

IMPEACHMENT OF
JUDGE G. THOMAS PORTEOUS, JR.

CONSTITUTIONAL PROVISIONS; RULES OF
PROCEDURE AND PRACTICE IN THE SEN-
ATE WHEN SITTING ON IMPEACHMENT
TRIALS; ARTICLES OF IMPEACHMENT
AGAINST JUDGE G. THOMAS PORTEOUS,
JR.; JUDGE PORTEOUS' ANSWER; AND
AMENDED REPLICATION OF THE HOUSE
OF REPRESENTATIVES



Printed at the direction of NANCY ERICKSON, Secretary of the Senate,
pursuant to S. Res. 457, 111th Cong., 2d Sess. (2010)

MARCH 17, 2010.—Ordered to be printed

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111TH CONGRESS
2^D SESSION

S. RES. 457

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2010

Mr. REID (for himself and Mr. MCCONNELL) submitted the following resolution; which was considered and agreed to

RESOLUTION

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.

1 *Resolved*, That a summons shall be issued which com-
2 mands G. Thomas Porteous, Jr. to file with the Secretary
3 of the Senate an answer to the articles of impeachment
4 no later than April 7, 2010, and thereafter to abide by,
5 obey, and perform such orders, directions, and judgments
6 as the Senate shall make in the premises, according to
7 the Constitution and laws of the United States.

8 SEC. 2. The Sergeant at Arms is authorized to utilize
9 the services of the Deputy Sergeant at Arms or another
10 employee of the Senate in serving the summons.

1 SEC. 3. The Secretary shall notify the House of Rep-
2 resentatives of the filing of the answer and shall provide
3 a copy of the answer to the House.

4 SEC. 4. The Managers on the part of the House may
5 file with the Secretary of the Senate a replication no later
6 than April 21, 2010.

7 SEC. 5. The Secretary shall notify counsel for G.
8 Thomas Porteous, Jr. of the filing of a replication, and
9 shall provide counsel with a copy.

10 SEC. 6. The Secretary shall provide the answer and
11 the replication, if any, to the Presiding Officer of the Sen-
12 ate on the first day the Senate is in session after the Sec-
13 retary receives them, and the Presiding Officer shall cause
14 the answer and replication, if any, to be printed in the
15 Senate Journal and in the Congressional Record. If a
16 timely answer has not been filed, the Presiding Officer
17 shall cause a plea of not guilty to be entered.

18 SEC. 7. The articles of impeachment, the answer, and
19 the replication, if any, together with the provisions of the
20 Constitution on impeachment, and the Rules of Procedure
21 and Practice in the Senate When Sitting on Impeachment
22 Trials, shall be printed under the direction of the Sec-
23 retary as a Senate document.

24 SEC. 8. The provisions of this resolution shall govern
25 notwithstanding any provisions to the contrary in the

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1 Rules of Procedure and Practice in the Senate When Sit-
2 ting on Impeachment Trials.

3 SEC. 9. The Secretary shall notify the House of Rep-
4 resentatives of this resolution.

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II. CONSTITUTIONAL PROVISIONS ON IMPEACHMENT

The provisions of the United States Constitution which apply specifically to impeachment are as follows:

Article I, Section 2, Clause 5

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

Article I, Section 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, Section 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, Section 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.

Article III, Section 1

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

Article III, Section 2, Clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

III. RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS

I. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the Presiding Officer of the Senate shall direct the Sergeant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against _____"; after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if ordered by the Senate, proceed to the consideration of such articles and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States or the Vice President of the United States, upon whom the powers and duties of the Office of President shall have devolved, shall be impeached, the Chief Justice of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall be administered the oath by the Presiding Officer of the Senate and shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates,

writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be taken in accordance with the Standing Rules of the Senate.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the person impeached, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person impeached, or if that cannot conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the person impeached to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the person impeached, after service, shall fail to appear, either in person or by attorney, on the day so fixed thereof as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, _____, do solemnly swear that the return made by me upon the process issued on the _____ day of _____, by the Senate of the United States, against _____ is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he does not appear, either personally or by agent or attorney, the same shall be recorded.

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

XII. At 12:30 o'clock afternoon, or at such other hour as the Senate may order, of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of _____, in the Senate Chamber.

XIII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m.; and when the hour shall arrive, the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIV. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

XV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XVI. All motions, objections, requests, or applications whether relating to the procedure of the Senate or relating immediately to the trial (including questions with respect to admission of evidence or other questions arising during the trial) made by the parties or their counsel shall be addressed to the Presiding Officer only, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

XVII. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

XVIII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XIX. If a Senator wishes a question to be put to a witness, or to a manager, or to counsel of the person impeached, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer. The parties or their counsel may interpose objections to witnesses answering questions propounded at the request of any Senator and the merits of any such objection may be argued by the parties or their counsel. Ruling on any such objection shall be made as provided in Rule VII. It shall not be in order for any Senator to engage in colloquy.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions. A motion to close the doors may be acted upon without objection, or, if objection is heard, the motion shall be voted on without debate by the yeas and nays, which shall be entered on the record.

XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour (unless the Senate otherwise orders) on each side.

XXII. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXIII. An article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial. Once voting has commenced on an article of impeachment, voting shall be continued until voting has been completed on all articles of impeachment unless the Senate adjourns for a period not to exceed one day or adjourns *sine die*. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person impeached shall be convicted upon any such article by the votes of two-thirds of the Members present, the

Senate may proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment. Upon pronouncing judgment, a certified copy of such judgment shall be deposited in the office of the Secretary of State. A motion to reconsider the vote by which any article of impeachment is sustained or rejected shall not be in order.

Form of putting the question on each article of impeachment

The Presiding Officer shall first state the question; thereafter each Senator, as his name is called, shall rise in his place and answer: guilty or not guilty.

XXIV. All the orders and decisions may be acted upon without objection, or, if objection is heard, the orders and decisions shall be voted on without debate by yeas and nays, which shall be entered on the record, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the Members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

XXV. Witnesses shall be sworn in the following form, viz: "You, _____, do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and _____, shall be the truth, the whole truth, and nothing but the truth: So help you God." Which oath shall be administered by the Secretary, or any other duly authorized person.

Form of a subpoena to be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel

To _____, greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the _____ day of _____, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate in which the House of Representatives have impeached _____.

Fail not.

Witness _____, and Presiding Officer of the Senate, at the city of Washington, this _____ day of _____, in the year of our Lord _____, and of the Independence of the United States the _____.

Presiding Officer of the Senate.

Form of direction for the service of said subpoena

The Senate of the United States to _____, greeting:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this — day of —, in the year of our Lord —, and of the Independence of the United States the —.

_____,
Secretary of the Senate.

Form of oath to be administered to the Members of the Senate and the Presiding Officer sitting in the trial of impeachments

“I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of _____, now pending, I will do impartial justice according to the Constitution and laws: So help me God.”

Form of summons to be issued and served upon the person impeached

THE UNITED STATES OF AMERICA, SS:

The Senate of the United States to _____, greeting:

Whereas the House of Representatives of the United States of America did, on the — day of —, exhibit to the Senate articles of impeachment against you, the said _____, in the words following:

[Here insert the articles]

And demand that you, the said _____, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said _____, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the — day of —, at — o'clock —, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness _____, and Presiding Officer of the said Senate, at the city of Washington, this — day of —, in the year of our Lord —, and of the Independence of the United States the —.

_____,
Presiding Officer of the Senate.

Form of precept to be indorsed on said writ of summons

THE UNITED STATES OF AMERICA, SS:

The Senate of the United States to _____, greeting:

You are hereby commanded to deliver to and leave with _____, if conveniently to be found, or if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least — days before the appearance day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness _____, and Presiding Officer of the Senate, at the city of Washington, this ____ day of ____, in the year of our Lord ____, and of the Independence of the United States the ____.

_____,
Presiding Officer of the Senate.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the Senate.

XXVI. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

111TH CONGRESS
2^D SESSION

H. RES. 1031

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2010

Received

RESOLUTION

Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors.

Resolved, That G. Thomas Porteous, Jr., a judge of the United States District Court for the Eastern District of Louisiana, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of 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 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. His conduct deprived the parties and the public of the right to the honest services of his office.

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.

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 requested 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 representations 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 Investigation 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 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”.

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.

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Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

NANCY PELOSI,
Speaker of the House of Representatives.

Attest: LORRAINE C. MILLER,
Clerk.

V. ANSWER OF JUDGE G. THOMAS PORTEOUS, JR. TO THE ARTICLES OF IMPEACHMENT

The Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, as commanded by the summons of the Senate of the United States, answers the accusations made by the House of Representatives of the United States in the four Articles of Impeachment it has exhibited to the Senate as follows:

PREAMBLE

THE HOUSE OF REPRESENTATIVES' IMPEACHMENT OF JUDGE PORTEOUS IS UNPRECEDENTED AND UNJUSTIFIED

For the first time in modern history, the House of Representatives has impeached a sitting Article III Judge who has never been charged with a crime. Indeed, it has been more than 74 years since the House of Representatives has brought Articles of Impeachment against a judge that were not preceded by that judge's indictment in the criminal courts. The Articles of Impeachment brought against Judge Porteous are also unprecedented in two additional ways. First, this is the only time since the ratification of the Constitution that the House of Representatives has brought Articles of Impeachment against a judge after the Executive Branch, having conducted a thorough investigation, has declined to prosecute. Second, it is the only time in the same period that the House of Representatives has based an Article of Impeachment against a judge, or any other officer, upon allegations that pre-date his or her entry into federal office.

These actions are unprecedented and they are also unjustified by the facts of this case. The four Articles of Impeachment do not allege a single offense that supports the conviction and removal of a sitting Article III Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Indeed, in some instances, the Articles allege violations of the canons of judicial ethics or criticize Judge Porteous' handling of matters before the Court. While Judge Porteous vehemently denies violating those canons or mishandling matters, noncriminal ethical violations or incorrect decisions have never been found to be a sufficient basis for conviction and removal from office. Such issues simply do not rise to the level of "high Crimes and Misdemeanors" as contemplated by the Framers. To the extent that a trial on the Articles in this case is permitted to convert—in contravention of both the Constitution and impeach-

ment precedent—such acts into grounds for removal of an Article III Judge, it will set a new standard. A standard that treads deeply and dangerously into the realm of an independent judiciary that was at the very core of the Framers' vision of three co-equal branches of government.

In devising the three branches, the Framers divided the ability to impeach and remove Executive and Judicial Branch officers between the House of Representatives and the Senate. By doing so, the Framers, through the Constitution, empowered the House to allege the standard for impeachment based upon the language of the impeachment clause. But history has shown the power to impeach is not the power to remove. The power to try impeachments and remove officers upon conviction was vested solely in the Senate. It is the Senate—a uniquely deliberative body, free from the passions and prejudices of the majority—that sits in judgment and determines whether a given Article of Impeachment is sufficient, both legally and factually, to justify the removal of an Article III Judge.

In striking this careful balance, the Framers made clear that the trial and removal process is not one that should embrace unprecedented or novel impeachments. In vesting the power in the Senate, the Framers' intent was that the process would not be exercised easily or quickly, but carefully and deliberately. The Framers, through the Constitution, positioned the Senate along the path between the possibility of ill-considered and novel uses of the power to impeach and the decision to remove, confident that the Senate would stand as a safeguard against removal when constitutional standards had not been met. The Articles of Impeachment returned by the House are unprecedented, unjustified, and fail to meet the constitutionally required standard. Accordingly, Judge Porteous, in answer, asks the Senate to fulfill its constitutionally mandated role by dismissing the articles or, alternatively, acquitting him of the charges.

GENERAL DENIAL OF FACTS NOT ADMITTED

Judge Porteous denies each and every material allegation of the four Articles of Impeachment not specifically admitted in this ANSWER.

ARTICLE I

ANSWER TO ARTICLE I

Without waiving his affirmative defenses, Judge Porteous admits that he presided as a United States District Judge over the *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises* litigation and that on October 17, 1996, he denied a motion seeking to recuse him from presiding over the case. Judge Porteous denies that he engaged in any corrupt conduct in connection with his handling of the litigation or in denying the motion for recusal. Judge Porteous denies that he intentionally made any misleading statements during the recusal hearing. Judge Porteous also denies engaging in a corrupt scheme of any sort with Jacob Amato, Jr. and Robert Creely and that he, at any time, deprived the parties or the public of the right to the honest services of his office. Judge Porteous further denies that he engaged in any corrupt conduct

after the bench trial in *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises* or at any time while the case was under advisement.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE I

Article I does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon “Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.” The charges in the articles against Judge Porteous do not rise to the constitutionally required level of “high Crimes and Misdemeanors.” Because Article I does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of “high Crimes and Misdemeanors” as required by the Constitution. In essence, Article I alleges that Judge Porteous took several judicial actions while presiding as a United States District Judge in *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises*, including failing to grant a recusal motion and failing to disclose certain facts. In doing so, the Article alleges that Judge Porteous “deprived the parties and the public of the right to the honest services of his office.” This “deprivation of the right to honest services” language is borrowed from Title 18, United States Code, Section 1346, a statute that is fraught with vagueness concerns. Indeed, its constitutional viability is currently pending before the United States Supreme Court in a series of cases. See *Weyhrauch v. United States*, No. 08–1196; *Black v. United States*, No. 08–876; and *Skilling v. United States*, No. 08–1394. The inclusion of this standard, as well as the nonspecific allegations regarding the allegedly improper judicial actions taken by Judge Porteous, render Article I unconstitutionally vague.

It is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific “high Crime and Misdemeanor” upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article I fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is fatally flawed because it charges multiple instances of allegedly corrupt conduct in a single article. The Constitution provides that “no person shall be convicted without the Concur-

rence of two thirds of the Members present.” Senate Rule XXIII provides that “an article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial.”

Despite these clear pronouncements, the House of Representatives, in Article I, has alleged a series of allegedly wrongful acts. In doing so, the House of Representatives has returned an Article of Impeachment which might permit a Senator to vote for impeachment if he or she finds that Judge Porteous committed even a single allegedly wrongful act, even where two-thirds of the Senators do not agree on which wrongful act was committed. This creates the very real possibility that conviction could occur even though Senators were in wide disagreement as to the alleged wrong committed. The structure of Article I presents the possibility that Judge Porteous could be convicted even though he would have been acquitted if separate votes were taken on each allegedly wrongful acts included in the article. As written, Article I does not require the constitutionally required number of Senators to agree on the specific conduct forming the basis for conviction and removal. By charging multiple wrongs in one article, the House of Representatives has made it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of two-thirds of the members. Accordingly, Article I should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I

Article I was returned by the House of Representatives in violation of Judge Porteous’ constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony, Article I must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

ARTICLE II

ANSWER TO ARTICLE II

Without waiving his affirmative defenses, Judge Porteous denies that he engaged in a longstanding pattern of corrupt conduct demonstrating his unfitness to serve as a United States District Court Judge as alleged in Article II. Judge Porteous further denies that he improperly set aside or expunged felony convictions for two Marcotte employees. Judge Porteous also denies that he at any time took any action in his capacity as a United States District Judge that related in any way to the Marcottes or their business interests.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE II

Article II does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge

under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon “Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.” The charges in the articles against Judge Porteous do not rise to the constitutionally required level of “high Crimes and Misdemeanors.” Because Article II does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE II

Article II is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of “high Crimes and Misdemeanors” as required by the Constitution. Article II alleges that Judge Porteous engaged in certain corrupt actions prior to his appointment and confirmation to the position of Un[ite]d States District Judge. Article II makes no specific allegations concerning actions taken by Judge Porteous while on the federal bench. Indeed, the only allegations concerning Judge Porteous tenure on the federal bench is that he in some unidentified way “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.” The vagueness problem here cannot be overstated. It is simply not possible to begin to defend against this type of allegation. It is wholly lacking in any factual basis and clearly fails to frame a set of facts that amount to “high Crimes and Misdemeanors.”

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific “high Crime and Misdemeanor” upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article II fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE II

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article II is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article II should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE II

Article II cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous’ service as a United States District Judge.

The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of “high Crimes and Misdemeanors” while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer’s entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer’s entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III’s “good behaviour” clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution’s impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the “good behaviour” clause, that clause states that judges “shall hold their offices during good behaviour” and clearly relates to a judge’s conduct while in federal judicial office. Because the allegations of Article II relate to a period prior to Judge Porteous taking the federal bench, Article II must be dismissed.

ARTICLE III

ANSWER TO ARTICLE III

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly and intentionally made material false statements and representations in connection with his personal bankruptcy or that he knowingly and intentionally repeatedly violated a court order in his bankruptcy case.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE III

Article III does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon “Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.” The charges in the articles against Judge Porteous do not rise to the constitutionally required level of “high Crimes and Misdemeanors.” Because Article III does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE III

Article III is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of “high Crimes and Misdemeanors” as required by the Constitution. In essence, Article III alleges a number of actions taken by Judge Porteous in connection with his personal bankruptcy, but is unclear as to the specific acts that are claimed to violate the constitutional standard. Moreover, it also does not clearly state the specific allegations regarding

what transaction Judge Porteous concealed during the bankruptcy process or what new debts he allegedly incurred.

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific “high Crime and Misdemeanor” upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article III fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article III is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article III should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I, Article III was returned by the House of Representatives in violation of Judge Porteous’ constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony, Article I must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

FIFTH AFFIRMATIVE DEFENSE TO ARTICLE III

The allegations in Article III do not rise to the level of “high Crimes and Misdemeanors” because they address purely personal conduct that is not criminal. Prior impeachment precedent has never before sought to convict and remove a judge from office based upon personal non-criminal conduct. The very nature of the impeachment process is focused first and foremost upon the official actions of judges. Where allegations in the Articles of Impeachment address non-official personal acts by judges, longstanding precedent has limited “high Crimes and Misdemeanors” to those personal acts that are also indictable offenses. Article III ignores this precedent in seeking to convict and remove Judge Porteous from office for

non-official, non-criminal acts. While it is possible that the House of Representatives would claim that the actions taken in relation to the personal bankruptcy were indictable offenses, this claim would conflict with the multi-year investigation of the United States Department of Justice which concluded that prosecution was not warranted in light of the concern that the issues related to the bankruptcy were not material. It would also conflict with the criminal bankruptcy statu[t]es, which require that any alleged false statement not be made simply knowingly or willfully, but fraudulently, before criminal liability may attach to such conduct. In framing Article III, the House of Representatives is seeking to convict and remove a sitting United States District Judge based upon a lowered standard, one that does not constitute “high Crimes and Misdemeanors,” and one that has never before provided a basis for impeachment, much less conviction and removal from office. Article III of the Articles of Impeachment should be dismissed.

ARTICLE IV

ANSWER TO ARTICLE IV

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly made material false statements in order to obtain the office of United States District Court Judge.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon “Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.” The charges in the articles against Judge Porteous do not rise to the constitutionally required level of “high Crimes and Misdemeanors.” Because Article IV does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of “high Crimes and Misdemeanors” as required by the Constitution. In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation that was used to evaluate his appointment and confirmation as a United States District Judge. However, it is not clear whether Article IV contends that simply providing a single one of the alleged false statements is a “high Crime or Misdemeanor” or whether the “high Crime or Misdemeanor” is based upon all of the acts alleged, i.e., several alleged false statements and other conduct alleged. Moreover, the nature of the questions on the forms that are the focus of this Article themselves add to the vagueness problem.

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges

he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific “high Crime and Misdemeanor” upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article IV fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE IV

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article IV is constitutionally defective because it charges multiple instances of alleged acts of making false statements in one article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article IV should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous’ service as a United States District Judge. The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of “high Crimes and Misdemeanors” while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer’s entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer’s entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III’s “good behaviour” clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution’s impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the “good behaviour” clause, that clause states that judges “shall hold their offices during good behaviour” and clearly relates to a judge’s conduct while in federal judicial office. Because the allegations of Article IV relate to a period prior to Judge Porteous taking the federal bench, Article IV must be dismissed.

Respectfully submitted,

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Submitted: April 7, 2010.

VI. AMENDED REPLICATION OF THE HOUSE OF REPRESENTATIVES TO THE ANSWER OF G. THOMAS PORTEOUS, JR., TO THE ARTICLES OF IMPEACHMENT

The House of Representatives, through its Managers and counsel, respectfully replies to the Answer to Articles of Impeachment as follows:

RESPONSE TO THE PREAMBLE

Judge Porteous in his Answer to the Articles of Impeachment, denies certain of the allegations and makes what are primarily technical arguments as to the charging language that do not address the factual substance of the allegations. However, it is in Judge Porteous's Preamble that he sets forth his real defense and, without denying he committed the conduct that is alleged in the Articles of Impeachment, insists that nevertheless he should not be removed from Office,

At several points in his Preamble, Judge Porteous notes that he was not criminally prosecuted by the Department of Justice, the implication being that the House and the Senate should abdicate their Constitutionally assigned roles of deciding whether the conduct of a Federal judge rises to the level of a high crime or misdemeanor and warrants the Judge's removal, and should instead defer to the Department of Justice on this issue. Judge Porteous maintains that impeachment and removal may only proceed upon conduct that resulted in a criminal prosecution, no matter how corrupt the conduct at issue, or what reasons explain the Department's decision not to prosecute. Judge Porteous provides no support for this contention because there is none—that is not what the Constitution provides.

Indeed, the Senate has by its prior actions made it clear that the decision as to whether a Judge's conduct warrants his removal from Office is the Constitutional prerogative of the Senate—not the Department of Justice—and the existence of a successful (or even an unsuccessful) criminal prosecution is irrelevant to the Senate's decision. The Senate has convicted and removed a Federal judge who was acquitted at a criminal trial (Judge Alcee Hastings). The Senate has also convicted a Federal judge for personal financial misconduct (Judge Harry Claiborne) while at the same time acquitting that same Judge of the Article that was based specifically on the fact of his criminal conviction.¹ Thus, Judge Porteous's repeated references to what the Department of Justice did or did not

¹Judge Harry E. Claiborne was acquitted of Article III, charging that he "was found guilty by a twelve-person jury" of criminal violations of the tax code, and that "a judgement of conviction was entered against [him]." See "Impeachment of Harry E. Claiborne," H. Res. 471, 99th Cong., 2d Sess. (1986) (Articles of Impeachment); 132 Cong. Rec. S15761 (daily ed. Oct. 9, 1986) (acquitting him on Article III).

do adds nothing to the Senate's evaluation of the charges or the facts in this case.²

Further, according to Judge Porteous, pre-Federal bench conduct cannot be the basis of Impeachment, even if that conduct consisted of egregious corrupt activities that was beyond the reach of criminal prosecution because the statute of limitations had run, and even if Judge Porteous fraudulently concealed that conduct from the Senate and the White House at the time of his nomination and confirmation. There is nothing in the Constitution to support this contention, and it flies in the face of common sense. The Senate is entitled to conclude that Judge Porteous's pre-Federal bench conduct reveals him to have been a corrupt state judge with his hand out under the table to bail bondsmen and lawyers. Such conduct, which, as alleged in Articles I and II, continued into his Federal bench tenure, demonstrates that he is not fit to be a Federal judge.

Finally, the notion that Judge Porteous is entitled to maintain a lifetime position of Federal judge that he obtained by acts that included making materially false statements to the United States Senate is untenable. Judge Porteous would turn the confirmation process into a sporting contest, in which, if he successfully were to conceal his corrupt background prior to the Senate vote and thereby obtain the position of a Federal judge, he is home free and the Senate cannot remove him.

ARTICLE I

The House of Representatives denies each and every statement in the Answer to Article I that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article I sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article I is vague. To the contrary, Article I sets forth several precise and narrow factual assertions associated with Judge Porteous's handling of a civil case (the *Liljeberg* litigation), including allegations that Judge Porteous "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" and that while that case was pending, Judge Porteous "solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash." There is no vagueness whatsoever in these allegations. Article I's allegation that Judge Porteous de-

²Moreover, the Department of Justice's investigation hardly vindicated Judge Porteous. To the contrary, the Department viewed Judge Porteous's misconduct as so significant that it referred the matter to the Fifth Circuit for disciplinary review and potential impeachment, and set forth its findings in its referral letter.

prived the public and the Court of Appeals of his “honest services”—a phrase to which Judge Porteous raises a particular objection—could not be more clear and free of ambiguity as used in this Article, and accurately describes Judge Porteous’s dishonesty in handling a case, including his distortion of the factual record so that his ruling on the recusal motion was not capable of appellate review.³

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of the purported affirmative defense that Article I charges more than one offense. The plain reading of Article I is that Judge Porteous committed misconduct in his handling of the *Liljeberg* case by means of a course of conduct involving his financial relationships with the attorneys in that case and his failure to disclose those relationships or take other appropriate judicial action. The separate acts set forth in Article I constitute part of a single unified scheme involving Judge Porteous’s dishonesty in handling *Liljeberg*. Further, the charges in this Article are fully consistent with impeachment precedent.⁴

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, and the immunity order provided that his testimony from that proceeding could not be used against him in “any criminal case.” Simply put, an impeachment trial is not a criminal case.⁵ Accordingly, there is simply no credible basis

³Judge Porteous treats Article I as if it alleges the criminal offense of “honest services fraud,” in violation of Title 18, United States Code, Section 1346, and that because the term “honest services” has been challenged as vague in the criminal context, the term is likewise vague as used in Article I. Despite Judge Porteous’s suggestion to the contrary, Article I does not allege a violation of the “honest services” statute. Moreover, it could hardly be contended that proof that Judge Porteous acted dishonestly in the performance of his official duties does not go to the very heart of the Senate’s determination of whether he is fit to hold office.

⁴The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See “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, 74th Cong., 2d Sess. (March 30, 1936), reprinted in “Impeachment, Selected Materials, House Comm. on the Judiciary,” Comm. Print (1973) [hereinafter “1973 Committee Print”] at 188–197 (H. Res. 422), 198–202 (H. Res. 471); [“Articles of Impeachment against Judge Robert W. Archbald”], H. Res. 622, 62d Cong., 2d Sess. (1912), 48 Cong. Rec. (House) July 8, 1912 (8705–08), reprinted in 1973 Committee Print at 176; and [“Articles of Impeachment against George W. English,”] Cong. Rec. (House), Mar. 25, 1926 (6283–87), reprinted in 1973 Committee Print at 162.

⁵The Constitution makes it clear that impeachment was not considered by the Framers to be a criminal proceeding. It provides: “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.” U.S. Const., Art. 3, cl. 7. See also, *United States v. Nixon*, 506 U.S. 224, 234 (1993) (“There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings.

Continued

to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony.

ANSWER TO ARTICLE II

The House of Representatives denies each and every statement in the Answer to Article II that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article II sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that the Article is vague. To the contrary, Article II sets forth several precise and narrow factual assertions associated with Judge Porteous's relationship with the Marcottes—both prior to and subsequent to Judge Porteous taking the Federal bench. Article II alleges with specificity the things of value given to Judge Porteous over time and identifies the judicial or other acts taken by Judge Porteous for the benefit of the Marcottes and their business.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that the Article improperly charges multiple offenses. The plain reading of Article II is that Judge Porteous engaged in a corrupt course of conduct whereby, over time, he solicited and accepted things of value from the Marcottes, and, in return, he took judicial acts or other acts while a judge to benefit the Marcottes and their business.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article II improperly charges pre-Federal bench conduct as a basis for impeachment. First, Article II plainly alleges that Judge Porteous's corrupt relationship with the Marcottes continued while he was a Federal Judge. Second, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment finds no support in the Constitution and is not supported by any other sound legal or logical basis.⁶ As a factual matter, it is especially appropriate for the Senate to consider Judge Porteous's pre-Federal bench corrupt relationship with the Marcottes where it was affirmatively concealed from the Senate in the confirmation process, where it involved conduct as a judicial officer directly bearing on whether he was fit to hold a Federal judicial office, and where that conduct,

. . . The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments . . .”).

⁶As but one example, if the pre-Federal bench conduct consisted of treason, there could be no credible contention that such conduct would not provide a basis for impeachment.

having now been exposed, brings disrepute and scandal to the Federal bench.

ARTICLE III

The House of Representatives denies each and every statement in the Answer to Article III that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article III sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges in substance that the allegations in Article III are vague. To the contrary, Article III sets forth several specific allegations associated with Judge Porteous's conduct in his bankruptcy proceedings. There is no credible contention that Judge Porteous cannot understand what he is charged with in this Article.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges, in substance, that Article III charges more than one offense. The plain reading of Article III is that Judge Porteous committed misconduct in his bankruptcy proceeding by making a series of false statements and representations, and by incurring new debt in violation of a Federal Bankruptcy Court order. This Article alleges a single unified fraud scheme, with the purpose of deceiving the bankruptcy court and creditors as to his assets and his financial affairs, so that Judge Porteous could enjoy undisclosed wealth and income for personal purposes—including gambling.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, effectively eliminating the possibility that any of that testimony could be used against him in any criminal case. An impeachment trial is not a criminal case. There is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony.

FIFTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense—which does not take issue with the proposition that Judge Porteous committed misconduct in a Federal judicial bankruptcy proceeding, but contends only that

the acts as alleged do not warrant impeachment. First, this is not an affirmative defense. It is up to the Senate to decide whether the facts surrounding the bankruptcy warrant impeachment.

Second, the Senate has in fact removed a judge for personal financial misconduct, and in 1986 convicted Federal Judge Harry Claiborne and removed him from office for evading taxes. It is significant that the Senate did not convict Judge Claiborne for the crime of evading taxes. Rather, the Senate acquitted Judge Claiborne of the one Article that charged him with having committed and having been convicted of a crime.

Third, what the Department of Justice may consider material for purposes of a criminal prosecution has nothing to do with what the Senate may deem to be material for purposes of determining whether Judge Porteous should be removed from Office—an Office which requires that he oversee bankruptcy cases and administer and enforce the oath to tell the truth.⁷

ARTICLE IV

The House of Representatives denies each and every statement in the Answer to Article IV that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article IV sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges the Article is vague. The allegations sets forth in Article IV are specific and precise. In fact, Judge Porteous's description of the charge fairly characterizes the offense: "In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation . . ." It is apparent, therefore, that Judge Porteous has a clear understanding of these allegations in Article IV, which specify the dates and circumstances when the statements were made, and the contents of the statements that are alleged to have been false. There is no credible contention that the Article IV does not provide Judge Porteous specific notice as to what this Article alleges.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense. The allegation sets forth in Article IV are specific and precise. They charge in substance that Judge Porteous made a series of false statements to conceal the fact of his improper and corrupt relationships with the Marcottes and with attorneys Creely and Amato in order to procure the posi-

⁷It should be noted that Judge Porteous has testified and cross-examined witnesses at the Fifth Circuit Hearing on the subject of his bankruptcy, and the House therefore possesses evidence that was unavailable to the Department of Justice.

tion of United States District Court Judge. Charging these four false statements, all involving a single issue, in a single Article is consistent with precedent.⁸

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, alleging that the Senate cannot impeach Judge Porteous based on pre-Federal bench conduct. First, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment is not supported by the Constitution. Notwithstanding Judge Porteous's assertions to the contrary, the Constitution does not limit Congress from considering pre-Federal bench conduct in deciding whether to impeach, and there are compelling reasons for Congress to consider such conduct—especially where such conduct consists of making materially false statements to the Senate. The logic of Judge Porteous's position is that he cannot be removed by the Senate, even though the false statements he made to the Senate concealed dishonest behavior that goes to the core of his judicial qualifications and fitness to hold the Office of United States District Court Judge. The proposition that the Senate lacks power under these circumstances to remedy the wrong committed by Judge Porteous is simply untenable.

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.

April 22, 2010.

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⁸As but one example, Article III of the Articles of Impeachment against Judge Walter Nixon charged that he concealed material facts from the Federal Bureau of Investigation and the Department of Justice by making six, specified, false statements on April 18, 1984 at an interview, and by making seven discrete false statements under oath to the Grand Jury. "Impeachment of Walter L. Nixon, Jr.," H. Res. 87, 101st Cong., 1st Sess. (1989) (Article III).