.

It is problematic for a judge to accept expense-paid hunting trips from parties in pending proceedings[27] unless the trips qualify as "social hospitality based on personal relationships," which falls outside the regulatory definition of gift.[28] In this case, however, the hospitality was provided not by a person, but by corporations. Accepting that Judge Porteous did not and could not have a "personal relationship" with an artificial entity, accepting the gift is problematic. The objective of a corporation is to make profits (or minimize losses) - not to make friends. Therefore, when a corporation is a regular party in litigation before a given judge, and that corporation extends special hospitalities to the judge on a recurring basis, it raises an unavoidable suspicion that the corporation's underlying motivation is to further its financial self-interest by currying favor. Having accepted inappropriate gifts from parties in litigation before him, disqualification was necessary. Put in terms of the language of the disqualification standard, an objective lay observer fully informed of the relevant circumstances might reasonably question the impartiality of a judge who enjoyed numerous expense-paid hunting trips courtesy of corporations that appeared regularly as parties in litigation.

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[26] Model Code, terminology.

[27] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts §5 ("A judicial officer . . shall not accept a gift from anyone who is seeking official action from or doing business with the court"); see also, Code of Conduct, Canon 5C4 (predecessor) ("A judge should not accept anything of value from anyone seeking official action from . . the court . except that a judge may accept a gift as permitted by the Judicial Conference gift regulations ")

[28] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts §3 ("'Gift' means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value but does not include (a) social hospitality based on personal relationships.")

Attachment Twelve

July 27, 2010

Alan Baron, Esq.
Special Impeachment Counsel
Committee On the Judiciary, United States
House of Representatives
Seyfarth Shaw LLP
975 F Street, NW
Washington, DC 20004

Dear Mr. Baron:

You asked for my views on an issue that has arisen in the impeachment proceedings regarding United States District Judge Judge G. Thomas Porteous, Jr. The House of Representatives has impeached Judge Porteous, and the matter is now before the Senate.

The question you asked me to address is whether the conduct for which a civil officer may be impeached, convicted, and removed from office includes only actions that took place while the officer held the office that is the subject of impeachment. Judge Porteous argues, in motions to dismiss two of the articles of impeachment, that conduct that took place prior to his appointment as United States District Judge cannot support impeachment.

In my view the Constitution imposes no such limitation. As I will explain, the important question concerning the relationship between the officer's alleged high crimes and misdemeanors and the officer's current office is not temporal. Rather, the question is whether the conduct, whenever it occurred, is such as to disqualify the officer from any longer holding the public trust.

Article II, Section 4 of the Constitution provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The text identifies the individuals who are subject to impeachment and the kind of conduct for which they may be impeached, but does not impose any explicit requirement regarding the time at which a high crime or misdemeanor must have occurred. While that silence is not dispositive, it is significant, especially because the Constitution elsewhere draws such a distinction. The Ineligibility Clause of Article I, Section 6, provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." It would be too much to say simply that because the framers knew how to impose that kind of restriction, whenever they did not do so in so many words

they did not do so implicitly, but the drafters' familiarity with the possible importance of terms of service does make it less likely that they would have left the restriction to be inferred.

Despite the absence from the text of such a limitation, the idea that impeachment must be based on conduct during office has some appeal. That appeal, though, derives from considerations that when thought through lead to a different limiting principle. An example in which those considerations are quite strong involves a civil office holder who, as a youth, committed a serious criminal offense and was convicted and punished for it, and who has since been a model of probity and public service. It is tempting to say that the Constitution does not authorize the House and Senate to bring back that long-past misconduct and remove the officer for it. But intuitions based on examples are only the beginning of analysis, and are often readily countered by seemingly contrary intuitions based on other examples. The case of the youthful offender can be countered by that of the civil officer who, shortly before being appointed, committed treason. If it is troublesome to think that the Constitution permits the removal of the former, it is shocking to think that the Constitution does not permit the removal of the traitor.

While the principle that impeachment may be based only on conduct during office cannot reconcile the contrary reactions to those cases, another principle can, and it is quite reasonably attributed to the Constitution. The difference between the two examples is that the youthful offender's past conduct does not bear on current fitness for office, whereas recent treason does. Two powerful considerations indicate that this, and not a temporal cut-off, is the actual constitutional principle. First, the context of the Constitution's provisions concerning impeachment is of course federal office, and context routinely supplies implicit limitations and other modifiers to seemingly general language. Hence it is natural to think that the high crimes and misdemeanors that support impeachment are those that have some connection to office. As the example of the traitor shows, that connection need not be contemporaneity. Second, the central instance of the kind of culpable conduct that gives rise to impeachment and removal is precisely culpable conduct that shows the officer to be, or makes the officer, unfit for the public's confidence. "Omitting qualifications, and recognizing that the definition is only an approximation, I think we can say that 'high Crimes and Misdemeanors,' in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator." Charles L. Black, Jr., *Impeachment: A Handbook* 39-40 (1974).

The question whether bad conduct has made an officer holder's continuance in office inconsistent with the public interest is fundamentally political. It is thus in keeping with the fundamentally political character of the impeachment process. While that process is of course in an important sense judicial, with Senators on oath or affirmation for the trial itself, U.S. Const., Art. I, sec. 3, it also involves the kind of judgments about what is good for the country that are properly made by elected and electorally accountable individuals, not judges whose primary expertise is in law. And just as the

judgments to be made in an impeachment proceeding are political, so are the stakes. Conviction upon impeachment may entail no punishment other than removal from office and ineligibility to hold further office. *Id.* Life, liberty, and private property are not at stake, only eligibility to exercise power in the name of the people. Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgment of unfitness may be based on conduct that took place before an officer-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder.

It may be objected that if there is no absolute temporal limitation on the wrongdoing that can support impeachment, the House and Senate can ransack an officer's past, fixing on long-ago and now irrelevant actions in order to remove someone whom they do not like. But if the past conduct is indeed irrelevant to current fitness, then the two houses would be wrong to rely on it, if I am correct that the Constitution does require that impeachment and conviction be based on wrongdoing that renders the officer unfit. And if the two houses were intent on removing an officer in the face of all constitutional difficulties, they could easily enough decide that some action the officer committed while in office was a high crime or misdemeanor.

So far I have discussed the Constitution's provisions specifically regarding impeachment. Under Article III, section 1, of the Constitution, Judge Porteous was appointed to serve "during good Behaviour." One might infer that a judge may be removed through impeachment only for bad behavior that occurs during his term of office. The reasoning would be that the judge has been appointed to hold office until he behaves badly, so that bad behavior after the term begins is a necessary predicate for removal. Senator John D. Works of California gave this as a reason, in the impeachment trial of Judge Robert W. Archbald in 1913, for voting not to convict on the articles of impeachment that related to conduct before Judge Archbald was appointed to the office he held at the time of impeachment. S. Doc. No. 62-1140, v. II, at 1635-1636 (1913). (Judge Archbald was convicted on other articles and removed from office.) But the President is to hold his office "during the Term of four Years," U.S. Const., Art. II, sec. 1, and similar reasoning would lead to the conclusion that the President therefore may not be removed until four years are up, which would mean that a President could not be removed by impeachment at all. Yet Article II's list of impeachable officers begins with the President, *id.*, sec. 4. Impeachment thus must be a particular exception to the general rule that the President serves for four years. In similar fashion, if there is a conflict between the term set out in Article III and the provision for removal through impeachment, the latter prevails.

As just indicated, some Senators were unwilling to vote to convict Judge Archbald on the articles related to conduct before he was appointed Circuit Judge, the office he held at the time of his impeachment. Those votes are part of the practice of the Senate, and hence must be weighed in assessing the bearing of precedent on this issue. So must the willingness of the House of Representatives to impeach Judge Archbald on

those grounds. In weighing the Senators' statements, it important to bear in mind that they were not actually confronted with a situation in which a sitting judge had engaged in otherwise-impeachable conduct during a prior judgeship and no other impeachable misconduct could be proved. Indeed, Senator Borah made this point, explaining that he voted not to convict on counts based on prior behavior because of his doubts about the constitutional question and the fact that it was unnecessary to resolve that issue, "the object of the impeachment being fully accomplished." *Id.* at 1634-1635. What he and other Senators would have done had they been forced to make such a choice we do not know.

I have not examined in detail the facts on which the House of Representatives based its decision to impeach Judge Porteous, and so will comment only generally on the application of the foregoing principles to those facts. It does seem to me that the House and Senate reasonably could conclude that misconduct in a prior judicial office of the kind that would support impeachment and removal if engaged in during the officer's current judicial office is both sufficiently culpable and sufficiently indicative of unfitness to serve to lead to impeachment and removal now. The connection between the past misconduct and fitness for the current office is clear enough. So is the connection between an office and culpably false statements made in the process of obtaining that office. Whether the House's allegations are true, and whether if true they describe high crimes or misdemeanors that render Judge Porteous unfit to serve on the federal bench, is for the Senate to decide. In my view, the fact that the alleged conduct took place before Judge Porteous was appointed to his current position does not remove it from the category of high crimes and misdemeanors that can be the subject of impeachment.

These views are my own. They are presented as a public service, not on behalf of any client or of my employer, the University of Virginia. If there is anything more I can do to be of assistance, please let me know.

Sincerely,

John C. Harrison

Attachment Thirteen

FILED
IN OPEN COURT
DEC 12 2005
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO. 1:05CR543
	)	
v.	)	Count 1: 18 U.S.C. 2071(b)
	)	(Removal of U.S. Documents)
DONALD W. KEYSER	)	
	)	Counts 2 - 3: 18 U.S.C. 1001(a)
	)	(False Official Statements)

CRIMINAL INFORMATION

THE UNITED STATES ATTORNEY CHARGES THAT:

COUNT ONE

From in or about 1992 until on or about September 4, 2004, in Fairfax County, Virginia, within the Eastern District of Virginia and in the District of Columbia, the defendant, Donald W. Keyser, having custody of classified United States documents and papers in a public office, that is, the United States Department of State, willfully and unlawfully removed classified documents and papers from the Department of State to his residence in Fairfax County, Virginia.

(In violation of Title 18, United States Code, Section 2071(b))

COUNT TWO

On or about September 7, 2003, at Dulles International Airport, in Loudoun County, in the Eastern District of Virginia, defendant DONALD WILLIS KEYSER did knowingly, willfully, and unlawfully make material false, fictitious, and fraudulent statements and representations, and conceal material facts, in a matter within the jurisdiction of an agency within the executive branch of the Government of the United States; to wit, on or about the above date, KEYSER transmitted a Customs Declaration form upon his return to the United States from overseas to an official of the U.S. Department of Homeland Security, on which form he falsely stated, in response to an item on the form requiring the traveler to identify the "[c]ountries visited on this trip prior to U.S. arrival," that he had visited only China and Japan, when, in fact, KEYSER had also visited Taiwan.

(In violation of Title 18, United States Code, Section 1001(a))

COUNT THREE

On or about August 9, 2004, in Arlington, Virginia, in the Eastern District of Virginia, the defendant DONALD WILLIS KEYSER did knowingly, willfully, and unlawfully make material false, fictitious, and fraudulent statements and representations, and conceal material facts, in a matter within the jurisdiction of an agency within the executive branch of the Government of the United States; to wit, on or about the above date, KEYSER falsely stated to an investigator of the Bureau of Diplomatic Security of the U.S. Department of State at the Foreign Service Institute in Arlington, Virginia, in an interview relating to KEYSER's security reinvestigation, that he had not engaged in conduct which may make him vulnerable to coercion, exploitation, or pressure from a foreign government.

(In violation of Title 18, United States Code, Section 1001(a))

Respectfully submitted,

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: Patricia M. Haynes
Patricia M. Haynes
David H. Laufman
Assistant United States Attorneys

Attachment Fourteen

Impeachment of Judge Robert W. Archbald*

In 1862 West H. Humphreys, United States district judge for the district of Tennessee, was impeached on several specifications, one of which was based on his action in making a speech at a public meeting, while off the bench, inciting revolt and rebellion against the Constitution and Government of the United States. The evidence clearly showed that he was in no wise acting in a judicial capacity, yet he was convicted on this charge.

A number of the impeachments of judges of the several States of the Union have been predicated on various acts of debauchery entirely separate from the performance of their official duties.

Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must needs be committed in an official capacity. If such an atrocious doctrine should receive the sanction of the congressional authority, there is no limit to the variety and the viciousness of the offenses which a Federal judge might commit with perfect immunity from effective impeachment.

IMPEACHMENT FOR OFFENSES COMMITTED IN ANOTHER JUDICIAL OFFICE

Certain of the proposed articles of impeachment against Judge Archbald are based on offenses committed while he held the office of United States district judge for the middle district of Pennsylvania, whereas he now holds the office of circuit judge of the United States for the third judicial circuit, and is assigned to serve for a period of four years in the Commerce Court. In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution.

By virtue of the provisions of section 609 of the Revised Statutes, which were then in force, Judge Archbald, while holding the office of United States district judge, was duly clothed with authority to sit or preside in the United States circuit court, and he was actually presiding over such circuit court at Scranton, Pa., during the time that some or all of the offenses charged in these articles were committed.

Since his elevation to a circuit judgeship the United States circuit courts have been abolished by the act of March 3, 19711 (36 Stat., 1087), entitled "An act to codify, revise, and amend the laws relating to the judiciary," but the provisions relative to the interchangeability of district and circuit judges remain substantially the same. Section 18 of this act provides that—

> Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge or associate justice or

* From Congressional Record (House) July 8, 1912 (8705–08)

> Chief Justice shall designate and appoint any circuit judge of the circuit to hold said district court.

Thus it appears that Judge Archbald now holds a civil office, within the meaning of the Constitution, of the same judicial nature as the office held by him at the time of the commission of the offenses charged in the said articles, and that, under the existing law, he may be called upon at any time to perform precisely the same functions that he performed as United States district judge.

In State *v.* Hill (37 Nebr., 80) the Legislature of Nebraska had impeached certain ex-officers of the State for offenses alleged to have been committed during their respective terms of office. The Supreme Court of Nebraska held that inasmuch as they had ceased to be civil officers of the State they were not subject to impeachment. In the course of the decision the court said (pp. 88–89):

> Judge Barnard was impeached in the State of New York during his second term for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment proceedings against Judge Hubbel, of Wisconsin, and on the trial of Gov. Butler, of this State, and in each of which the ruling was the same as in the Barnard case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office, that object is attained and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.

In the cases discussed there was a constructive breach in the tenure of the offices held by the defendants between the time of the commission of the offenses charged and the adoption of the articles of impeachment. Even though the offices held by the defendants at the time of their impeachment had not been the same offices which they held at the time of the commission of the alleged offenses, it might well have been decided, on principle, that impeachment would lie if in fact the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse.

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

Conclusion.

Judges "shall hold their offices during good behavior." Thus says the Constitution. The framers of that instrument were desirous of having an independent and incorruptible judiciary, but they never intended to provide that any judge should hold his office upon non-

forfeitable life tenure. Those who formulated the organic law sought to protect the people against the malfeasance and misfeasance of unjust and corrupt judges. Therefore they wisely limited the tenure of office to "during good behavior" and provided the remedy for misbehavior to be forfeiture of office and the removal therefrom by impeachment.

The conduct of this judge has been exceedingly reprehensible and in marked contrast with the high sense of judicial ethics and probity that generally characterizes the Federal judiciary. Be it said to the credit of the wisdom of our fathers and in behalf of our American institutions that the judges have, as a rule, deported themselves in such manner as to merit and keep the confidence of the people. The public respect for the judicial branch of our Government has almost amounted to reverence. This confidence has been deserved, and let us hope that it will continue to be deserved, to the end that an upright and independent judiciary may be maintained for the perpetuation of our government of law.

A judge should be the personification of integrity, of honor, and of uprightness in his daily work and conversation. He should hold his exalted office and the administration of justice above the sordid desire to accumulate wealth by trading or trafficking with actual or probable litigants in his court. He should be free and unaffected by any bias born of avarice and unhampered by pecuniary or other improper obligations.

Your committee is of opinion that Judge Archbald's sense of moral responsibility has become deadened. He has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence. He has degraded his high office and has destroyed the confidence of the public in his judicial integrity. He has forfeited the condition upon which he holds his commission and should be removed from office by impeachment.

Recommendation.

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

House Resolution 622.

Resolved, That Robert W. Archbald, additional circuit judge of the United States from the third judicial, appointed pursuant to the act of June 18, 1910 (U.S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U.S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court:

ARTICLE 1.

That the said Robert W. Archbald, at Scranton, in the State of Pennsylvania, being a United States circuit judge, and having been duly designated as one of the judges of the United States Commerce Court, and being then and there a judge of the said court, on March 31, 1911, entered into an agreement with one Edward J. Williams whereby the said Robert W. Archbald and the said Edward J. Williams agreed to become partners in the purchase of a certain culm dump, commonly known as the Katydid culm dump, near Moosic, Pa., owned by the Hillside Coal & Iron Co., a corporation, and one John M. Robertson, for the purpose of disposing of said property at a profit. That pursuant to said agreement, and in furtherance thereof, the said Robert W. Archbald, on the 31st day of March, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence, and did induce and influence, the officers of the said Hillside Coal & Iron Co. and of the Erie Railroad Co., a corporation, which owned all of the stock of said coal company, to enter into an agreement with the said Robert W. Archbald and the said Edward J. Williams to sell the interest of the said Hillside Coal & Iron Co. in the Katydid culm dump for a consideration of $4,500. That during the period covering the several negotiations and transactions leading up to the aforesaid agreement the said Robert W. Archbald was a judge of the United States Commerce Court, duly designated and acting as such judge; and at the time aforesaid and during the time the aforesaid negotiations were in progress the said Erie Railroad Co. was a common carrier engaged in interstate commerce and was a party litigant in certain suits, to wit, the Baltimore & Ohio Railroad Co., et al. *v.* The Interstate Commerce Commission, No. 38, and the Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 39, then pending in the United States Commerce Court; and the said Robert W. Archbald, judge as aforesaid, well knowing these facts, willfully, unlawfully, and corruptly took advantage of his official position as such judge to induce and influence the officials of the said Erie Railroad Co. and the said Hillside Coal & Iron Co., a subsidiary corporation thereof, to enter into a contract with him and the said Edward J. Williams, as aforesaid, for profit to themselves, and that the said Robert W. Archbald, then and there, through the influence exerted by reason of his position as such judge, willfully, unlawfully, and corruptly did induce the officers of said Erie Railroad Co. and of the said Hillside Coal & Iron Co. to enter into said contract for the consideration aforesaid.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 2.

That the said Robert W. Archbald, on the 1st day of August, 1911, was a United States circuit judge, and, having been duly designated as one of the judges of the United States Commerce Court, was then and there a judge of said court.

That at the time aforesaid the Marian Coal Co., a corporation, was the owner of a certain culm bank at Taylor, Pa., and was then and there engaged in the business of washing and shipping coal; that prior to that time the said Marian Coal Co. had filed before the Interstate Commerce Commission a complaint against the Delaware, Lackawanna & Western Railroad Co. and five other railroad companies as defendants, charging said defendants with discrimination in rates and with excessive charges for the transportation of coal shipped by the said Marian Coal Co. over their respective lines of road; that all of the said defendant companies were common carriers engaged in interstate commerce. That the decision of the said case by the Interstate Commerce Commission at the instance of either party thereto was subject to review, under the law, by the United States Commerce Court; that one Christopher G. Boland and one William P. Boland were then the principal stockholders of the said Marian Coal Co. and

controlled the operation of the same, and they, the said Christopher G. Boland and the said William P. Boland, employed one George M. Watson as an attorney to settle the case then pending as aforesaid in the Interstate Commerce Commission and to sell to the Delaware, Lackawanna & Western Railroad Co. two-thirds of the stock of the said Marian Coal Co.; and at the time aforesaid there was pending in the United States Commerce Court a certain suit entitled the Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, to which suit the said Delaware, Lackawanna & Western Railroad Co. was a party litigant.

That the said Robert W. Archbald, being judge as aforesaid and well knowing these facts, did, then and there, engage, for a consideration, to assist the said George M. Watson to settle the aforesaid case then pending before the Interstate Commerce Commission and to sell to the said Delaware, Lackawanna & Western Railroad Co. the said two-thirds of the stock of the said Marian Coal Co., and in pursuance of said engagement the said Robert W. Archbald, on or about the 10th day of August, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence the officers of the Delaware, Lackawanna & Western Railroad Co. to enter into an agreement with the said George M. Watson for the settlement of the aforesaid case and the sale of said stock of the Marian Coal Co.; and the said Robert W. Archbald thereby willfully, unlawfully, and corruptly did use his influence as such judge in the attempt to settle said case and to sell said stock of the said Marian Coal Co. to the Delaware, Lackawanna & Western Railroad Co.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 3.

That the said Robert Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about October 1, 1911, did secure from the Lehigh Valley Coal Co., a corporation, which coal company was then and there owned by the Lehigh Valley Railroad Co., a common carrier engaged in interstate commerce, and which railroad company was at that time a party litigant in certain suits then pending in the United States Commerce Court, to wit, The Baltimore & Ohio Railroad Co. et al. *v.* Interstate Commerce Commission et al., No. 38, and The Lehigh Valley Railroad Co. *v.* Interstate Commerce Commission et al., No. 49, all of which was well known to said Robert W. Archbald, an agreement which permitted said Robert W. Archbald and his associates to lease a culm dump, known as Packer No. 3, near Shenandoah, in the State of Pennsylvania, which said culm dump contained a large amount of coal, to wit, 472,670 tons, and which said culm dump the said Robert W. Archbald and his associates agreed to operate and to ship the product of the same exclusively over the lines of the Lehigh Valley Railroad Co.; and that the said Robert W. Archbald unlawfully and corruptly did use his official position and influence as such judge to secure from the said coal company the said agreement.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a misdemeanor in such office.

ARTICLE 4.

That the said Robert W. Archbald, while holding the office of United States circuit judge and being a member of the United States Commerce Court, was and is guilty of gross and improper conduct, and was and is guilty of a misdemeanor as said circuit judge and as a member of said Commerce Court in manner and form as follows, to wit: Prior to and on the 4th day of April, 1911, there was pending in said United States Commerce Court the suit of Louisville and Nashville Railroad Co. *v.* The Interstate Commerce Commission. Said suit was argued and submitted to said United States Commerce Court on the 4th day of April, 1911; that afterwards, to wit, on the 22d day of August, 1911, while said suit was still pending in said court, and before the same had been decided, the said Robert W. Archbald, as a member of said United States Commerce Court, secretly, wrongfully, and unlawfully did write a letter to the attorney for the said Louisville & Nashville Railroad Co. requesting said attorney to see one of the witnesses who had testified in said suit on behalf of said company and to get his explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to the said Robert W. Archbald, which request

was complied with by said attorney; that afterwards, to wit, on the 10th day of January, 1912, while said suit was still pending, and before the same had been decided by said court, the said Robert W. Archbald, as judge of said court, secretly, wrongfully, and unlawfully again did write to the said attorney that other members of said United States Commerce Court has discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the said attorney, and the said Robert W. Archbald, judge of said United States Commerce Court as aforesaid, in said letter requested the said attorney to make to him, the said Robert W. Archbald, an explanation and an answer thereto; and he, the said Robert W. Archbald, as a member of said United States Commerce Court aforesaid, did then and there request and solicit the said attorney for the said railroad company to make and deliver to the said Robert W. Archbald a further argument in support of the contentions of the said attorney so representing the said railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 5.

That in the year 1904 one Frederick Warnke, of Scranton, Pa., purchased a two-thirds interest in a lease on certain coal lands owned by the Philadelphia & Reading Coal & Iron Co., located near Lorberry Junction, in said State, and put up a number of improvements thereon and operated a culm dump located on said property for several years thereafter; that operations were carried on at a loss; that said Frederick Warnke thereupon applied to the Philadelphia & Reading Coal & Iron Co. for the mining maps of the said land covered by the said lease, and was informed that the lease under which he claimed had been forfeited two years before it was assigned to him, and his application for said maps was therefore denied; that said Frederick Warnke then made a proposition to George F. Baer, president of the Philadelphia & Reading Railroad Co. and president of the Philadelphia & Reading Coal & Iron Co., to relinquish any claim that he might have in this property under the said lease, provided that the Philadelphia & Reading Coal & Iron Co. would give him an operating lease on what was known as the Lincoln culm bank located near Lorberry; that said George F. Baer referred said proposition to one W. J. Richards, vice president and general manager of the Philadelphia & Reading Coal & Iron Co., for consideration and action; that the general policy of the said coal company being adverse to the lease of any of its culm banks, the said George F. Baer and the said W. J. Richards declined to make the lease, and the said Frederick Warnke was so advised; that the said Frederick Warnke then made several attempts, through his attorneys and friends, to have the said George F. Baer and the said W. J. Richards reconsider their decision in the premises, but without avail; that on or about November 1, 1911, the said Frederick Warnke called upon Robert A. Archbald, who was then and now is a United States circuit judge, having been duly designated as one of the judges of the United States Commerce Court, and asked him, the said Robert W. Archbald, to intercede in his behalf with the said W. J. Richards; that on November 24, 1911, the said Robert W. Archbald, judge as aforesaid, pursuant to said request, did write a letter to the said W. J. Richards requesting an appointment with the said W. J. Richards; that several days thereafter the said Robert W. Archbald called at the office of the said W. J. Richards to intercede for the said Frederick Warnke; that the said W. J. Richards then and there informed the said Robert W. Archbald that the decision which he had given to the said Warnke must be considered as final, and the said Archbald so informed the said Warnke; that the entire capital stock of the Philadelphia & Reading Coal & Iron Co. is owned by the Reading Co., which also owns the entire capital stock of the Philadelphia & Reading Railroad Co., which last-named company is a common carrier engaged in interstate commerce.

That the said Robert W. Archbald, judge as aforesaid, well knowing all of the aforesaid facts, did wrongfully attempt to use his influence as such judge to aid and assist the said Frederick Warnke to secure an operating lease of the said Lincoln culm dump owned by the Philadelphia & Reading Coal & Iron Co., as aforesaid, which lease the officials of the said Philadelphia & Reading Coal &

Iron Co. had theretofore refused to grant, which said fact was also well known to the said Robert W. Archbald.

That the said Robert W. Archbald, judge as aforesaid, shortly after the conclusion of his attempted negotiations with the officers of the Philadelphia & Reading Railroad Co. and of the Philadelphia & Reading Coal & Iron Co. aforesaid in behalf of the said Frederick Warnke, and on or about the 31st day of March, 1912, willfully, unlawfully, and corruptly did accept as a gift, reward, or present from the said Frederick Warnke, tendered in consideration of favors shown him by said judge in his efforts to secure a settlement and agreement with the said railroad company and the said coal company, and for other favors shown by said judge to the said Frederick Warnke, a certain promissory note for $500 executed by the firm of Warnke & Co., of which the said Frederick Warnke was a member.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as a judge and high crimes and misdemeanor in office.

ARTICLE 6.

That the said Robert W. Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about the 1st day of December, 1911, did unlawfully, improperly, and corruptly attempt to use his influence as such judge with the Lehigh Valley Coal Co. and the Lehigh Valley Railway Co. to induce the officers of said companies to purchase a certain interest in a tract of coal land containing 800 acres, which interest at said time belonged to certain persons known as the Everhardt heirs.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 7.

That during the months of October and November, A.D. 1908, there was pending in the United States district court, in the city of Scranton, State of Pennsylvania, over which court Robert W. Archbald was then presiding as the duly appointed judge thereof, a suit or action at law wherein the Old Plymouth Coal Co. was plaintiff and the Equitable Fire & Marine Insurance Co. was defendant. That the said coal company was principally owned and entirely controlled by one W. W. Rissinger, which fact was well known to said Robert W. Archbald; that on or about November 1, 1908, and while said suit was pending, the said Robert W. Archbald and the said W. W. Rissinger wrongfully and corruptly agreed together to purchase stock in a gold-mining scheme in Honduras, Central America, for the purpose of speculation and profit; that in order to secure the money with which to purchase said stock the said Rissinger executed his promissory note in the sum of $2,500, payable to Robert W. Archbald and Sophia J. Hutchison, which said note was indorsed then and there by the said Robert W. Archbald for the purpose of having same discounted for cash; that one of the attorneys for said Rissinger in the trial of said suit was one John T. Lenahan; that on the 23d day of November, 1908, said suit came on for trial before said Robert W. Archbald, judge presiding, and a jury, and after the plaintiff's evidence was presented the defendant insurance company demurred to the sufficiency of such evidence and moved for a nonsuit, and after extended argument by attorneys for both plaintiff and defendant the said Robert W. Archbald ruled against the defendant and in favor of the plaintiff, and thereupon the defendant proceeded to introduce evidence, before the conclusion of which the jury was dismissed and a consent judgment rendered in favor of the plaintiff for $2,500, to be discharged upon the payment of $2,129.63 if paid within 15 days from November 23, 1908, and on the same day judgments were entered in a number of other like suits against different insurance companies, which resulted in the recovery of about $28,000 by the Old Plymouth Coal Co.; that before the expiration of said 15 days the said Rissinger, with the knowledge and consent of said Robert W. Archbald, presented said note to the said John T. Lenahan for discount, which was refused and which was later discounted by a bank and has never been paid.

All of which acts on the part of the said Robert W. Archbald were improper, unbecoming, and constituted misbehavior in his said office as judge and render him guilty of a misdemeanor.

ARTICLE 8.

That during the summer and fall of the year 1909 there was pending in the United States district court for the middle district of Pennsylvania, in the

city of Scranton, over which court the said Robert W. Archbald was then and there presiding as the duly appointed judge thereof, a civil action wherein the Marian Coal Co. was defendant, which action involved a large sum of money, and which defendant coal company was principally owned and controlled by one Christopher G. Boland and one William P. Boland, all of which was well known to said Robert W. Archbald; and while said suit was so pending the said Robert W. Archbald drew a note for $500, payable to himself, and which note was signed by one John Henry Jones and indorsed by the said Robert W. Archbald, and then and there during the pendency of said suit as aforesaid the said Robert W. Archbald wrongfully agreed and consented that the said note should be presented to the said Christopher G. Boland and the said William P. Boland, or one of them, for the purpose of having the said note discounted, corruptly intending that his name on said note would coerce and induce the said Christopher G. Boland and the said William P. Boland, or one of them to discount the same because of the said Robert W. Archbald's position as judge, and because the said Bolands were at that time litigants in his said court.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his office as judge, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 9.

That the said Robert W. Archbald, of the city of Scranton and State of Pennsylvania, on or about November 1, 1909, being then and there a United States district judge in and for the middle district of Pennsylvania, in the city of Scranton and State aforesaid, did draw a note in his own proper handwriting, payable to himself, in the sum of $500, which said note was signed by one John Henry Jones, which said note the said Robert W. Archbald indorsed for the purpose of securing the sum of $500, and the said Robert W. Archbald, well knowing that his indorsement would not secure money in the usual commercial channels, then and there wrongfully did permit the said John Henry Jones to present said note for discount, at his law office, to one C. H. Von Storch, attorney at law and practitioner in said district court, which said Von Storch, a short time prior thereto, was a party defendant in a suit in the said district court presided over by said Robert W. Archbald, which said suit was decided in favor of the said Von Storch upon a ruling by the said Robert W. Archbald; and when the said note was presented to the said Von Storch for discount, as aforesaid, the said Robert W. Archbald wrongfully and improperly used his influence as such judge to induce the said Von Storch to discount same; that the said note was then and there discounted by the said Von Storch, and the same has never been paid, but is still due and owing.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his said office, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 10.

That the said Robert W. Archbald, while holding the office of United States district judge, in and for the middle district of the State of Pennsylvania, on or about the 1st day of May, 1910, wrongfully and unlawfully did accept and receive a large sum of money, the exact amount of which is unknown to the House of Representatives, from one Henry W. Cannon; that said money so given by the said Henry W. Cannon and so unlawfully and wrongfully received and accepted by the said Robert W. Archbald, judge as aforesaid, was for the purpose of defraying the expenses of a pleasure trip of the said Robert W. Archbald to Europe; that the said Henry W. Cannon, at the time of the giving of said money and the receipt thereof by the said Robert W. Archbald, was a stockholder and officer in various and divers interstate railway corporations, to wit: A director in the Great Northern Railway, a director in the Lake Erie & Western Railroad Co., and a director in the Fort Wayne, Cincinnati & Louisville Railroad Co.; that the said Henry W. Cannon was president and chairman of the board of directors of the Pacific Coast Co., a corporation which owned the entire capital stock of the Columbus & Puget Sound Railroad Co., the Pacific Coast Railway Co., the Pacific Coast Steamship Co., and various other corporations engaged in the mining of coal and in the development of agricultural and timber land in various parts of the United States; that the acceptance by the said Robert W. Archbald, while holding said office of United States district judge, of said favors from an officer

and official of the said corporations, any of which in the due course of business was liable to be interested in litigation pending in the said court over which he presided as such judge, was improper and had a tendency to and did bring his said office of district judge into disrepute.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 11.

That the said Robert W. Archbald, while holding the office of United States district judge in and for the middle district of the State of Pennsylvania, did, on or about the 1st day of May, 1910, wrongfully and unlawfully accept and receive a sum of money in excess of $500, which sum of money was contributed and given to the said Robert W. Archbald by various attorneys who were practitioners in the said court presided over by the said Robert W. Archbald; that said money was raised by subscription and solicitation from said attorneys by two of the officers of said court, to wit, Edward R. W. Searle, clerk of said court, and J. B. Woodward, jury commissioner of said court, both the said Edward R. W. Searle and the said J. B. Woodward having been appointed to the said positions by the said Robert W. Archbald, judge aforesaid.

Wherefore said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 12.

That on the 9th day of April, 1901, and for a long time prior thereto, one J. B. Woodward was a general attorney for the Lehigh Valley Railroad Co., a corporation and common carrier doing a general railroad business; that on said day the said Robert W. Archbald, being then and there a United States district judge in and for the middle district of Pennsylvania, and while acting as such judge, did appoint the said J. B. Woodward as a jury commissioner in and for said judicial district, and the said J. B. Woodward, by virtue of said appointment and with the continued consent and approval of the said Robert W. Archbald, held such office and performed all the duties pertaining thereto during all the time that the said Robert W. Archbald held said office of United States district judge, and that during all of said time the said J. B. Woodward continued to act as a general attorney for the said Lehigh Valley Railroad Co.; all of which was at all times well known to the said Robert W. Archbald.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 13.

That Robert W. Archbald, on the 29th day of March, 1901, was duly appointed United States district judge for the middle district of Pennsylvania and held such office until the 31st day of January, 1911, on which last-named date he was duly appointed a United States circuit judge and designated as a judge of the United States Commerce Court.

That during the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court he, the said Robert W. Archbald, at divers times and places, has sought wrongfully to obtain credit from and through certain persons who were interested in the result of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which the said Robert W. Archbald is a member.

That the said Robert W. Archbald, being United States circuit judge and being then and there a judge of the United States Commerce Court, at Scranton, in the State of Pennsylvania, on the 31st day of March, 1911, and at divers other times and places, did undertake to carry on a general business for speculation and profit in the purchase and sale of culm dumps, coal lands, and other coal properties, and for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and in the furtherance of his efforts to compromise such litigation and of his speculations in coal properties, willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce the officers of the Erie Railroad Co., the Delaware, Lackawanna & Western Railroad Co., the Lackawanna & Wyoming Valley Railroad Co., and

other railroad companies engaged in interstate commerce, respectively, to enter into various and divers contracts and agreements in which he was then and there financially interested with divers persons, to wit, Edward J. Williams, John Henry Jones,, Thomas H. Jones, George M. Watson, and others, without disclosing his said interest therein on the face of the contract, but which interest was well known to the officers and agents of said railroad companies.

That the said Robert W. Archbald did not invest any money or other thing of value in consideration of any interest acquired or sought to be acquired by him in securing or in attempting to secure such contracts or agreements or properties as aforesaid, but used his influence as such judge with the contracting parties thereto, and received an interest in said contracts, agreements, and properties in consideration of such influence in aiding and assisting in securing same.

That the said several railroad companies were and are engaged in interstate commerce, and at the time of the execution of the several contracts and agreements aforesaid and of entering into negotiations looking to such agreements had divers suits pending in the United States Commerce Court, and that the conduct and efforts of the said Robert W. Archbald in endeavoring to secure and in securing such contracts and agreements from said railroad companies was continuous and persistent from the said 31st day of March, 1911, to about the 15th day or April, 1912.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of misdemeanors in office.

Mr. CLAYTON. Mr. Speaker, I beg to say, for the benefit of the Members of the House, that a thousand copies of this report, with the accompanying resolution, have been printed by the committee, so that any Member of the House desiring to have a copy of this report, with the accompanying resolution, may have the same by applying to the Committee on the Judiciary at its rooms in the House Office Building.

Attachment Fifteen

Impeachment of Judge Halsted L. Ritter

[H. Res. 422, 74th Cong. 2d sess.]

Congress of the United States of America,
In the House of Representatives,
March 2, 1936.

Resolved, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under H. Res. 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United States district judge for the southern district of Florida, on February 15, 1929.

ARTICLE I

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of a high crime and misdemeanor in office in manner and form as follows, to wit: On or about October 11, 1929, A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge), as solicitor for the plaintiff, filed in the court of the said Judge Ritter a certain foreclosure suit and receivership proceeding, the same being styled "Bert E. Holland and others against Whitehall Building and Operating Company and others" (Number 678–M–Eq.). On or about May 15, 1930, the said Judge Ritter allowed the said Rankin an advance of $2,500 on his fee for his services in said case. On or about July 2, 1930, the said Judge Ritter by letter requested another judge of the United States district court for the southern district of Florida, to wit, Honorable Alexander Akerman, to fix and determine the total allowance for the said Rankin for his services in said case for the reason as stated by Judge Ritter in said letter, that the said Rankin had formerly been the law partner of the said Judge Ritter, and he did not feel that he should pass upon the total allowance made said Rankin in that case and that if Judge

Akerman would fix the allowance it would relieve the writer, Judge Ritter, from any embarrassment if thereafter any question should arise as to his, Judge Ritter's, favoring said Rankin with an exorbitant fee.

Thereafterward, notwithstanding the said Judge Akerman, in compliance with Judge Ritter's request, allowed the said Rankin a fee of $15,000 for his services in said case, from which sum the said $2,500 theretofore allowed the said Rankin by Judge Ritter as an advance on his fee was deducted, the said Judge Ritter, well knowing that at his request compensation had been fixed by Judge Akerman for the said Rankin's services in said case, and notwithstanding the restraint of propriety expressed in his said letter to Judge Akerman, and ignoring the danger of embarrassment mentioned in said letter, did fix an additional and exorbitant fee for the said Rankin in said case. On or about December 24, 1930, when the final decree in said case was signed, the said Judge Ritter allowed the said Rankin, additional to the total allowance of $15,000 theretofore allowed by Judge Akerman, a fee of $75,000 for his services in said case, out of which allowance the said Judge Ritter directly profited. On the same day, December 24, 1930, the receiver in said case paid the said Rankin, as part of his said additional fee, the sum of $25,000, and the said Rankin on the same day privately paid and delivered to the said Judge Ritter the sum of $2,500 in cash; $2,000 of said $2,500 was deposited in bank by Judge Ritter on, to wit, December 29, 1930, the remaining $500 being kept by Judge Ritter and not deposited in bank until, to wit, July 10, 1931. Between the time of such initial payment on said additional fee and April 6, 1931, the said receiver paid said Rankin thereon $5,000. On or about April 6, 1931, the said Rankin received the balance of the said additional fee allowed him by Judge Ritter, said balance amounting to $45,000. Shortly thereafter, on or about April 14, 1931, the said Rankin paid and delivered to the said Judge Ritter, privately, in cash, an additional sum of $2,000. The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said A. L. Rankin the aforesaid sums of money, amounting to $4,500.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor.

ARTICLE II

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

On the 15th day of February 1929 the said Halsted L. Ritter, having been appointed as United States district judge for the southern district of Florida, was duly qualified and commissioned to serve as such during good behavior in office. Immediately prior thereto and for several years the said Halsted L. Ritter had practiced law in said district in partnership with one A. L. Rankin, which partnership was

dissolved upon the appointment of said Ritter as said United States district judge.

On the 18th day of July 1928 one Walter S. Richardson was elected trustee in bankruptcy of the Whitehall Building and Operating Company, which company had been adjudicated in said district as a bankrupt, and as such trustee took charge of the assets of said Whitehall Building and Operating Company, which consisted of a hotel property located in Palm Beach in said district. That the said Richardson as such trustee operated said hotel property from the time of his said appointment until its sales on the 3d of January 1929, under the foreclosure of a third mortgage thereon. On the 1st of November and the 13th of December 1929, the said Judge Ritter made orders in said bankruptcy proceedings allowing the said Walter S. Richardson as trustee the sum of $16,500 as compensation for his services as trustee. That before the discharge of said Walter S. Richardson as such trustee, said Richardson, together with said A. L. Rankin, one Ernest Metcalf, one Martin Sweeney, and the said Halsted L. Ritter, entered into an arrangement to secure permission of the holder or holders of at least $50,000 of first-mortgage bonds on said hotel property for the purpose of filing a bill to foreclose the first mortgage on said premises in the court of said Halsted L. Ritter, by which means the said Richardson, Rankin, Metcalf, Sweeney, and Ritter were to continue said property in litigation before said Ritter. On the 30th day of August 1929, the said Walter S. Richardson, in furtherance of said arrangement and understanding, wrote a letter to the said Martin Sweeney, in New York, suggesting the desirability of contacting as many first-mortgage bondholders as possible in order that their cooperation might be secured, directing special attention to Mr. Bert E. Holland, an attorney, whose address was in the Tremont Building in Boston, and who, as cotrustee, was the holder of $50,000 of first-mortgage bonds, the amount of bonds required to institute the contemplated proceedings in Judge Ritter's court.

On October 3, 1929, the said Bert E. Holland, being solicited by the said Sweeney, requested the said Rankin and Metcalf to prepare a complaint to file in said Judge Ritter's court for foreclosure of said first mortgage and the appointment of a receiver. At this time Judge Ritter was holding court in Brooklyn, New York, and the said Rankin and Richardson went from West Palm Beach, Florida, to Brooklyn, New York, and called upon said Judge Ritter a short time previous to filing the bill for foreclosure and appointment of a receiver of said hotel property.

On October 10, 1929, and before the filing of said bill for foreclosure and receiver, the said Holland withdrew his authority to said Rankin and Metcalf to file said bill and notified the said Rankin not to file the said bill. Notwithstanding the said instructions to said Rankin not to file said bill, said Rankin, on the 11th day of October 1929, filed said bill with the clerk of the United States District Court for the Southern District of Florida but with the specific request to said clerk to lock up the said bill as soon as it was filed and hold until Judge Ritter's return so that there would be no newspaper publicity before the matter was heard by Judge Ritter for the appointment of

a receiver, which request on the part of the said Rankin was complied with by the said clerk.

On October 16, 1929, the said Holland telegraphed to the said Rankin, referring to his previous wire requesting him to refrain from filing the bill and insisting that the matter remain in its then status until further instruction was given; and on October 17, 1929, the said Rankin wired to Holland that he would not make an application on his behalf for the appointment of a receiver. On October 28, 1929, a hearing on the complaint and petition for receivership was heard before Judge Halsted L. Ritter at Miami, at which hearing the said Bert E. Holland appeared in person before said Judge Ritter and advised the judge that he wished to withdraw the suit and asked for dismissal of the bill of complaint on the ground that the bill was filed without his authority.

But the said Judge Ritter, fully advised of the facts and circumstances hereinbefore recited, wrongfully and oppressively exercised the powers of his office to carry into execution said plan and agreement theretofore arrived at, and refused to grant the request of the said Holland and made effective the champertous undertaking of the said Richardson and Rankin and appointed the said Richardson receiver of the said hotel property, notwithstanding that objection was made to Judge Ritter that said Richardson had been active in fomenting this litigation and was not a proper person to act as receiver.

On October 15, 1929, said Rankin made oath to each of the bills for intervenors which were filed the next day.

On October 16, 1929, bills for intervention in said foreclosure suit were filed by said Rankin and Metcalf in the names of holders of approximately $5,000 of said first-mortgage bonds, which intervenors did not possess the said requisite $50,000 in bonds required by said first mortgage to bring foreclosure proceedings on the part of the bondholders.

The said Rankin and Metcalf appeared as attorneys for complainants and intervenors, and in response to a suggestion of the said Judge Ritter, the said Metcalf withdrew as attorney for complainants and intervenors and said Judge Ritter thereupon appointed said Metcalf as attorney for the said Richardson, the receiver.

And in the further carrying out of said arrangement and understanding, the said Richardson employed the said Martin Sweeney and one Bemis, together with Ed Sweeney, as managers of said property, for which they were paid the sum of $60,000 for the management of said hotel for the two seasons the property remained in the custody of said Richardson as receiver.

On or about the 15th day of May 1930 the said Judge Ritter allowed the said Rankin an advance on his fee of $2,500 for his services in said case.

On or about July 2, 1930, the said Judge Ritter requested Judge Alexander Akerman, also a judge of the United States District Court for the Southern District of Florida, to fix the total allowance for the said Rankin for his services in said case, said request and the reasons therefor being set fort hin a letter by the said Judge Ritter, in words and figures as follows, to wit:

July 2, 1930.

Hon. Alexander Akerman,
United States District Judge, Tampa, Fla.

My dear Judge:

In the case of Holland et al. v. Whitehall Building & Operating Co. (No. 678-M-Eq.), pending in my division, my former law partner, Judge A. L. Rankin, of West Palm Beach, has filed a petition for an order allowing compensation for his services on behalf of the plaintiff.

I do not feel that I should pass, under the circumstances, upon the total allowance to be made Judge Rankin in this matter. I did issue an order, which Judge Rankin will exhibit to you, approving an advance of $2,500 on his claim, which was approved by all attorneys.

You will appreciate my position in the matter, and I request you to pass upon the total allowance which should be made Judge Rankin in the premises as an accommodation to me. This will relieve me from any embarrassment hereafter if the question should arise as to my favoring Judge Rankin in this matter by an exorbitant allowance.

Appreciating very much your kindness in this matter, I am,
Yours sincerely,

Halsted L. Ritter.

In compliance with said request the said Judge Akerman allowed the said Rankin $12,500 in addition to the $2,500 theretofore allowed by Judge Ritter, making a total of $15,000 as the fee of the said Rankin in the said case.

But notwithstanding the said request on the part of said Ritter and the compliance by the said Judge Akerman and the reasons for the making of said request by said Judge Ritter of Judge Akerman, the said Judge Ritter, on the 24th day of December 1930, allowed the said Rankin an additional fee of $75,000.

And on the same date when the receiver in said case paid to the said Rankin as a part of said additional fee the sum of $25,000, said Rankin privately paid and delivered to said Judge Ritter out of the said $25,000 the sum of $2,500 in cash, $2,000 of which the said Judge Ritter deposited in a bank and $500 of which was put in a tin box and not deposited until the 10th day of July 1931, when it was deposited in a bank with an additional sum of $600.

On or about the 6th day of April 1931, the said Rankin received as a part of the $75,000 additional fee the sum of $45,000, and shortly thereafter, on or before the 14th day of April 1931, the said Rankin paid and delivered to said judge Ritter, privately and in cash, out of said $45,000 the sum of $2,000.

The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said Rankin the aforesaid sums of $2,500 in cash and $2,000 in cash, amounting in all to $4,500.

Of the total allowance made to said A. L. Rankin in said foreclosure suit, amounting in all to $90,000, the following sums were paid out by said Rankin with the knowledge and consent of said Judge Ritter, to wit: to said Walter S. Richardson, the sum of $5,000; to said Metcalf, the sum of $10,000; to Shutts and Bowen, also attorneys for the receiver, the sum of $25,000; and to said Halsted L. Ritter, the sum of $4,500.

In addition to the said sum of $5,000 received by the said Richardson as aforesaid, said Ritter by order in said proceedings allowed said Richardson a fee of $30,000 for services as such receiver.

The said fees allowed by said Judge Ritter to A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge) as solicitor for the plaintiff in said case were excessive and unwarranted, and said judge profited personally thereby in that out of the money so allowed said solicitor he received personally privately, and in cash $4,500 for his own use and benefit.

While the Whitehall Hotel was being operated in receivership under said proceeding pending in said court (and in which proceeding the receiver in charge of said hotel by appointment of said Judge was allowed large compensation by said judge) the said judge stayed at said hotel from time to time without cost to himself and received free rooms, free meals, and free valet service, and, with the knowledge and consent of said judge, members of his family, including his wife, his son, Thurston Ritter, his daughter, Mrs. M. R. Walker, his secretary, Mrs. Lloyd C. Hooks, and her husband, Lloyd C. Hooks, each likewise on various occasions stayed at said hotel without cost to themselves or to said judge, and received free rooms, and some or all of them received from said hotel free meals and free valet service; all of which expenses were borne by the said receivership to the loss and damage of the creditors whose interests were involved therein.

The said judge willfully failed and neglected to perform his duty to conserve the assets of the Whitehall Building and Operating Company in receivership in his court, but to the contrary, permitted waste and dissipation of its assets, to the loss and damage of the creditors of said corporation, and was a party to the waste and dissipation of such assets while under the control of his said court, and personally profited thereby, in the manner and form hereinabove specifically set out.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of a high crime and misdemeanor in office.

ARTICLE III

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which, at the time of the appointment of Halsted L. Ritter to be judge of the United States

District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustees, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the final decree had been entered in said cause, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation, (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not, but if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give."

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company orgainized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from February 15, 1929.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE IV

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

The said Judge Ritter by his actions and conduct, as an individual and as such judge, has brought his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice in his said court, and to the prejudice of public respect for and confidence in the Federal judiciary:

1. In fact in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1183–M–Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judiciary Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives, an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said power suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recitd: "And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause."

2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others, numbered 1043–M–Eq., and Edmunds Committee and others against Marion Mortgage Company and others numbered 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J. H. Therrell liquidator for said Trust Company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company, and appointed Julian S. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter, and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there were filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another

judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter, the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932 J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard. With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J. M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Company of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals, which held that Judge Ritter, or the court in which he presided, had been without jurisdiction in the matter of the appointment of said Eaton and Stearns as receivers. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties, and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

3. In that the said Halsted L. Ritter, while such Federal judge accepted, in addition to $4,500 from his former law partner as alleged in article I hereof, other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929, J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge. On, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from said Brodek, Raphael and Eisner, representing Mulford Realty Corporation, through his attorney, Charles A. Brodek, as a

fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from February 15, 1929.

4. By his conduct as detailed in articles I and II hereof.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office.

JOSEPH W. BYRNS,
Speaker of House of Representatives.

Attest:

SOUTH TRIMBLE,
Clerk.

Mr. Manager SUMNERS. Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Halsted L. Ritter, district judge of the United States for the southern district of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Halsted L. Ritter may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives, by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Halsted L. Ritter to answer said impeachment and do now demand his impeachment, conviction, and removal from office.

The VICE PRESIDENT. The Senate will take proper order, and notify the House of Representatives.

Mr. ASHURST. Mr. President, I move that the senior Senator from Idaho (Mr. Borah), who is the senior Senator in point of service in the Senate, be now designated by the Senate to administer the oath to the presiding officer of the court of impeachment.

The motion was agreed to; and Mr. Borah advanced to the Vice President's desk and administered the oath to Vice President Garner as presiding officer, as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The amendments to the articles of impeachment are, in full, as follows:

AMENDMENTS TO ARTICLES OF IMPEACHMENT AGAINST HALSTED L. RITTER

[H. Res. 471, 74th Cong., 2d sess.]

CONGRESS OF THE UNITED STATES OF AMERICA,
IN THE HOUSE OF REPRESENTATIVES,
March 30, 1936.

RESOLUTION

Resolved, That the articles of impeachment heretofore adopted by the House of Representatives in and by H. Res. 422, House Calendar number 279 be, and they are hereby, amended as follows:

Article III is amended so as to read as follows:

"ARTICLE III

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States District judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which, at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustee, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had, on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal Judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that 'this matter is one among very few which I am assuming to continue my interest in until finally closed up'; and stating specifically in said letter:

"'I do not know whether any appeal will be taken in the case or not but, if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give'; and further that he was 'of course primarily interested in getting some money in the case', and that he thought '$2,000 more by way of attorneys' fees should be allowed'; and asked that he be communicated with direct about the matter, giving his post-office-box number. On to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael, and Eisner, a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael and Eisner, was one of the directors, was drawn, payable to the order of 'Honorable Halsted L. Ritter for $2,000 and which was duly endorsed 'Honorable Halsted L. Ritter. H. L. Ritter' and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with his former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

"At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real

estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from, to wit, February 15, 1929.

"After writing said letter of March 11, 1929, Judge Ritter further exercised the profession or employment of counsel or attorney, or engaged in the practice of the law, with relation to said case.

"Which acts of said judge were calculated to bring his office into disrepute constitute a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office."

By adding the following articles immediately after article III as amended:

"ARTICLE IV

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U. S. C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that Judge Ritter did exercise the profession or employment of counsel or attorney, or engage in the practice of the law, representing J. R. Francis, with relation to the Boca Raton matter and the segregation and saving of the interest of J. R. Francis herein, or in obtaining a deed or deeds to J. R. Francis from the Spanish River Land Company to certain pieces of realty, and in the Edgewater Ocean Beach Development Company matter for which services the said Judge Ritter received from the said J. R. Francis the sum of $7,500.

"Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of the law above recited, and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

"ARTICLE V

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146 (h) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defend the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1929 said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of some $12,000, yet paid no income tax thereon.

"Among the fees included in said gross taxable income for 1929 were the extra fee of $2,000 collected and received by Judge Ritter in the Brazilian Court case as described in article III, and the fee of $7,500 received by Judge Ritter from J. R. Francis.

"Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

"ARTICLE VI

"That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the

southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

"That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146 (b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1930 the said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of to wit, $5,300, yet failed to report any part thereof in his income-tax return for the year 1930, and paid no income tax thereon.

"Two thousand five hundred dollars of said gross taxable income for 1930 was that amount of cash paid Judge Ritter by A. L. Rankin on December 24, 1930, as described in article I.

"Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office."

Original article IV is amended so as to read as follows:

"ARTICLE VII

"That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

"The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him until to continue to serve as such judge:

"1. In that in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1138–M–Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judicial Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said power suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: 'And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause.'

"2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others numbered 1043–M–Eq., and Edmunds Committee and others against Marion Mortgage Company and others, numbered 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J. H. Therrell liquidator for said trust company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company and appointed Julian E. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932, J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrender all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard.

With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J. M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Company of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals which held that the State officer was entitled to the custody of the property involved and that said Eaton and Stearns as receivers were not entitled to such custody. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

"3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law partner as alleged in article I hereof other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929, J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge; and on, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from Brodek, Raphael and Elsner, representing Mulford Realty Corporation, as its attorneys, through Charles A. Brodeck, senior member of said firm and a director of said corporation, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holding being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from, to wit, February 15, 1929.

"4. By his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions as set forth in articles V and VI hereof.

"Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office."

JOSEPH W. BYRNS,
Speaker of the House of Representatives.

Attest:
[SEAL] SOUTH TRIMBLE, *Clerk.*

The PRESIDING OFFICER. What is the pleasure of counsel for the respondent with reference to the amendments?

Mr. HOFFMAN. Mr. President, with reference to the amendments, we ask the honorable Senate, sitting as a Court of Impeachment, to grant to us ample time within which to file our response to the amended or new articles. If I may be permitted to do so, I suggest that 48 hours will be ample time. We have no desire to take time that would interfere with the present arrangement for trial on the 6th of April.

The PRESIDING OFFICER. Counsel for the respondent has indicated that 48 hours would be ample time. Is there objection to that?

Mr. Manager SUMNERS. There is no objection on the part of the managers for the House.

The PRESIDING OFFICER. What is the pleasure of the Court? Is there objection?

Mr. ASHURST. Mr. President, am I correct in the understanding that the honorable counsel for the respondent are granted 48 hours within which to reply to all the pleadings?

Mr. HOFFMAN. Just the new articles. We are ready to file pleadings this morning directed to articles I, II, III, and the original article IV, which is now article VII.

Mr. ASHURST. Very well, Mr. President. I am sure there will be no objection to counsel for the respondent being granted 48 hours; and now is the appropriate time for counsel for the respondent to exhibit their reply to the various articles heretofore presented.

The PRESIDING OFFICER. There being no objection, the 48 hours requested will be allowed; and the Court will now hear counsel for the respondent.

Mr. ASHURST. Would the attorney for the respondent object to taking a place on the rostrum? It would facilitate audition very much if there is no objection.

Mr. HOFFMAN. There is no objection, sir.

The PRESIDING OFFICER. There is no objection.

The Impeachment of President Andrew Johnson

(A) PROCEEDINGS OF THE SENATE PRELIMINARY TO THE TRIAL OF ARTICLES OF IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES.

TUESDAY, FEBRUARY 25, 1868.

A message from the House of Representatives, by Mr. McPherson, its Clerk:

Mr. President: The House of Representatives has passed the following resolution:

Resolved, That a committee of two be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and that the committee do demand that the Senate take order for the appearance of said Andrew Johnson to answer to said impeachment.

Ordered, That Mr. Thaddeus Stevens and Mr. John A. Bingham be appointed such committee.

The Sergeant at Arms announced a committee from the House of Representatives, Mr. Thaddeus Stevens and Mr. John A. Bingham, who appeared at the bar of the Senate and delivered the following message:

Mr. President: By order of the House of Representatives we appear at the bar of the Senate, and in the name of the House of Representatives, and of all the people of the United States, we do impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and we do further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same; and in their name we do demand that the Senate take order for the appearance of the said Andrew Johnson to answer to said impeachment.

The President of the Senate pro tempore replied that the Senate would take order in the premises, and the committee withdrew.

Mr. Howard submitted the following resolution; which was considered, by unanimous consent, and agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Andrew Johnson, President of the United States, be referred to a select committee of seven, to be appointed by the Chair, to consider the same and report thereon; and

The President pro tempore appointed Mr. Howard, Mr. Trumbull, Mr. Conkling, Mr. Edmunds, Mr. Morton, Mr. Pomeroy, and Mr. Johnson.