

**United States House of Representatives
Committee on the Judiciary
Impeachment Task Force**

Meeting Memorandum

**Meeting on Inquiry into Whether
Judge G. Thomas Porteous Should Be Impeached**

The House Committee on the Judiciary, Impeachment Task Force, will hold a meeting on Thursday, January 21, 2010, in Room 2141 Rayburn House Office Building. At that Meeting, the Task Force will consider recommending Articles of Impeachment to the Full Committee.

I. PURPOSE OF THE MEETING

The purpose of this meeting is to consider four Articles of Impeachment against Judge G. Thomas Porteous. The meeting will be conducted similar to a regular Committee or Subcommittee “mark-up.”

II. BACKGROUND - NATURE OF IMPEACHMENT INQUIRY

The Committee on the Judiciary, acting through and with the assistance of its duly appointed Impeachment Task Force, has conducted an inquiry into the conduct of G. Thomas Porteous, United States District Judge for the Eastern District of Louisiana. In particular, the Committee has considered whether Judge Porteous committed misconduct of the following

nature:

1) engaging in a course of conduct consisting of unlawful activity and profound ethical misconduct as a state judge consisting of taking official acts of assigning curatorships to a private attorney, for which that attorney would receive compensation, and requesting and obtaining money from that attorney (Robert Creely) and his partner (Jacob Amato);

2) engaging in a course of conduct consisting of unlawful activity and profound ethical misconduct as a state judge, constituting of taking official acts of setting bonds at the request of a private bail bonds company and expunging and setting aside convictions of that company's employees, and accepting things of value as bribes and gratuities from that company;

3) to obtain his appointment and confirmation as a federal judge, making false statements to the Federal Bureau of Investigation and the Senate in connection with his nomination to be a federal judge in 1994 and concealing from the Senate material facts associated with his relationships with the private attorneys and bail bondsman described in paragraphs 1 and 2;

4) as a United States district judge presiding over the case Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc.,¹ in which Jacob Amato and another attorney, Leonard Levenson, with whom Judge Porteous had a close relationship, represented the Liljebergs; denying Lifemark's motion to recuse and otherwise failing to recuse himself notwithstanding the fact that Judge Porteous had the financial relationship with Jacob Amato and his partner Robert Creely described in paragraph 1 and that he continued to accept things of value from Jacob Amato and his partner, Robert Creely, during the pendency of the case before him; and, in denying the motion to recuse, making false and misleading statements about his relationship with Jacob Amato and Leonard Levenson, who represented the Liljebergs in that case, thus depriving the Fifth Circuit Court of Appeals a truthful record upon which it could rely in reviewing Judge Porteous's decision;

5) as a United States district judge, while the Liljeberg case was pending, soliciting and accepting from Jacob Amato approximately \$2500 cash;

6) as United States district judge, while the Liljeberg case was pending, accepting from Robert Creely and Jacob Amato things of value, including Robert Creely's payment for Judge Porteous's hotel room in Las Vegas, Nevada, Robert Creely's payment of monies towards Judge Porteous's son's bachelor party in Las Vegas, Nevada, Robert Creely's payment for a party to honor Judge Porteous's fifth year on the federal bench, and numerous meals at expensive restaurants;

7) as United States district judge, performing acts for the bail bondsmen as a

¹Civ. Action No. 93-1794 (E.D. La.). See PACER Docket Report (Ex. 50).

continuation of the corrupt relationship described in paragraph 2 above, including introducing the bail bondsman to other state judicial officials so that the bail bondsman could form a relationships with them and otherwise assisting the bail bondsmen in their business, notwithstanding Judge Porteous's personal knowledge of his own corrupt relationship with the bail bondsmen.

8) while a United States district judge, making numerous false statements in his personal bankruptcy petition, including filing the petition under a false name, concealing from the bankruptcy court and creditors an anticipated a tax refund, and otherwise generally concealing his gambling activities, and committing acts generally consisting of seeking and obtaining credit from casinos in violation of the order of the bankruptcy judge.

III. JUDGE G. THOMAS PORTEOUS

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

From 1971 to 1973, G. Thomas Porteous was Special Counsel to the Office of the Louisiana Attorney General. He then served as an Assistant District Attorney from approximately 1973 through 1984. During that time period, Assistant District Attorneys could also hold outside employment. During some portion of this time, Judge Porteous was a law partner of Jacob J. Amato. Robert Creely also worked at this firm.

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

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

IV. PROCEDURAL BACKGROUND

In or about late 1999, the Department of Justice (the "Department" or "DOJ") and the Federal Bureau of Investigation (the "FBI") undertook a criminal investigation of Judge Porteous. The criminal investigation continued for several years, and ultimately ended in or about early 2007, without an indictment.²

²Among the reasons the Department gave in declining prosecution was that some of the conduct at issue was barred by the statute of limitations, and that some of the demonstrably false

However, in a letter dated May 18, 2007, the Department submitted a formal complaint of judicial misconduct to the Honorable Edith H. Jones, Chief Judge, United States Court of Appeals for the Fifth Circuit. This letter described numerous instances of alleged misconduct by Judge Porteous that potentially related to his fitness as a judge.³ The alleged misconduct included soliciting and accepting things of value from litigants, attorneys and other interested persons (such as the owners of a bail bond company) with matters before the judge. The misconduct was alleged to have commenced while Judge Porteous was a state judge serving on the 24th Judicial District Court in New Orleans (from 1984 to 1994) and to have continued while he was a federal district judge. In addition, the Department also set forth information that Judge Porteous, while on the federal bench, allegedly made false statements and engaged in other dishonest conduct in connection with his personal bankruptcy matter (for example, he filed for bankruptcy under a false name).

Upon receipt of the Department's complaint, the Fifth Circuit appointed a Special Investigative Committee (the "Special Committee") to investigate the Department's allegations. A hearing was held October 29 and 30, 2007, at which Judge Porteous, representing himself, testified,⁴ cross-examined witnesses, and called witnesses on his own behalf. Thereafter, the Special Committee issued a Report to the Judicial Council of the Fifth Circuit (the "Judicial Council") dated November 20, 2007. The Special Committee's Report concluded that Judge Porteous committed misconduct which "might constitute one or more grounds for

statements may not have been "material" as a matter of law. Letter from John C. Keeney, Deputy Assistant Attorney General, U.S. Department of Justice, to Hon. Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr., May 18, 2007 (hereinafter "DOJ Complaint Letter") at 1 (Ex. 4).

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

³DOJ Complaint Letter (Ex. 4).

⁴An order of immunity had been obtained and provided to Judge Porteous in connection with his testimony before the Special Committee.

impeachment.”⁵

On December 20, 2007, by a majority vote, the Judicial Council of the Judicial Conference of the United States accepted and approved the Special Committee’s Report, and likewise concluded that Judge Porteous “has engaged in conduct which might constitute one or more grounds for impeachment under Article II of the Constitution.”⁶

Thereafter, the Judicial Conference of the United States forwarded to Speaker of the House a Certificate dated June 17, 2008, certifying “that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted.”⁷ This determination was similarly based on the November 2007 Special Committee’s Report. On September 10, 2008, the Judicial Council of the Fifth Circuit issued an “Order and Public Reprimand” taking the maximum disciplinary action allowed by law against Judge Porteous, including ordering that no new cases be assigned to him and suspending his authority to employ staff for two years or “until Congress takes final action on the impeachment proceedings, whichever occurs earlier.”⁸

On September 17, 2008, the House of Representatives of the 110th Congress passed House Resolution 1448, which provided, in pertinent part: “Resolved, That the Committee on the Judiciary shall inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana.” H. Res. 1448 (2008). On January 6, 2009, Chairman Conyers introduced House Resolution 15, which continued the authority of House Resolution 1448 of the 110th Congress for this Congress. H. Res. 15 (2009). On January 13, 2009, House Resolution 15 passed the full House by voice vote.

V. COMMITTEE AND TASK FORCE ACTIONS

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

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

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

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

On January 22, 2009, the impeachment matter was referred by the Judiciary Committee to a Task Force established to conduct the inquiry.⁹ On July 29, 2009, the Judiciary Committee voted to permit the House General Counsel to seek immunity orders to compel the testimony of 8 witnesses.

A. In General

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

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

Judge Porteous has litigated in three different courts to try to preclude the Committee from obtaining critically-needed information in this impeachment inquiry. Moreover, he has sought to disqualify numerous judges from considering his positions in an effort to delay the Committee from obtaining the information.

After review of the DOJ Complaint Letter, and the referral from the U.S. Judicial Conference, the Committee moved to obtain a court order authorizing DOJ to disclose grand jury materials. The Committee originally moved on July 8, 2009, for an order authorizing the disclosure of grand jury materials related to the DOJ investigations of Judge Porteous, Rowan Company and Diamond Offshore, and a Department of Interior employee, Donald C. Howard.¹⁰ (Howard had been prosecuted for not disclosing receipt of taking hunting trips of from Rowan Companies on his financial disclosure reports, and, in fact, had been on some of the same Rowan hunting trips as Judge Porteous). Judge Porteous's counsel wrote to the judge assigned to the case and asserted that it would not be proper for any judge currently sitting in the judicial districts comprising the Fifth Circuit to hear and decide the Committee's motion.¹¹ As a result, the Fifth Circuit designated the Honorable Callie V. S. Granade, the Chief Judge of the Southern

⁹See Reestablishment of the Task Force on Judicial Impeachment: Before the H. Comm. on the Judiciary, 111th Con. (2009) (statement of John Conyers, Jr., Chairman, Committee on the Judiciary) available at <http://judiciary.house.gov/hearings/transcripts/transcript090122.pdf> at 30-34.

¹⁰ Motion and Memorandum in Support of the U.S. House of Representatives Committee on the Judiciary for an Order Directing the Department of Justice to Disclose Certain Grand Jury Materials, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. July 8, 2009).

¹¹ Letter from Richard W. Westling, Counsel to Judge Porteous, to the Honorable Neal B. Biggers, Jr. Senior United States District Judge (July 13, 2009).

District of Alabama, to hear and decide the Committee's motion.

On July 28, 2009, Judge Porteous filed an opposition to the Committee's Motion.¹² While never challenging the fact that the information sought was relevant and necessary for the impeachment inquiry, the Judge's opposition was based solely on a claimed concern for secrecy of grand jury matters. The court dismissed this objection and issued an order dated August 5, 2009, granting the Committee's Motion.¹³ Thereafter, Judge Porteous moved to stay the Order pending his appeal to the U.S. Court of Appeals for the Fifth Circuit;¹⁴ the Committee opposed Judge Porteous's stay motion;¹⁵ and the District Court denied the stay as without merit.¹⁶ Judge Porteous took an appeal of the August 5 grand jury disclosure order.¹⁷ Judge Porteous moved in the U.S. Court of Appeals for the Fifth Circuit to stay disclosure pending the duration of the

¹² Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to the Motion of the U.S. House of Representatives, Committee on the Judiciary's Motion for an Order Directing the Department of Justice to Disclose Certain Grand Jury Materials, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. July 28, 2009).

¹³ Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Aug. 5, 2009) (granting motion to disclose grand jury materials).

¹⁴ Judge Porteous's Motion for a Stay of the Court's August 5, 2009 Grand Jury Disclosure Order Pending Appeal of the Order to the United States Court of Appeals for the Fifth Circuit, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Aug. 10, 2009).

¹⁵ U.S. House Committee on the Judiciary's Opposition to Motion for Stay of the Court's Grand Jury Disclosure Order Pending Appeal, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Aug. 13, 2009).

¹⁶ Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Aug. 18, 2009) (denying motion to stay disclosure pending appeal).

¹⁷ Notice of Appeal of the Court's August 5, 2009 Grand Jury Disclosure Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Aug. 10, 2009).

entire appeal.¹⁸ The Committee opposed this motion,¹⁹ and the Court of Appeals denied the stay.²⁰ Throughout these pleadings, Judge Porteous never once argued that the grand jury materials sought were not relevant to the Committee's impeachment inquiry.

On September 23, 2009, the Committee moved for summary affirmance of the district court's August 5, 2009 grand jury disclosure order.²¹ Judge Porteous opposed this motion²² and the Committee replied.²³ Judge Porteous moved to disqualify the panel of Fifth Circuit Judges that ruled on the motion for a stay pending appeal, to vacate the panel's order denying the stay, and to designate a panel of judges from another Circuit to hear all further proceedings in the appeal.²⁴ The Committee opposed this motion.²⁵ On October 26, 2009, Judge Porteous filed the merits brief in his appeal.²⁶

¹⁸ Appellant's Motion for a Stay of the District Court's Grand Jury Disclosure Order Pending Appeal, *In Re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, No. 09-30737 (5th Cir. Aug. 20, 2009).

¹⁹ Opposition to Appellant's Motion for Stay, *In Re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, No. 09-30737 (5th Cir. Aug. 26, 2009).

²⁰ Order, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Sept. 14, 2009) (denying appellant's motion for a stay pending appeal).

²¹ Appellee's Motion for Summary Affirmance, *In Re: Grand Jury [Proceedings]*, No. 09-30737 (5th Cir. Sept. 23, 2009).

²² Appellant's Memorandum in Opposition to Appellee's Motion for Summary Affirmance, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Oct. 5, 2009).

²³ Reply of U.S. House Judiciary Committee to Appellant's Memorandum in Opposition to Appellee's Motion for Summary Affirmance, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Oct. 9, 2009).

²⁴ Appellant's Motion to Disqualify the Panel of Judges that Ruled on the Motion for a Stay Pending Appeal, to Vacate the Panel's Order Denying a Stay, and to Designate a Panel of Judges From Another Circuit to Hear all Further Proceedings in this Appeal, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Sept. 29, 2009).

²⁵ Opposition of the U.S. House Judiciary Committee to Appellant's Motion to Disqualify the Panel . . . To Vacate the Panel's Order . . . and to Designate a Panel of Judges From Another Circuit to Hear . . . This Appeal, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Oct. 6, 2009).

²⁶ Original Brief on Behalf of Appellant G. Thomas Porteous, Jr., United States District Judge, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Oct. 26, 2009).

On November 12, 2009, the U.S. Court of Appeals for the Fifth Circuit issued an order which granted the Committee's motion for summary affirmance, and denied all of Judge Porteous's motions.²⁷ The Task Force finally obtained access to the grand jury materials in mid-November 2009. Thus, the Judge's legal maneuverings delayed for approximately five months access by the staff to important and relevant information.

The Committee sought a second Order authorizing disclosure of grand jury and Title III wiretap materials that related to Judge Porteous that were obtained during the Department's "Wrinkled Robe" investigation into corruption in connection with the state judges of the 24th Judicial District Court of Louisiana, where Judge Porteous had presided prior to becoming a federal judge.²⁸ Again, Judge Porteous filed an opposition to this motion²⁹ and the Committee replied.³⁰ The Department of Justice filed a memorandum in support of the Committee.³¹ On October 23, 2009, the court granted the Committee's motion and authorized disclosure of the grand jury and Title III materials.³²

²⁷ Order, *In Re: Grand Jury Proceedings*, No. 09-30737 (5th Cir. Nov. 12, 2009) (granting appellee's motion for summary affirmance and denying appellant's motions to disqualify all Fifth Circuit Court of Appeals Judges from the case, vacate the order denying the motion for staying pending appeal, to designate a panel from another Circuit, and stay pending appeal).

²⁸ U.S. House Judiciary Committee's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Oct. 8, 2009).

²⁹ Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to the Motion of the U.S. House of Representatives, Committee on the Judiciary's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Oct. 16, 2009).

³⁰ Reply of U.S. House Judiciary Committee to Judge G. Thomas Porteous's Opposition to the Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Oct. 23, 2009).

³¹ Memorandum in Response to U.S. House Judiciary Committee's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Oct. 16, 2009).

³² Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Oct. 23, 2009) (granting Committee's motion for order authorizing disclosure of grand jury and Title III materials).

Once again, Judge Porteous moved in the district court to stay disclosure.³³ The Committee opposed his stay motion.³⁴ Again, the district court denied the stay motion as without merit.³⁵ Judge Porteous did not move to stay disclosure in the Court of Appeals, but he did file and pursue an appeal of the disclosure order. Because Judge Porteous's application for a stay was denied, the Committee obtained access to the Wrinkled Robe grand jury and Title III materials in mid-November pursuant to the district court's disclosure order.

The Committee has moved for summary affirmance of the pending appeal that Judge Porteous filed and is pursuing from the Wrinkled Robe disclosure order.³⁶

The district court and the Fifth Circuit granted the Committee's unopposed motions to unseal the litigation³⁷ so that all of the pleadings are available to the public.

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

³³ Judge Porteous's Motion for a Stay of the Court's October 23, 2009 Grand Jury and Specified Wiretaps Disclosure Order Pending Appeal of the Order to the United States Court of Appeals for the Fifth Circuit, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Nov. 4, 2009).

³⁴ Opposition of the Committee on the Judiciary of the U.S. House of Representatives to Judge Porteous's Motion for Stay of the Court's October 23, 2009 Order Pending Appeal, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Nov. 10, 2009).

³⁵ Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Nov. 12, 2009) (denying motion for stay pending appeal).

³⁶ Appellee's Motion for Summary Affirmance, *In Re: Grand Jury Proceedings*, No. 09-31062 (5th Cir. Dec. 30, 2009).

³⁷ Order, *In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr.*, Misc. No. 09-4346 (E.D. La. Dec. 14, 2009) (granting unopposed motion to unseal); Order, *In Re: Grand Jury Proceeding*, No. 09-30737 (5th Cir. Dec. 30, 2009) (same); Order, *In Re: Grand Jury Proceedings*, No. 09-31062 (5th Cir. Dec. 30, 2009) (same).

Special Committee more than two years earlier.³⁸ On an expedited schedule, the Committee moved to dismiss this motion,³⁹ and Judge Porteous replied.⁴⁰ United States District Judge Richard J. Leon of the United States District Court for the District of Columbia denied Judge Porteous's motion for a temporary restraining order after oral argument on November 16, 2009.⁴¹ Per the Court's request, the Committee filed a supplemental memorandum in support of its motion to dismiss.⁴² Judge Porteous opposed this motion⁴³ and the Committee replied. The motion to dismiss is under advisement.

C. Task Force Hearings

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

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

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

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

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

³⁸ Complaint for Declaratory Judgment and Injunctive Relief, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 12, 2009); Plaintiff G. Thomas Porteous, Jr.'s Motion for a Temporary Restraining Order and Preliminary Injunction, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 12, 2009).

³⁹ Defendants' Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 13, 2009).

⁴⁰ Judge G. Thomas Porteous, Jr.'s Reply Memorandum to Defendants' Opposition to his Motion for a Temporary Restraining Order and a Preliminary Injunction, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 14, 2009).

⁴¹ Bench Order, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 16, 2009) (denying motion for a temporary restraining order).

⁴² Defendants' Supplemental Memorandum in Support of Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Dec. 18, 2009).

⁴³ Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to Defendants' Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Jan. 8, 2010).

Gerhardt testified.

VI. THE DEPARTMENT OF JUSTICE'S DECISION NOT TO PROSECUTE JUDGE PORTEOUS

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

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

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

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

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

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

VII. A BRIEF DISCUSSION OF IMPEACHMENT

A. Pertinent Constitutional Provisions

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

Article I, § 2, clause 5:

The House of Representatives . . . shall have the sole Power of Impeachment.

Article I, § 3, clauses 6 and 7:

The Senate shall have the sole Power to try all

Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two-thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II, § 2, clause 1:

The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, § 4:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

In this regard, it has long been recognized that federal judges are “civil Officers” within the meaning of Article II, Section 4.⁴⁴ Finally, as to the life tenure of federal judges, the

⁴⁴A commentator wrote in 1825:

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

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

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

Constitution provides:

Article III, § 1:

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

B. The Meaning of “High Crimes and Misdemeanors”⁴⁵

There have been a number judicial impeachment proceedings during our Nation’s history. The precedents from these prior judicial impeachments as to the meaning of the phrase “high crimes and misdemeanors” is highly instructive. The Committee takes note of these precedents in informing its recommendations to the House.

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

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

and liable to impeachment.

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

⁴⁵This discussion in this Section tracks closely the language used in H.R. Rep. No. 111-159, “Impeachment of Judge Samuel B. Kent, Report of the Committee of the Judiciary to Accompany H. Res. 520,” 111th Cong., 1st Sess. (2009) [hereinafter “Kent Impeachment Report”] at 5-6.

criminal laws and impeachment.⁴⁶

That Report concluded:

Thus, from an historical perspective the question of what conduct by a federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge's conduct calls into questions his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.⁴⁷

The Impeachment Report that accompanied the Alcee Hastings impeachment resolution stated that the phrase "high crimes and misdemeanors" "refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct."⁴⁸ That Report stressed that impeachment is "non-criminal," designed not to impose criminal penalties, but instead simply to remove the offender from office,⁴⁹ and that it is "the ultimate means of preserving our constitutional form of government from the depredations of those in high office who abuse or violate the public trust."⁵⁰ The fact that the individual who is impeached and removed from office "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," makes it further clear that impeachment is simply a remedial provision, not a punitive one.⁵¹

⁴⁶H.R. Rep. No. 101-36, "Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87," 101st Cong., 1st Sess. (1989) [hereinafter "[Walter] Nixon Impeachment Report"] at 5 (1989).

⁴⁷Id. at 12.

⁴⁸H.R. Rep. No. 100-810, "Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499," 100th Cong., 2d Sess. (1988) [hereinafter "Hastings Impeachment Report"], at 6.

⁴⁹Hastings Impeachment Report at 7.

⁵⁰Id. at 7. The last four judicial impeachments – those of Judge Samuel B. Kent, Judge Walter L. Nixon, Judge Alcee Hastings, and Judge Harry Claiborne – followed federal criminal proceedings, and the impeachment articles were to a great extent patterned after the federal criminal charges. However, the principles that underpin the propriety of impeachment do not require that the conduct at issue be criminal in nature, or that there have been a criminal prosecution.

⁵¹U.S. Constitution, Article I, Section III, cl 7.

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

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

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

Thus, as a practical matter, the factors that go into a determination by the House and Senate as to whether pre-federal bench conduct justifies impeachment are really no different from the determination whether post-federal bench conduct justifies impeachment. Such a determination requires a consideration of the nature of the conduct at issue and whether that conduct is of the sort that renders the individual unfit to hold his position – for example, because it demonstrates the individual is not fit for the position of trust or otherwise because the conduct is so shameful that it brings disrepute upon the judiciary for that individual to continue to have the powers and position of a federal judge.⁵² In making such a determination, evidence that an individual committed misconduct in the nature of “bribery” while occupying the position as a state judge, close in time to being appointed to the federal bench, may more clearly demonstrate that individual’s unfitness for office than other misconduct in a purely personal capacity at a time-frame remote from the judicial appointment.

VIII. ARTICLE BY ARTICLE ANALYSIS OF THE PROPOSED ARTICLES

⁵²Because this Report and these Articles apply to one judge in particular – where the conduct occurred immediately prior to his being appointed to the federal bench, in his capacity as a judicial officer,” it is not possible to delineate the precise types of “pre-federal bench conduct” that would meet the Constitutional “high crimes and misdemeanors” standard. Presumably, extreme misconduct in a personal capacity could also meet that standard.

A. In General

In connection with the impeachment of one Federal Judge George W. English in 1926, the House Committee on the Judiciary noted: “Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case.”⁵³ That observation is particularly true in regard to Judge Porteous, who has committed misconduct in several spheres of activity over many years. As one scholar noted, the lack of factual precedents directly on point “has to do with more the nature of Judge Porteous’s misconduct than with anything else. The facts is that we are discovering or finding in this case a pattern of misbehavior that extends over such a long period of time that is virtually unique in the annals of impeachment.”⁵⁴ Nonetheless, a review of prior judicial impeachments reveals that the Articles against Judge Porteous are consistent with impeachment precedent and standard understandings of Constitutional law.

B. Discussion of the Articles

1. Article I

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

The sort of conduct alleged in Article I – financial entanglements with persons having business before the court – is consistent with conduct that has previously formed the basis of articles of impeachment. In 1912, the House voted articles of impeachment against Circuit Judge Robert W. Archbald alleging numerous incidents of improper financial involvement with

⁵³“Impeachment of Judge George W. English,” excerpts from Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 163.

⁵⁴*Hearing to Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., Part IV: Hearing Before the Task Force on Judicial Impeachment of the House Comm. on the Judiciary*, 111th Cong. ____ (Dec. 15, 2009) [hereinafter *Judge Porteous Impeachment Task Force Hearing (Part IV)*] (statement of Prof. Michael J. Gerhardt, University of North Carolina).

attorneys and parties. Articles 7 through 9 described complicated relationships through which Judge Archbald obtained money from counsels for parties with cases in front of him when he was a district court judge. Article 10 charged that as a district court judge, Judge Archbald received money from an individual who was an officer and director of major railroad corporations “which in the due course of business was liable to be interested in litigation pending in the said court over which [Archbald] presided as a judge.” That Article further charged that Judge Archbald’s acceptance of the money was thus “improper and had a tendency to and did bring his said office of district judge into disrepute.” Article 11 charged that Judge Archbald did “wrongfully accept and receive” money that was “contributed to [him] by various attorneys who were practitioners in the said court presided over by [Judge Archbald].”⁵⁵

Similarly, in 1936, the House voted articles of impeachment against Judge Halsted L. Ritter.⁵⁶ In particular, Article I of the Ritter Articles set forth financial dealings between Judge

⁵⁵H. Res. 622, 62d Cong., 2d Sess (1912) (Articles of Impeachment against Judge Robert W. Archbald), 48 Cong Rec. (House) July 8, 1912 (8705-08), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 176, 181-82 (Articles 10 and 11). The Committee Print also contains excerpts from the accompanying Report, “Robert W. Archbald, Judge of the United States Commerce Court,” H. Rept. No. 946, 62d Cong., 2d sess. (1912), 48 Cong Rec. (House) July 8, 1912 (8697).

Articles 1 through 6 against Judge Archbald described complicated financial schemes whereby, while he was a judge of the Commerce Court, Judge Archbald enriched himself through financial dealings with companies and attorneys with cases before the Court. For example, Article 1 alleged that judge Archbald sought to purchase property from a coal company, which in turn was owned by Erie Railroad Co., a company with a case in front of the Commerce Court, and that Archbald “willfully, unlawfully, and corruptly took advantage of his official position as such judge to induce and influence the officials of [Erie and its subsidiary] to enter into a contract with him [and his partner] for profit to themselves” Article 3 alleged that Archbald “unlawfully and corruptly did use his official position and influence” as a Commerce Court judge to secure a lease agreement from a coal company, which in turn was owned by a railroad company with a lawsuit then pending in front of the Commerce Court. Article 5 alleged that Judge Archbald intervened in a dispute between an individual and a railroad, and thereafter “wilfully, unlawfully, and corruptly did accept as a gift, reward, or present from [the individual], tendered in consideration of favors shown him by [Archbald] in his efforts to secure a settlement and agreement with the railroad ... and for other favors shown ... a certain promissory note for \$500... .” *Id.* at 177 (Article 1), 178 (Article 3), and 179-180 (Article 5). Archbald was ultimately convicted in the Senate of 5 of the 13 articles, Articles 1, 3, 4, and 5 involving circuit court conduct, and Article 13, a “catch-all” article involving both district court and commerce court conduct. VI Cannon’s Precedents of the House of Representatives, §512, p. 707.

⁵⁶“Impeachment of Judge Halsted L. Ritter,” H Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and “Amendments to Articles of Impeachment Against Halsted L. Ritter,” H. Res. 471,

Ritter and his prior law partner in which Judge Ritter corruptly received \$4,500 from that individual after he had been paid a \$75,000 as a receiver, a position that he had been appointed to by Ritter. This fee had been originally set at \$15,000 by another judge, but Judge Ritter had raised it.⁵⁷

2. Article II

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

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

Pre-Federal Bench Conduct – The Archbald Impeachment

Judge Robert W. Archbald was a District Court Judge in the Middle District of Pennsylvania from March 29, 1901 through January 31, 1911, at which point he was appointed to the Circuit Court for the Third Circuit. While on the Circuit Court, he also sat on the United States Commerce Court.⁵⁸

In 1912 – while he was a circuit court judge – the House voted articles of impeachment against Judge Archbald, alleging improper conduct both as a circuit judge (sitting on the

74th Cong., 2d Sess. (March 30, 1936), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 188-197 (H. Res 422), 198-202 (H. Res. 471).

⁵⁷“Impeachment of Judge Halsted L. Ritter,” H Res. 422, 74th Cong., 2d Sess. (March 2, 1936), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 188-189. Judge Ritter's conduct is similar in material aspects to Judge Porteous's arrangement with attorneys whereby they provided him a portion of the curatorship fees. Judge Ritter was acquitted of that Article in the Senate, however it is not possible to determine the basis for the verdict – whether it was for failure of proof or because of some other reason. In any event, Judge Ritter was convicted of a different Article – Article 7 – which re-alleged the \$4,500 cash payment from his former partner.

⁵⁸The United States Commerce Court was in existence from 1910 to 1913. It heard appeals from orders of the Interstate Commerce Commission.

Commerce Court) (Articles 1 through 6) and in his prior position as a district judge (Articles 7 through 12). Article 13 set forth a “catch-all” article alleging, in essence, a course of conduct encompassing the numerous schemes spanning his service both as a district judge and as a circuit judge sitting on the Commerce Court. Article 13 alleged that:

[D]uring the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court, ... at divers [sic] times and places, has sought wrongfully to obtain credit from and through certain persons who were interested in the result of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which the said Robert W. Archbald is a Member.”⁵⁹

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

It is indeed anomalous if the Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments.⁶⁰

Applying this reasoning to the situation of Judge Porteous, it would be just as “anomalous” if Congress were “powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other [state] judicial office.”⁶¹ Moreover, Article II against Judge Porteous, like Article 13 against Judge Archbald (of which he was convicted), alleges a single scheme, encompassing conduct that occurred both in his current and former judicial offices.

⁵⁹“Impeachment of Robert W. Archbald,” excerpts from Cong. Rec. (House) July 8, 1912 (8705-08), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 182 (emphasis added).

⁶⁰“Impeachment of Robert W. Archbald,” excerpts from the Congressional Record (House) July 8, 1912 (8705-08), *reprinted in* “Impeachment, Selected Materials,” House Committee on the Judiciary,” House Committee Print, 93d Cong., 1st Sess. (Oct. 1973) at 175.

⁶¹*Id.*

Finally, for reasons discussed below in considering the views of Constitutional scholars, there is no basis in reason or in the Constitution for the House or Senate to take a “narrow” or “technical” view of their Constitutional powers that would, in effect, immunize a federal official from impeachment for even the most egregious conduct.

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

Even though the offices held by the defendant at the time of their impeachment had not been the same offices which they held at the time of the commission of the alleged offenses, it might well have been decided, on principle, that impeachment would lie if in fact the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse.⁶²

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

Pre-Federal Bench Conduct – Views of Constitutional Scholars

In addition, there is broad support among scholars that certain pre-Federal bench conduct – especially of the sort that was committed while Judge Porteous held a similar state position – may properly constitute a basis for impeachment. As noted impeachment expert Professor Michael Gerhardt testified: though the Constitution describes in Article II certain types of conduct for which impeachment is warranted (“Treason, Bribery, or other high Crimes and Misdemeanors”), “it does not say *when* the misconduct must have been committed,”⁶³ and certainly does not command that such conduct occur during the tenure of the federal office from which impeachment is sought. Rather, “[t]he critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgement that are required in order for him to continue to function” as a Federal judge.⁶⁴

⁶²“Impeachment of Robert W. Archbald,” excerpts from Cong. Rec. (House) July 8, 1912 (8705-08), reprinted in “Impeachment, Selected Materials,” House Committee on the Judiciary,” House Committee Print, 93d Cong., 1st Sess. (Oct. 1973) at 175.

⁶³*Judge Porteous Impeachment Task Force Hearing (Part IV)*” at ____ (statement of Prof. Michael J. Gerhardt, University of North Carolina) (emphasis in original).

⁶⁴*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

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

Say, for instance, that the offence was murder – it is as serious a crime as we have, and its commission by a judge completely undermines both his integrity and moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern 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.⁶⁵

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

Let's take bribery. Imagine now a person who bribes his very way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the briber from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.⁶⁶

In light of the Judge Archbald precedent, in which a circuit court judge was impeached by the House for judicial conduct that occurred prior to his becoming a circuit judge, and in which the House Report specifically recognized it would be “anomalous” if Congress was constrained from doing just that; in light of the fact that the conduct alleged in Article II is a form of bribery and is thus specifically contemplated in the Constitution as a basis for impeachment; in light of the fact that Judge Porteous's pre-Federal bench conduct alleged in Article II occurred in a judicial capacity immediately proximate in time to his appointment as a Federal judge and, indeed, spanned both his state court and Federal court appointments; in light of the plain reading of the Constitution that sets forth no limitation as to when impeachable conduct must occur; and finally, in consideration of what are, at bottom, commonsense and

⁶⁵*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Michael J. Gerhardt, University of North Carolina). This particular example is used to illustrate the principle that pre-Federal bench conduct may justify impeachment; it is not intended to suggest that such conduct must be comparable to homicide. Rather, “[f]rom there you simply have to ask yourself whether the conduct as a State judge is sufficiently egregious to rise to an impeachable standard.” *Id.* at ____ (statement of Prof. Charles Geyh, University of Indiana).

⁶⁶*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Akhil Reed Amar, Yale University).

persuasive views of leading Constitutional scholars as to the propriety of considering pre-Federal bench conduct as a basis for impeachment, the Committee is convinced that Judge Porteous's conduct alleged in Article II – conduct, which, when committed by others similarly situated, resulted in felony convictions and prison sentences – warrants his impeachment.

3. Article III

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

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

Now what is true of bribery is equally true of fraud. A person who procures a judgeship by lying to the President and lying to the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.⁶⁷

Professor Gerhardt agreed that “lying to or defrauding the Senate in order to be approved as a Federal judge “is likely to justify impeachment.” First of all, that conduct is itself serious as a stand-alone matter in that it “plainly erodes the essential, indispensable integrity without which a federal judge is unable to do his job.” 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

⁶⁷*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Akhil Reed Amar, Yale University).

Senate.⁶⁸

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

[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.⁶⁹

4. Article IV

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

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

did willfully and knowing make and subscribe a United States Individual Income Tax Return for [calendars years 1979 and 1980 respectively], which return was verified by a written declaration

⁶⁸*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

⁶⁹*Judge Porteous Impeachment Task Force Hearing (Part IV)* at ____ (statement of Prof. Akhil Reed Amar, Yale University). Professor Amar further noted that this was not some sort of “trap” for the unwary: “All he has to do is say, [‘]I do not wish to be considered for this position.[’]” *Id.* at __.

that the return was made under penalties of perjury; which return was filed with the Internal Revenue, Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of [\$80,227.04 and \$54,251 respectively] where, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return [in violation of law].

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

In the impeachment of District Court Judge Walter L. Nixon, Jr., the first two Articles each alleged, in substance, discrete incidents of perjury before the Grand Jury, namely, that “[i]n the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make material false or misleading statement to the grand jury.” Each Article summarized the substance of the alleged perjurious statement. Article I, for example, alleged that “[t]he false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.” Each Article concluded: “Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.”⁷⁰

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

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

⁷⁰H.R. Rep. No. 99-688, "Impeachment of Judge Harry E. Claiborne, Report of the Committee on the Judiciary to Accompany H. Res. 461," 99th Cong., 2d Sess. 1-2 (1986) [hereinafter “Claiborne Impeachment Report”].

for the authority of the supervising federal court.⁷¹

5. “Bringing Disrepute to the Judiciary” Allegations.

Several of the prior impeachments have include an article charging that the judge, by his conduct, harmed the judicial system by bringing it into disrepute. Such a harm to the judicial system constitutes a separate and discrete, and indeed profound, injury that constitutes a high crime or misdemeanor in its own right and may warrant impeachment. When Judge Porteous denies a recusal motion and it is later revealed he had financial entanglements with certain of the attorneys, not only does he harm one of the parties seeking a fair trial (Lifemark), but he harms the judicial system as a whole by inviting cynicism as to its fairness and by suggesting to the public at large that in order to prevail at trial it may be necessary for a party or attorney to have paid the judge or taken him to lunch or on a trip.⁷²

Thus, consistent with precedent from several other judicial impeachments, several of the Articles specifically allege that by Judge Porteous, through his dishonest conduct, has brought disrepute to the federal courts thus warranting his impeachment.

⁷¹One Professor noted that the violation of the bankruptcy laws “reflects a level of disdain for the law that I think is just simply incompatible with being a Federal judge.” *Judge Porteous Impeachment Task Force Hearing (Part IV)* at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

⁷² One of the Articles against Judge Harold Louderback accused him of partiality so as “to excite fear and distrust and to inspire a widespread belief in and beyond said norther district of California that causes were not decided in said court according to their merits, but were decided with partiality and prejudice and favoritism to certain individuals ... all of which is prejudicial to the dignity of the judiciary.” H. Res. 403 (1933), “Articles of Impeachment Against Harold Louderback,” *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 185. This same language was used in the impeachment against Judge George W. English, in which Judge English was similarly accused of conduct so as to “excite fear and distrust and to inspire a widespread belief ... that causes were not decided in said court according to their merits but were decided with partiality and with prejudice and favoritism to certain individuals” “Impeachment of Judge George W. English,” excerpts from Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) at 163. Numerous of the judicial impeachments, including those of Judges Claiborne, Nixon and Ritter, have thus included a “summary” article that recites the essential facts which had been set forth in discrete articles, and alleged that by virtue of that conduct the judge has brought such disrepute to the federal courts that the judge should be impeached.