TO CONSIDER POSSIBLE IMPEACHMENT OF UNITED STATES DISTRICT JUDGE G. THOMAS PORTEOUS, JR. (PART IV)

HEARING

BEFORE THE

TASK FORCE ON JUDICIAL IMPEACHMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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DECEMBER 15, 2009

TO CONSIDER POSSIBLE IMPEACHMENT OF UNITED STATES DISTRICT JUDGE G. THOMAS PORTEOUS, JR. (PART IV)

TUESDAY, DECEMBER 15, 2009

HOUSE OF REPRESENTATIVES,
TASK FORCE ON JUDICIAL IMPEACHMENT
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force met, pursuant to notice, at 10:38 a.m., in room 2141, Rayburn House Office Building, the Honorable Adam B. Schiff (Chairman of the Task Force) presiding.

Present: Representatives Schiff, Jackson Lee, Johnson, Pierluisi, Gonzalez, Sensenbrenner, Goodlatte, Lungren, and Gohmert.

Staff Present: Alan Baron, Counsel; Harold Damelin, Counsel; Mark Dubester, Counsel; Jessica Klein, Staff Assistant; and Kirsten Konar, Counsel.

Also Present: (Representing G. Thomas Porteous) Richard W. Westling, Esq., Ober Kaler, Attorneys at Law, Washington, DC 20005-3324.

Mr. SCHIFF. This hearing of the House Judiciary Task Force on Judicial Impeachment will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing.

I will now recognize myself for an opening statement.

Today, the Task Force will continue its inquiry whether United States District Court Judge Thomas Porteous should be impeached by the U.S. House of Representatives. To date, the Task Force has held 4 days of hearings where testimony was taken regarding the following: allegations that Judge Porteous violated the public trust, law, and ethical canons by presiding over the case In re Liljeberg Enterprises, Inc.; by repeatedly making false and misleading statements, including the concealment of debts under oath and disregard of a bankruptcy court's orders; and by accepting things of value from the owners of a bail bonds company in Louisiana in exchange for access and assistance in his official capacity as a judge, including setting aside convictions.

Today's hearing is part four in our series and will focus on whether Judge Porteous's conduct renders him unfit to hold office and provides a sufficient basis for impeachment.

After our witnesses make their initial statements, Members will have the opportunity to ask questions under the 5-minute rule. Judge Porteous'scounsel will then be permitted to question the

panel for 10 minutes, followed by a second round of Member questions, if necessary.

I will now recognize my colleague, Mr. Goodlatte, the distinguished Ranking Member of the Task Force, for his opening remarks.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Article 3 of the Constitution provides that Federal judges are appointed for life and that they shall hold their offices during good behavior. Indeed, the Framers knew that an independent judiciary, free of political motivations, was necessary to the fair resolution of disputes and the fair administration of our laws. However, the Framers were also pragmatists and had the foresight to include checks against the abuse of independence and power that comes with a judicial appointment.

Article I, section two, clause five of the Constitution grants the House of Representatives the sole power of impeachment. This is a very serious power that should not be undertaken lightly. However, if evidence emerges that an individual is abusing his judicial office, the integrity of the judicial system becomes compromised, and the House of Representatives has the duty to investigate the matter and take any appropriate actions to end the abuse and restore confidence in the judicial system.

The Task Force on Judicial Impeachment has been conducting a detailed investigation of the alleged misconduct of Federal District Judge Thomas Porteous. The Task Force has also held a series of hearings to gather further evidence from those who have firsthand knowledge of Judge Porteous's conduct.

Today, we will shift gears a little and hear from expert witnesses on the standards for impeachment, the standards of judicial conduct, and Judge Porteous's actions in relation to those standards. I look forward to hearing from the witnesses, and I thank you, Mr. Chairman, for holding this important hearing.

Mr. SCHIFF. I thank the gentleman, who yields back.

Would any other Member at this time like to make an opening statement?

Okay. I want to welcome our witnesses today and thank them for their participation.

Our first witness is Professor Charles Geyh of the Maurer School of Law, Indiana University. Professor Geyh received his law degree from the University of Wisconsin. Following graduation, he clerked for Judge Thomas Clark of the U.S. Court of Appeals for the Eleventh Circuit. Professor Geyh was then an associate at Covington & Burling and served as counsel to this very Committee. He has also served as special counsel to the Office of Legislative and Public Affairs at the Administrative Office of the U.S. Courts and as an advisor to then-Senator Joseph Biden, Jr., on the Senate confirmation of Justice Thomas to the Supreme Court.

In 1991, Professor Geyh joined the field of academia at Widener University of Law. He began teaching at Indiana in 1998, where he currently teaches courses on civil procedure, legal ethics, Federal courts, and the relationship between the judicial and legislative branches. Professor Geyh is the current director of the ABA Judicial Disqualification Project.

He is also a co-author of Judicial Conduct and Ethics and the author of Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism; Rescuing Judicial Accountability from the Realm of Political Rhetoric; Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts, Courts, Congress, and the Constitutional Politics of Interbranch Restraint; and Informal Methods of Judicial Discipline.

Our second witness is Professor Akhil Amar from Yale Law School. Professor Amar received both his undergraduate and law degrees from Yale University. While in law school, he served as an editor of the Yale Law Journal. Upon graduation, he clerked for future U.S. Supreme Court Justice Stephen Breyer while he sat on the U.S. Court of Appeals for the First Circuit.

Professor Amar joined the faculty of Yale in 1985 and is currently the Sterling Professor of Law and Political Science at Yale University. In this capacity, he teaches constitutional law at both the undergraduate and law school levels. Professor Amar is also co-editor of Processes of Constitutional Decisionmaking, and the sole author of several other books, including The Constitutional and Criminal Procedures: First Principles; The Bill of Rights: Creation and Reconstruction; and America's Constitution: A Biography.

Our final witness is Professor Michael Gerhardt of the University of North Carolina School of law. Professor Gerhardt graduated from Yale University, received his master's from the London School of Economics and his law degree from the University of Chicago. He served as a professor at William & Mary Law School for over a decade before joining the faculty of the University of North Carolina School of Law, where he currently teaches.

Professor Gerhardt has been a visiting professor at the Cornell and Duke Law Schools and was a visiting fellow at Princeton University as a part of their James Madison Program in American Institutions and Ideals. Professor Gerhardt is frequently consulted as an expert on constitutional law by national media and has testified before Congress on several occasions, including as the only joint witness in the House Judiciary Committee's special hearing on the history of the Federal impeachment process for its consideration of the impeachment of President Clinton.

He has also testified before this Committee regarding legislative proposals involving the judicial branch. He is the author of a number of works, including The Federal Impeachment Process: A Constitutional and Historical Analysis, as well as the co-author of three editions of the Constitutional Theory Reader and over 50 law review publications.

Given the gravity of the issues we are discussing today, we would appreciate it if you would take an oath before you begin your testimony.

I will now swear the witnesses. If you would each please rise and raise your right hands.

[Witnesses sworn.]

Mr. SCHIFF. Thank you. Please be seated.

And we will now begin with Professor Geyh.

TESTIMONY OF CHARLES G. GEYH, PROFESSOR, MAURER SCHOOL OF LAW, INDIANA UNIVERSITY

Mr. GEYH. Thank you, Mr. Chairman.

My testimony today is going to be directed at the ethical implications of Judge Porteous'sconduct, with a focus on the Code of Conduct for United States Judges. As you already know, the Porteous matter is very complicated, spanning a number of episodes over a period of years. I am going to orient my testimony around those episodes beginning with those that I think are most problematic.

As a preamble here, the ethical responsibilities of Federal judges are articulated in the Code of Conduct for United States Judges. The Code seeks to ensure that Federal judges serve with integrity, impartiality, and independence. Those are the watch phrases.

Core principles embedded in the Code of Conduct are that judges avoid impropriety and the appearance of impropriety in all their activities. That means on and off the bench. That they act at all times, again, meaning on and off the bench, in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

Now, moving on to the *Liljeberg* case, which strikes me as certainly the most problematic in the bunch, there are specific directives applicable there as well. Judges must disqualify themselves whenever their impartiality might reasonably be questioned.

Now, I want to emphasize here that this duty to disqualify is embedded as a procedural requirement in Title 28 of the U.S. Code, but it is also appearing in the Code of Conduct, so that it is both a procedural requirement and an ethical obligation. In addition, the Code of Conduct declares that judges must not solicit or accept gifts from lawyers who appear before them.

Now, in *Liljeberg,* Judge Porteous declined to disqualify himself from a major piece of commercial litigation in which two of the lawyers hired during the eleventh hour to represent defendants in that case were not just long-time friends, they were friends with benefits. They had bought him countless meals and hunting trips over the years. They had paid him thousands of dollars on demand over the years. They had arranged to give him what can only be described in my mind as kickbacks from curatorships he had assigned them while a State judge.

And so under these circumstances in which this lawyer, Amato in particular, appears before him, it is clear to me that a reasonable, fully informed, objective observer looking at that situation would question Judge Porteous'simpartiality, requiring disqualification under both the ethical rules and Title 28.

Now, in the routine case a judge's failure to disqualify himself merits nothing more than reversal, because judges make mistakes the same as everybody else and a mistake is not an ethical violation. However, this is more than an honest mistake. The facts as alleged here show that there was a willfulness on Judge Porteous'spart. And again I am relying on facts as found by the Judicial Conference, and I am turning to testimony that has been adduced so far in these proceedings, and I leave it to you to find the facts.

But taking those facts as given, it would appear that although Judge Porteous knew that he had received thousands of dollars

from Mr. Amato over the years and solicited moneys and kickbacks, that he nevertheless reported on the record at the disqualification hearing that he had taken money from Amato only once, when Judge Porteous first ran for judge. This kind of misdirection indicates to me a willful intent to conceal information he knew required disqualification and morphs it out of a simple error and into the form of a much more serious, willful failure to disqualify under circumstances in which he knew that he should.

It gets worse. When he allegedly solicited thousands of dollars from Amato while that very case was pending, he first violated gift rules, which basically indicate you can't solicit moneys from lawyers in pending cases; and, to make matters worse still, that gift was not reported later, which to me indicates an attempt to conceal or an awareness that at the time he is asking for a gift it is not appropriate to receive.

He accepts that gift, having solicited it. It made disqualification even more necessary at that point, that he had accepted a $2,000 gift from a lawyer in a pending proceeding, and made his failure to do so all the more flagrant. To me, then, this is not just a failure to disquality.

We are now going back to the core directive that a judge must act at all times to avoid impropriety, and a judge must at all times work to promote public confidence in the impartiality of the judiciary— both of which directives were, in my judgment, sidestepped.

The second of the three examples I am going to talk about here is the bankruptcy proceeding, which you have heard about more recently. Judges I think categorically have a duty to respect and comply with the law. It is embedded in the Code of Conduct. That duty is understandable enough, because if judges are going to be sworn to uphold the law in cases that come before them, they must honor and obey that law in their private lives.

Judge Porteous allegedly violated perjury and fraud statutes in the bankruptcy proceedings. If so, he disregarded that directive. Now, even if we say that because he was not prosecuted for that conduct he did not technically abrogate the duty or violate the duty to comply with the law, one can nevertheless conclude, as courts all over the place have in the State systems, that a judge who violates the law, even if it is unprosecuted, has failed to avoid impropriety and has failed to act at all times in a manner that promotes public confidence in the integrity of the judiciary. And bear in mind that integrity in this case is defined to mean honesty and probity, which fraud and perjury would certainly seem to be the antithesis of.

Finally, in the case of a bail bondsman, judges have an ethical duty to avoid lending the prestige of judicial office to advance the interests of others. In this case, Judge Porteous, while on the Federal bench, allegedly accepted free meals and other favors in exchange for recommending the bondsman in question to State judges, thereby lending the prestige of his office to advance the bondsman's interests. To me, this likewise runs afoul of the Code of Conduct.

As egregious as the judge's alleged conduct was in the several episodes that I have spoken of here and in others that are included in my written testimony, to me the whole exceeds the sum of its

parts. Taken together, the actions that Judge Porteous is reported to have taken as a State and Federal judge reflect a cynical and contorted view of judicial service as an opportunity to be exploited, of judicial power as a thing to be abused for personal gain, and of legal and ethical constraints on judicial conduct as obstacles to be circumvented. This, gentleman, is not appropriate conduct.

Thank you.

[The prepared statement of Mr. Geyh follows:]

PREPARED STATEMENT OF CHARLES G. GEYH

TESTIMONY OF CHARLES G. GEYH
ON H. RES. 1448 (2008), INQUIRING INTO THE IMPEACHMENT OF
DISTRICT JUDGE G. THOMAS PORTEOUS

December 15, 2009

My name is Charles G. Geyh (pronounced "Jay"). I am the Associate Dean for Research and the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. I am the co-author of over forty books, book chapters and articles on judicial conduct, ethics, independence, accountability, and administration, including the treatise "Judicial Conduct and Ethics" (4th Ed. 2007) (with Alfini, Lubet & Shaman); the book "When Courts & Congress Collide: The Struggle for Control of America's Judicial System" (2006); and the forthcoming monograph "Judicial Disqualification: An Analysis of Federal Law" (2d Edition, Federal Judicial Center, forthcoming 2010). I have previously served as Reporter to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct; Director of and Consultant to the American Bar Association's Judicial Disqualification Project; Assistant Special Counsel to the Pennsylvania House of Representatives, on the Impeachment and Removal of Pennsylvania Supreme Court Justice Rolf Larsen; consultant to the National Commission on Judicial Discipline and Removal; and counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Administration of Justice (under Subcommittee Chairman Robert W. Kastenmeier). The views expressed in my testimony today are my own, and not necessarily those of the organizations with which I am or have been affiliated.

My testimony today will be directed at the ethical implications of Judge Porteous's alleged conduct, with a focus on the Code of Conduct for United States Judges. The analysis of judicial ethics is context dependent - whether a judge did or did not run afoul of an ethical directive will almost always turn on the facts surrounding that judge's conduct. In preparation for my testimony today, I have reviewed the following materials: the House Judiciary Committee's Impeachment Task Force hearing transcripts from November 17 and December 8, 2009; the Report and Recommendations of the Judicial Conference Committee on Judicial Conduct and Disability, dated June, 2008 and forwarded to the House of Representatives on June 18, 2008; the Report by the Special Investigatory Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit, together with accompanying exhibits and a concurring/dissenting Report, dated November 20, 2007; and an undated Hearing Memorandum to the House Judiciary Committee's Impeachment Task Force prepared in anticipation of its November 17, 2009 hearing. My analysis of Judge Porteous's conduct is based on information derived from these materials. I do not, however, presume to make my own findings of fact concerning Judge Porteous's conduct. Whenever possible, therefore, I have predicated my ethics analysis upon facts as found and summarized by the Judicial Conference in its June, 2008 Report. Although the findings of fact in the Judicial Conference Report impress me as consistent with testimony in the hearing record, I draw

no conclusions in that regard. Accordingly, my testimony throughout refers to the judge's "alleged" conduct.

The Porteous matter is complicated, spanning many years and featuring a number of episodes. I will orient my testimony around those episodes, beginning with the most problematic. In so doing, however, it is critically important not to lose the forest for the trees. As egregious as the judge's alleged conduct was in several episodes viewed in isolation, the whole exceeds the sum of its parts. Taken together, the actions that Judge Porteous is reported to have taken as a state and federal judge reflect a cynical and contorted view of judicial service as an opportunity to be exploited; of judicial power as a thing to be abused for personal gain; and of legal and ethical constraints on judicial conduct as obstacles to be circumvented. Measured against the directive of the first canon in the Code of Conduct - the canon articulating a judge's primary ethical duty - that he "uphold the integrity and independence of the judiciary," such conduct represents a grave and extreme abrogation of the judge's ethical responsibilities.

The Liljeberg Case and its Antecedents

Judge Porteous's reported conduct in the *Liljeberg* case raises ethical concerns of the most extreme sort, and culminated years of problematic behavior. To fully appreciate the severity of his ethical transgressions in *Liljeberg*, however, it is necessary to review the history of his relationship with the lawyers who represented the parties in that case, and the ethical problems that arose in the course of that relationship.

Conduct as a State Judge

Attorneys Jacob Amato and Leonard Levinson (who represented defendant in *Liljeberg*) and Donald Gardner (who represented plaintiff) each testified that they were longtime friends of Judge Porteous, and that during his years as a state judge, they took Judge Porteous to lunch innumerable times - often at expensive restaurants. Rarely, if ever, did Judge Porteous pay for his meals. Codes of conduct permit judges to accept "social hospitality" without running afoul of restrictions on the gifts judges may receive,[1] and friends and former colleagues who take each other to lunch can be a conventional form of social hospitality. This, however, was not ordinary "social hospitality." These lawyers reportedly paid Judge Porteous's lunch bills countless times for years with no meaningful reciprocation by the judge. Moreover, this one-way payment practice appears to be what Judge Porteous wanted and expected: Former state judge Ronald Bodenheimer testified that when Bodenheimer became a judge, Porteous told him that, once a judge, he would "never have to buy lunch again. . . There will always be somebody to take you to lunch." In other words, Judge Porteous was trading on his position as a judge in contravention of the ethical principle that a judge should not "lend

[1] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §3 ("'Gift' . . . does not include (a) social hospitality based on personal relationships;" *see also*, ABA Model Code of Judicial Conduct (Hereafter "Model Code") Rule 3.13(B)(3) (exempting "ordinary social hospitality").

the prestige of judicial office to advance the private interests of the judge."[2] Similarly, Amato's partner, Robert Creely, testified that he took Porteous on numerous, all expense-paid-hunting and fishing trips during his years as a state judge, which further exceeds traditional notions of "social hospitality," and lends additional support to the suspicion that Judge Porteous was exploiting his station for personal gain.[3]

In addition to meals and trips, the Judicial Conference Report noted that "much of the available evidence concerns Judge Porteous's solicitation and receipt of cash payments from a law firm, Amato & Creely [which was] . . . a relationship begun when Judge Porteous was a state court judge." According to Amato and Creely, Judge Porteous solicited tens of thousands of dollars from them over a period of years. These lawyers testified that they were good friends of the judge and were simply acting out of a desire to help a friend who was in a seemingly constant state of financial distress, and not because they were seeking or receiving favors. It is possible to credit this testimony completely and still conclude that Amato and Creely would not have shown such magnanimity to Porteous were he not a judge. Judges are important and powerful people in their communities, and it is understandable that lawyers would want to remain in their good graces, which is why ethics rules limit the gifts judges can receive and prohibit judges from exploiting their positions for personal gain.

Even more troubling, however, the Judicial Conference Report states that when the firm "indicated to Judge Porteous that it was unhappy with having to bear the expense of repeated payments to him . . . Judge Porteous frequently appointed the firm to curatorship proceedings and, at Judge Porteous's suggestion, received in return a portion of the fees paid." Such conduct is unethical in the extreme. Code of Conduct Canon 3B3 states that "a judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism and favoritism."[4] While Judge Porteous clearly exhibited favoritism in his assignment of curatorships, he did so less for the benefit of friends than himself. His conduct thus entailed a gross abuse of judicial power that manifested a fundamental disregard for core ethical directives that a judge "should avoid impropriety and the appearance of impropriety in all activities;" "should uphold the integrity . . . of the judiciary" and should not abuse the prestige of his office for personal gain.[5]

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[2] Code of Conduct for United States Judges, Canon 2B (2009) (hereafter "Code of Conduct(2009)");. State rules are comparable. ABA Model Code of Judicial Conduct, Rule 1.3 (2007) (hereafter "Model Code". The Code of Conduct for United States Judges was substantially revised in July, 2009. The Judicial Conference Report evaluated Judge Porteous's conduct with reference to predecessor Code. Differences between the two Codes do not affect the analysis of Judge Porteous's conduct, but in my testimony, I cite to both.

[3] The extent to which these meals and trips were offered at times when the lawyers at issue had matters pending before Judge Porteous is unclear, for which reason I have not factored that concern into the analysis here, although it is highly relevant later, in *Liljeberg*.

[4] The predecessor Code is comparable, providing that "A judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism." Code of Conduct for United States Judges, Canon 3B4 (2008) (hereafter "Code of Conduct (predecessor)." See ABA Model Code, Rule 2.13.

[5] Code of Conduct Canons 1, 2 (2009); *See also*, Model Code, Canon 1.

Although the Judicial Conference Report discussed Judge Porteous's conduct as a state judge to provide context, it did not factor such conduct into its recommendation that "consideration of impeachment may be warranted." It seems clear to me, however, that Congress is well within its rights to consider such conduct when evaluating Judge Porteous's continuing fitness to serve. By way of an extreme example, suppose that a federal judge is found to have committed a multiple homicide while a state judge ten years earlier. It is difficult to imagine that such conduct would be off limits in an impeachment inquiry simply because it predated the judge's ascension to the federal bench. Without getting into standards for impeachment (which other witnesses will address), the better question is whether the judge's conduct as a state judge affects his fitness to serve as a federal judge. In state court systems, for example, it is relatively well settled that a judge's conduct in a prior term, in a different judicial office, or even in private practice, may be the subject of judicial conduct proceedings.[6]

Conduct as a federal judge

The Judicial Conference Report states:

> It is undisputed that Judge Porteous solicited and received cash and other things of value from law firms and attorneys who appeared before him in litigation. These included, at a minimum, cash payments, numerous lunches, payments for travel, meals, and hotel rooms in Las Vegas, and payments for the expenses of a congressional externship for Judge Porteous's son.

These meals, trips and payments that Judge Porteous received from Amato, Levinson , Gardner and Creely continue a course of conduct begun when he was a state judge, and raise the same ethical problems detailed above. They likewise implicate an additional provision in the Code of Conduct for United States Judges, which provides that "A judge should refrain from financial and business dealings that . . . exploit the judicial position."[7] The *Liljeberg* case, however, added a new dimension because in that case three of these same lawyers appeared before Judge Porteous as counsel in a major piece of commercial litigation. Of particular interest is the appearance of attorneys Jacob Amato and Leonard Levenson, who were retained as counsel for defendant under unusual circumstances described in the Judicial Conference Report:

> [H]is [Judge Porteous's] friends Jacob Amato and Lenny Levenson appeared as counsel after the case was assigned to him. Amato had given money to Judge Porteous. Levenson had helped pay Judge Porteous's son's living expenses during an externship in Washington, D.C. and had treated Judge Porteous to lunch while he had matters pending before Judge Porteous. Although Amato and Levenson did not typically practice in federal court or frequently handle complex litigation, they were brought into Liljeberg with an 11% contingency fee to represent a client seeking a judgment of $110 million. Moreover, they

[6] JAMES ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN, & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS §§1.08, 1.09 (4th Ed. 2007) (hereafter ALFINI et al.)

[7] Code of Conduct, Canon 4D1(2009); Code of Conduct, Canon 5C1 (predecessor).

> had joined the case 39 months after it was originally filed just two months before it was to go to trial.

After Amato and Levenson appeared as counsel for the defendant, plaintiff moved to disqualify Judge Porteous, who denied the motion, explaining that "Courts have held that a judge need not disqualify himself just because a friend, even a close friend, appears as a lawyer." Shortly thereafter, plaintiff retained Donald Gardner as counsel, because as co-counsel for plaintiff testified, Gardner was another friend of Judge Porteous, whose presence in the case would "level the playing field."

Assuming these to be the facts, it is clear that Judge Porteous should have disqualified himself. Under the federal judicial disqualification statute and the Code of Conduct for United States Judges, a judge shall disqualify himself from any proceeding in which the judge's "impartiality might reasonably be questioned."[8] It is a standard that must be assessed from the perspective of an objective lay person fully informed of the circumstances. Under this approach, courts have held that judges need not disqualify themselves simply because a good friend represents a party before the court: a reasonable person would recognize that in a collegial legal community a judge will know most if not all of the lawyers who appear before him, many of whom will be friends and acquaintances from law school and practice. But Amato and Levenson were more than friends: they were long-time benefactors upon whom Porteous had depended for tens of thousands of dollars in quick cash, meals and other favors over many years. Receiving payments and favors of this sort from lawyers who appear before the judge is not ordinary "social hospitality" in any sense of the phrase, and constitutes clear grounds for disqualification.[9] Moreover, the need to disqualify was made even more manifest by the circumstances in which these long-time patrons of the judge were retained, being brought in at the eleventh hour to try a massive case before Judge Porteous in a non-jury trial on a matter outside of the lawyers' normal practice area. Taken together, this confluence of events gives rise to the unshakable suspicion that Judge Porteous was subject to favoritism and could not be counted upon to remain impartial.

Disqualification is both a matter of procedure (hence its inclusion in title 28 of the U.S. Code) and a matter of ethics (hence its inclusion in the Code of Conduct). Ordinarily, when a judge erroneously declines to disqualify himself, the appropriate remedy is a procedural one: reversal. A much more serious problem arises, however, when non-disqualification is willful:

> It has been held that a judge will be subject to discipline for incorrectly failing to disqualify himself only where the failure was willful. The test is an objective one, and therefore a willful failure to disqualify may be present even though a judge states on the record that that he or she does not believe that disqualification is necessary.[10]

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[8] 28 U.S.C. §455(a); Code of Conduct, Canon 3C1.
[9] ALFINI et al., *supra* note 7, at §7.15A (4th Ed. 2007)
[10] ALFINI et al, *supra* note 7, at §4.01.

In this case, the facts as reported lead to the conclusion that Judge Porteous's failure to disqualify was willful. First, Judge Porteous was well aware of undisclosed information that made the need for him to disqualify himself obvious - so obvious that his failure to recuse cannot be attributed to an honest mistake. Second, the judge's statements during the disqualification proceedings were calculatedly misleading. Judge Porteous acknowledged his friendship with Amato and Levenson, without disclosing any of the details that made that "friendship" problematic. He conceded that he had "gone along to lunch" with them without revealing that he had done so countless times, that the lawyers always (or nearly always) paid, and that he had received much more from them than free meals. And when plaintiff's counsel alleged that Amato and Levenson had contributed to the judge's election campaigns, Porteous replied that "[t]he first time I ran, 1984, I think is the only time when they gave me money" - a statement he made with full knowledge that he had solicited many thousands of dollars from Amato over the years for other purposes. The cumulative effect of these statements supports the conclusion that Judge Porteous was willfully concealing information that would have revealed the need for him to disqualify himself. Such conduct is a gross and inexcusable violation of judicial ethics.

The Judicial Conference Report then states that "[a]fter denying the motion [to disqualify], and while a bench verdict was pending, Judge Porteous solicited cash from Amato," delivered "in an envelope picked up at Amato and Creely's office by Judge Porteous's secretary." The Report notes "Creely told Judge Porteous that this was not 'appropriate,'" because he "felt this practice was too 'blatant.'" Even if we credit assertions that the cash was solicited and accepted as a favor, not a bribe, Judge Porteous's misconduct here was of the gravest sort. The current Code of Conduct for United States Judges provides that "A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations."[11] The applicable regulations define "gift" to include gratuities, favors, loans or "similar item(s) having monetary value" and provide that "[a] judicial officer shall not solicit a gift from any person who is seeking official action from or doing business with the court . . . served by the judicial officer."[12] The judge who solicits or receives money from a lawyer who has an important case pending before the court, creates the taint of corruption that the Judicial Conference's gift regulations are designed to prevent; it is thus unsurprising that ethics rules universally condemn the practice.[13] That Judge Porteous was told at the time that the payment was inappropriate, and did not report the payment as a gift, corroborates the view that he intentionally concealed a known impropriety.

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[11] Code of Conduct Canon 4D(4) (2009).

[12] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §§3, 4. *See also*, Code of Conduct, Canon 5C4 (predecessor).

[13] RICHARD C. FLAMM, JUDICIAL DISQUALIFICATION §9.1 (2d Ed. 2007) ("The practice of judges accepting gifts or favors from those who appear before them implicates fundamental policy concerns. Therefore, parties are usually not permitted to give such gifts and judges are not allowed to receive them."); JAMES ALFINI, et al. *supra* note 7, at §7.15A ("Courts tend to look with considerable skepticism at any gifts, favors, or favorable business deals that judges receive from lawyers who appear before them.").

Having improperly solicited thousands of dollars from a lawyer while he was representing a party in a case pending before him, the need for Judge Porteous to disqualify himself was even more plain, rendering his erroneous failure to withdraw more obviously willful. It is utterly inconceivable that a reasonable person would not question the impartiality of a judge who solicited thousands of dollars from a lawyer in a pending matter.[14] That Judge Porteous subsequently decided the case in favor of the defendant and was later reversed in resounding terms only heightens the suspicions that the disqualification and gift rules aim to dispel. If the ethical duty to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" means anything, it means that conduct of this kind is unacceptable.

The Bankruptcy Proceeding

Judge Porteous filed for bankruptcy in 2001, when he was a sitting federal district judge. The Judicial Conference Report summarizes his conduct in connection with the bankruptcy proceeding as follows:

> Judge Porteous filed for bankruptcy under a false name. In sworn court documents, he understated his income, overstated his expenses, and failed to disclose gambling losses and an anticipated tax refund. Likewise, he failed to disclose the existence of various financial accounts, including a credit card. By using this credit card and by taking our markers at various casinos, he continued to accumulate debt in violation of court orders. Finally, he failed to report payments routed through his secretary's checking account to preferred creditors. As a result of the foregoing, his creditors incurred unwarranted losses and he was enriched.

The Judicial Conference report concludes that his conduct violated federal perjury and bankruptcy fraud statutes. The alleged conduct likewise violates the judiciary's core ethical principles. Codes of conduct direct judges to "respect and comply with the law"[15] for obvious and compelling reasons: If we are to trust our judges to honor their oaths to uphold and apply the law in the courtroom, it is critical that they abide by the laws they have sworn to uphold. Unsurprisingly, then, criminal conduct, including fraud, has long been recognized as an extremely serious ethical lapse.[16]

One can argue whether violations of law that do not culminate in a criminal conviction technically qualify as a breach of the ethical duty to "follow the law," but it is settled that such conduct runs afoul of even more elemental norms. The legitimacy of the judiciary as an institution depends on preserving public confidence in the courts. Public confidence in the courts turns on judges behaving honorably on *and* off the bench.

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[14] In the federal system, disqualification has been ordered where the risk of favoritism was far more attenuated. *See, e.g., Pepsico v. McMillen*, 764 F.2d 458 (7th Cir. 1985) (Reversing refusal to disqualify where the judge—anonymously and through a recruiter—was exploring future job opportunities with law firms representing parties in a pending case).

[15] Code of Conduct Canon 2A (2009); Code of Conduct Canon 2A (predecessor); ABA Model Code Rule 1.1.

[16] ALFINI et al., *supra* note 7, at §10.04A.

Accordingly, judges are admonished to "avoid impropriety and the appearance of impropriety in all activities" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[17] We therefore explain in our treatise, that "regardless of whether unprosecuted criminal conduct qualifies as a failure to comply with the law, within the meaning of the codes of conduct, it clearly runs afoul of the more general directives that judges must avoid the appearance of impropriety and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[18]

The Judge's Relationship With Bail Bondsmen

Deposition records and related documents indicate that over a period of years, starting when he was a state judge, Judge Porteous was given things of value from bail bondsmen Louis Marcotte and his sister, Lori Marcotte. They paid for numerous meals at high-end restaurants, paid for the judge's home repairs, paid for his car repairs, and took Judge Porteous (and his secretary) to Las Vegas. In return, Judge Porteous set bonds at the Marcottes' request so as to permit them to maximize their profits; he set aside felony convictions of employees; he helped them form relationships (particularly with other judges) that would assist them in their business; and he interceded on their behalf with other judges before whom the Marcottes had civil litigation pending.

Unlike the relationship between Judge Porteous and attorneys Amato, Creely, Levenson and Gardner, his relationship with the Marcottes was unobscured by longstanding friendships. Rather, as described immediately above, this was a business relationship featuring quid pro quo. Corruption of this magnitude is not addressed in codes of conduct explicitly: A judge's ethical duty not to accept bribes, or take money or other favors in exchange for judicial or administrative action, quite literally goes without saying. As previously discussed, there are strict rules against judges soliciting or accepting favors from lawyers, parties, or others with whom the courts do business: Gift regulations for federal judges prohibit them from "solicit[ing] a gift from any person who is seeking official action from or doing business with the court," and likewise prohibit them from accepting gifts from such persons, subject to exceptions that are inapplicable here.[19] State ethics codes are similar.[20] As an ethical matter, however, the situation becomes "most egregious" when a judge receives improper "gifts" from interested individuals in exchange for official action, which are not really gifts or favors, but bribes and kickbacks .[21] For ethical lapses this extreme, the violations cut to the quick of the core directives that judges must "uphold the integrity and independence of the judiciary;"

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[17] Code of Conduct Canon 2 and 2A(2009); Code of Conduct Canon 2 and 2A(predecessor); Model Code, Canon 1, Rules 1.1, 1.2.
[18] ALFINI et al., *supra* note 7, at §10.04A.
[19] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts, §§4, 5.
[20] Model Code, Rule 3.13.
[21] Alfini et al, *supra* note 7, at §7.15B ("A recurring problem is the acceptance of gifts and loans from persons who come before the judge, such as bail bondsmen and receivers. In the most egregious cases, of course, these are not gifts, but kickbacks or bribes.")

"avoid impropriety;" and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[22]

After Porteous became a federal judge, Marcotte testified that he continued to include him at expense-paid lunches with state judges. Marcotte did so, he explained, because "whenever I brought Porteous to the table, I brought strength;" "other judges respected him and they listened to him when he talked;" and "he could tell them how great the bail bond business is." If true, such conduct is an almost textbook violation of the ethical duty not to "lend the prestige of judicial office to advance the private interest of the judge or others."[23]

Financial Disclosure

In its report, the Judicial Conference found:

> Judge Porteous's annual financial disclosure forms repeatedly made false statements that were material to the integrity of the office. It is undisputed that Judge Porteous solicited and received things of value from attorneys appearing in litigation before him. It is also undisputed that none of these benefits were listed as "Income," "Gifts," "Loans," or "Liabilities" on his financial disclosure forms, which he signed and attested to as accurate under oath.

To the extent Judge Porteous's conduct violated perjury laws, it likewise signals a violation of his ethical duties to follow the law, to avoid impropriety, and to uphold the integrity and independence of the judiciary, previously discussed in connection with his allegedly false statements under oath in the bankruptcy proceeding.[24] In addition, however, federal judges are under an independent ethical duty to "report the value of any gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States."[25]

By itself, filing incomplete or inaccurate gift disclosure forms is highly undesirable, but can be attributed to simple carelessness or lack of time. To that extent, the ethical implications of such conduct are modest. When, however, failure to disclose is - as the Judicial Conference found here - a means for the judge to conceal the receipt of improper gifts and favors, the ethical implications become much more serious. Such conduct violates not just the duty to report gifts as required by applicable codes and regulations, but also the duty to avoid impropriety and to act at all times in a manner that promotes the integrity of the judiciary. It may be noted that the Model Code of Judicial Conduct defines "integrity" in terms of "probity" and "honesty," which underscores why

[22] Code of Conduct Canons 1, 2 & 2A (2009); Code of Conduct Canons 1, 2 & 2A (predecessor); Model Code, Canon 1; Rule 1.2.
[23] Code of Conduct, Canon 2B (2009); Code of Conduct, Canon 2B (predecessor); Model Code, Rule 1.3.
[24] Code of Conduct, Canons 1, 2 & 2A (2009); Code of Conduct, Canons 1, 2, & 2A (predecessor).
[25] Code of Conduct, Canon 5C6 (predecessor). The current Code is to the same effect. *See* Code of Conduct, Canon 4H3 (2009).

deliberate disregard of reporting requirements to conceal improper gifts undermines judicial integrity.[26]

Hunting Trips and Meals from Oil Rig Companies

The evidentiary record reflects that Judge Porteous was assigned a number of cases in which two oil rig companies - Rowan Companies and Diamond Offshore - were litigants. Diamond and Rowan leased or owned hunting facilities in Texas, and both invited Judge Porteous on all-expense-paid hunting trips to their facilities. Diamond invited Judge Porteous in 2000, 2001, 2003, 2005, 2006, and 2007. The invitation from Diamond came at the suggestion of Judge Porteous's friend, attorney Richard Chopin, who frequently represented Diamond. Rowan invited Judge Porteous to attend hunting trips in 2002, 2004 and 2006. The invitation was extended by Rowan Vice-President Bill Hedrick who had met Judge Porteous on a different social hunting trip.

It is problematic for a judge to accept expense-paid hunting trips from parties in pending proceedings[27] unless the trips qualify as "social hospitality based on personal relationships," which falls outside the regulatory definition of gift.[28] In this case, however, the hospitality was provided not by a person, but by corporations. Accepting that Judge Porteous did not and could not have a "personal relationship" with an artificial entity, accepting the gift is problematic. The objective of a corporation is to make profits (or minimize losses) - not to make friends. Therefore, when a corporation is a regular party in litigation before a given judge, and that corporation extends special hospitalities to the judge on a recurring basis, it raises an unavoidable suspicion that the corporation's underlying motivation is to further its financial self-interest by currying favor. Having accepted inappropriate gifts from parties in litigation before him, disqualification was necessary. Put in terms of the language of the disqualification standard, an objective lay observer fully informed of the relevant circumstances might reasonably question the impartiality of a judge who enjoyed numerous expense-paid hunting trips courtesy of corporations that appeared regularly as parties in litigation.

[26] Model Code, terminology.

[27] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts §5 ("A judicial officer . . . shall not accept a gift from anyone who is seeking official action from or doing business with the court"); see also, Code of Conduct, Canon 5C4 (predecessor) ("A judge should not accept anything of value from anyone seeking official action from . . . the court . . except that a judge may accept a gift as permitted by the Judicial Conference gift regulations.")

[28] Regulations of the Judicial Conference of the United States Under Title III of the Ethics Reform Act of 1989 Concerning Gifts §3 ("'Gift' means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other similar item having monetary value but does not include (a) social hospitality based on personal relationships.")

Mr. SCHIFF. I thank the gentleman. Professor Amar.

TESTIMONY OF AKHIL REED AMAR, PROFESSOR, YALE LAW SCHOOL

Mr. AMAR. Thank you, Mr. Chair.

With respect, I have five points to make.

First, there is no good reason to believe that only offenses punishable under the criminal code merit impeachment. In context, a high misdemeanor is best understood as high misconduct, whether or not criminal. This is very clear from constitutional history, from the precedents established early on, from the common sense of the matter. And that is one of the reasons, by the way, that impeachment is given to a body that is not expert necessarily on criminal law technicalities. It is given to this body and the other body precisely because it is a broader, more commonsensical inquiry.

Second and related, the procedural rules applicable to ordinary criminal cases do not necessarily apply to impeachment trials. The jury, so to speak, the Senate, need not be unanimous. The recusal rules are not the ones that apply in ordinary criminal cases.

For similar reasons, in my view, the Fifth Amendment self-incrimination clause, a clause that applies to ordinary criminal cases, should not apply in all respects in an impeachment trial, which is only quasi-criminal. And the underlying reasoning here is simple. Ordinary criminal cases place the defendant's bodily liberty at risk. In a capital case, life hangs in the balance. But an impeachment defendant does not face any threat to life or limb in an impeachment proceeding even if he is being impeached for treason itself. Thus, these impeachment procedures need not be as tenderly protective of defendants because impeachment defendants face fewer punitive sanctions than ordinary criminal defendants.

And in this particular case, it is not even clear that removal from office is really punishing Judge Porteous by depriving him of anything that was ever rightfully his. Rather, removal from office simply undoes an ill-gotten gain. It ends a Federal judgeship that he should never have received in the first place and never would have received but for the falsehoods and frauds that he perpetrated while being vetted for this position here on Capitol Hill.

Third, it is a gross mistake to believe that Federal officers may be impeached only for misconduct committed while in office or, even more strictly, for misconduct that they committed in their capacity as Federal officers. This was the standard that was put forth by Judge Dennis in some of the materials you have before you, and it is a completely mistaken standard that really fatally compromises the analysis that Judge Dennis provided. The text of the Constitution has no such requirement, and structure and common sense demonstrate the absurdity of this position.

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.

This is a view, as is almost everything I am saying here, that I committed myself to in print long before these hearings; and my

written testimony contains more of the details of what I and other scholars have written before on this matter.

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.

Fourth, not all evasive or even downright false statements in the nomination and confirmation process deserve to be viewed as high misdemeanors equivalent to bribery. Here, as elsewhere, judgment is required; and the Congress, in my view, is perfectly positioned to exercise that judgment about what makes these misstatements particularly worthy of impeachment.

And in the case of Judge Porteous, as I understand the facts, here are some of the things that I would stress. He gave emphatically false statements to direct, albeit broad, questions. These emphatic falsehoods concealed gross prior misconduct as a judge in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power.

The nomination and confirmation process fraud and falsehood were part of a much larger pattern, as you have just heard, of fraud and falsehood, a pattern that began much earlier in State court and continued much later on the Federal bench as in the *Liljeberg* case. And, finally, had Judge Porteous told the truth in his confirmation process, it is absolutely inconceivable that he would have been confirmed and commissioned as a Federal judge.

Fifth, and finally, the House and Senate in this case need not worry about undoing the people's verdict on election day, a concern that does properly inform Presidential impeachment cases. Here Porteous is a judge only because the Senators themselves voted to make him one, and they did so under false pretenses. He lied to them.

This House should give the other body, which voted to place Porteous in the position of power over his fellow citizens the chance to revote and remove Porteous from power. And now that it is clear that he won that earlier position—that earlier vote by foul, fraud, falsehood, by high misdemeanor.

This isn't really harsh punishment in this case. It is simply disgorgement of wrongful gain and prevention of future foreseeable misconduct, given the gross pattern that has been demonstrated here.

In conclusion, every day that a fraudster continues to claim the title of a Federal judge and to draw his Federal salary is an affront to fellow citizens and taxpayers, to say nothing of the parties unfortunate to come before him. The mere fact that criminal prosecution of Porteous might not be warranted should not mean that he should therefore escape scrutiny and verdict of an impeachment court. I am reminded of the bank robber who managed to fool the judge into acquitting him. That is great, your Honor, the defendant blurted out. Does this mean that I can keep the money?

Thank you, Mr. Chair.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

Testimony Before the House Committee on the Judiciary Task Force to
Consider the Possible Impeachment of Judge G. Thomas Porteous, Jr.
December 15, 2009

By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I have been writing and teaching about the Constitution for a quarter century. Among other things, I have written extensively on the specific topic of impeachment. It is a solemn privilege to address this body on the weighty matter before you. In preparation for today's hearing, I have reviewed various materials presented to me by Special Impeachment Counsel Alan I. Baron. Based on these materials and my current understanding of the underlying facts, I believe that the impeachment of Judge G. Thomas Porteous, Jr. is clearly warranted, and I see no valid legal or constitutional objection to impeachment in these circumstances. I have five points to make.

First, there is no good reason to believe - no sound argument from the Constitution's specific text or general structure, no persuasive argument from the history of the Founding, no valid argument grounded in the precedents set by previous impeachment proceedings, no convincing argument from common sense or the American tradition of fair play - that only offenses punishable under the criminal code merit impeachment. As I explained in my 2005 book, *America's Constitution: A Biography*:

> In context, the words "high . . . Misdemeanors" most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal. Under the Articles of Confederation, the states mutually pledged to extradite those charged with any "high misdemeanor," and in that setting the phrase apparently meant only indictable crimes. The Constitution used the phrase in a wholly different context, in which adjudication would occur in a political body lacking general criminal jurisdiction or special criminal-law competence. Early drafts in Philadelphia had provided for impeachment in noncriminal cases of "mal-practice or neglect of duty" and more general "corruption." During the ratification process, leading Federalists hypothesized various noncriminal actions that might rise to the level of high misdemeanors warranting impeachment, such as summoning only friendly senators into special session or "giving false information to the Senate." In the First Congress, Madison contended that if a president abused his removal powers by "wanton removal of meritorious officers" he would be "impeachable . . . for such an act of mal-administration."[1] Consistent with these public expositions of the text, House members in the early 1 800s impeached a pair of judges for misbehavior on the bench

> that fell short of criminality. The Senate convicted one (John Pickering) of intoxication and indecency, and acquitted the other (Samuel Chase) of egregious bias and other judicial improprieties.[2]
>
> An impeachment standard transcending criminal-law technicalities made good structural sense. A president who ran off on a frolic in the middle of a national crisis demanding his urgent attention might break no criminal law, yet such gross dereliction of duty imperiling the national security and betraying the national trust might well rise to the level of disqualifying misconduct. (Page 200).

Second, and related, the procedural rules applicable in ordinary criminal cases do not necessarily apply to impeachment trials. For example, the Senate, sitting as a trial jury of sorts, need not be unanimous to convict, and the rules for recusal are quite different from those in an ordinary criminal trial. Also, House and Senate members may properly vote to impeach and convict even if in their minds the evidence of guilt does not rise to the level of proof beyond reasonable doubt. For similar reasons, I believe that the Fifth Amendment Self-Incrimination Clause - a clause that applies to ordinary criminal cases - should not apply in all respects to an impeachment trial, which is only quasi- criminal. Thus, reliable derivative fruits of compelled testimony should be admissible in an impeachment trial even if these fruits would ordinarily be barred from an ordinary criminal case; and perhaps even the compelled testimony itself should be admissible, as it would be admissible in a standard civil case. Also, unlike petit jurors in an ordinary criminal case involving a nontestifying defendant, Senators should be allowed to draw adverse inferences against an impeachment defendant who refuses to answer questions - as may trial jurors in a typical civil case where the defendant declines to take the stand.

The underlying reasoning here is simple. Ordinary criminal cases place the defendant's bodily liberty at risk. Indeed, in a capital case, a defendant's very life hangs in the balance. But an impeachment defendant does not face any threat to life or limb in an impeachment proceeding, even if he is being impeached for treason itself. Thus, impeachment procedures need not be as tenderly protective of defendants because impeachment defendants face fewer punitive sanctions than ordinary criminal defendants. In the case of Judge Porteous, it is not even clear that removal from office would

truly "punish" him by depriving him of anything that was ever *rightfully* his. Rather, removal from office would simply undo an ill-gotten gain, by ending a federal judgeship that he never should have received - and never would have received but for the falsehoods and frauds that he perpetrated when being vetted for this position.

Third, it is a gross mistake to believe that federal officers may be impeached only for misconduct committed while in office, or (even more strictly) only for misconduct that they committed in their capacity as federal officers.[3] The text of the Constitution contains no such requirement, and constitutional structure and common sense demonstrate the absurdity of this position. The Constitution explicitly mentions treason and bribery as impeachable offenses. Both offenses can be committed by someone prior to commencing federal office. Indeed, imagine for a moment an officer who procures his very office by bribing his way into it. By definition, the bribery here occurred prior to the commencement of officeholding, but surely this fact should not immunize the briber from impeachment and removal. Had the bribery not occurred, the person would never have been an officer in the first place. As I put the point in my 2005 book, "In the case of [an officer] who did not take bribes but gave them - paying men to vote for him - the bribery would undermine the very legitimacy of the election that brought him to office."

What is true of bribery is also true of fraud: A person who procures his judgeship by lying to the President and the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.

Fourth, not all evasive or incomplete or even downright false statements in the nomination and confirmation process deserve to be viewed as "high" misdemeanors equivalent to bribery. Here, as elsewhere, judgment is required, and the Congress is perfectly positioned to exercise that judgment. As I explained in 2005: "The House and Senate, comprising America's most distinguished and accountable

statesmen, would make the key decisions. Acting under the American people's watchful eye, these leaders would have strong incentives to set the bar at the right level. If they defined virtually anything as a 'high' misdemeanor, they and their friends would likely fail the test, which could one day return to haunt them. If, instead, they ignored plain evidence of gross [executive or judicial] malignance, the apparent political corruption and back-scratching might well disgust the voters, who could register popular outrage at the next election."

In the case of Judge Porteous, as I understand the facts, I would stress that he gave *emphatically false* answers to *direct* (albeit broad) questions; that his emphatic falsehoods concealed *gross* prior *misconduct* as a *judge* in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power; that this nomination-and-confirmation-process fraud and falsehood were part of a *much larger pattern of fraud and falsehood* that began much earlier (in state court) and continued much later (as evidenced by the frauds and falsehoods he perpetrated on counsel Mole in the *Liljeberg* case); and that had Porteous told the truth in his confirmation process it is *absolutely inconceivable* that he would have been confirmed and commissioned as a federal judge.

Fifth, the House and Senate need not worry in this case about undoing the People's verdict on Election Day - a concern that properly informs presidential impeachment cases. Here, Porteous is a judge because *the Senators themselves* voted to make him one - and they did so under false pretenses. Simply put, he lied to them. This House should give the other body, which voted to place Porteous in a position of power over his fellow citizens, the opportunity to revote and remove Porteous from power now that it is clear that he won the earlier vote by foul, fraud, and falsehood - that is, by high misdemeanor. As I suggested before, removal in this case would not be harsh punishment, but rather

would simply be disgorgement of wrongful gain and prevention of foreseeable future misconduct given the gross pattern that has been demonstrated here.

Every day that a fraudster continues to claim the title of a federal judge and to draw his federal salary is an affront to his fellow citizens and taxpayers, to say nothing of the parties unfortunate enough to come before him. The mere fact that criminal prosecution of Porteous might not be warranted should not mean that he should therefore escape the scrutiny and verdict of an impeachment court. I am reminded of the bank robber who managed to fool the judge into acquitting him. "That's great, your honor," the defendant blurted out. "Does this mean I can keep the money?"

Thank you, Mr. Chair.

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[1] *Farrand's Records*, 1:88, 230 ; 2:132, 186; *Elliot's Debates*, 3:500 (Madison); 4:126-27 (Iredell); *Annals*, 1:517 (Madison, June 17, 1789).

[2] Although it has been suggested that Judge Pickering was charged with the technical crime of blasphemy, see Raoul Berger, *Impeachment*, 60 n. (summarizing the position taken by attorney Simon Rifkind), the word "blasphemy" nowhere appeared in the articles of impeachment. *Annals*, 13:318-22 (January 4, 1804).

[3] Judge Dennis repeatedly makes this mistake and the mistake is fatal to his entire analysis. See In Re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980 (Dennis, Circuit Judge, joined by Melancon Hartfield and Brady, District Judges, concurring in part and dissenting in part) at 3 (Constitution "requires a showing that the subject judge abused or violated the constitutional judicial power entrusted to him"); id. at 22 ("impeachable high crimes and misdemeanors are limited to abuses or violations of constitutional judicial power").

Mr. SCHIFF. Thank you, Professor.
Professor Gerhardt.

TESTIMONY OF MICHAEL J. GERHARDT, PROFESSOR, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Mr. GERHARDT. Thank you, Mr. Chair. I greatly appreciate the invitation to be here. It is an honor to participate in these pro-

ceedings. It is also a great honor to participate today with my friends, Charlie Geyh and Akhil Amar.

You have my written statement, and so I will give you a much shorter version of it in these oral remarks.

At the outset, though, I want to take the liberty of reminding you that the integrity of the Federal judiciary and public confidence in the Federal judiciary are your solemn responsibility. It is the responsibility of the House of Representatives to monitor the conduct and the misconduct of those people who have been appointed to certain offices, including Federal judgeships.

In my written statement I focus on four different issues that I think are of interest to you as a Committee, and I will simply summarize those issues here.

The first has to do with the question of whether or not impeachable offenses have got to be indictable crimes, those kinds of crimes which people may, as Professor Amar was describing, lose their physical liberty.

I think the evidence on this is overwhelming. The overwhelming weight of authority is that impeachable offenses are not merely indictable crimes. The most common phrase that you find in reviewing the literature on impeachment and the history of it is the Framers and ratifiers intended impeachable offenses to be what they thought of as political crimes; and they describe these things as offenses against the State, injuries to the Republic, breaches of the public trust, abuses of power. They rarely talked about things that were actually codified as criminal offenses but instead described offenses that were not liable at law; and so I think the overwhelming weight of authority is that you need not restrict yourselves to consideration of conduct that would, if done, send somebody to prison.

The second issue has to do with whether or not somebody may be subject to impeachment conviction and removal for conduct done prior to occupying that particular position. I think this can be a difficult question, but I don't think it is a difficult question here.

As I suggest in my written statement, any egregious misconduct not disclosed prior to election or appointment to an office from which one may be impeached or removed is likely to qualify as a high crime or misdemeanor. While murder would be one obvious example of such misconduct, it is not the only example.

Another example I think is lying to or defrauding the Senate in order to be approved as a Federal judge. Such misconduct is not only serious but obviously connected to the status and responsibilities of being a Federal judge. Such misconduct plainly erodes the essential indispensable integrity without which a Federal judge is unable to do his job.

The third issue has to do with whether or not an impeachment is the same as, or should be the treated the same, as a criminal proceeding; and I think the answer to this is also very clear. Impeachment has always been understood to be a unique proceeding, sometimes described as a hybrid proceeding, a proceeding that has some things in common with civil proceedings and criminal trials, but it is unique in itself.

For one reason, it is vested in this body. The responsibility of impeachment is not given to a judge or a jury, it is given to political

authorities, people who are politically accountable. Other reasons are the unique punishments that are available in impeachment, which include removal from office and disqualification from certain privileges.

The last—and I should also say that the unique nature of an impeachment proceeding is something that thus would allow the Congress to use a different burden of proof and to use different evidence or evidentiary rules as it saw fit.

The critical thing, as Charles Black pointed out in his wonderful book on impeachment, is because it is political authorities who have been given the responsibility over impeachment, they have got the sophistication and the learning, the common sense, the know-how to deal with the kinds of matters that they have to deal with in these circumstances.

Justice Story talks about the fact that political crimes can't be delineated in a particular statute. They can't be codified. You have to learn about them on a case-by-case basis. This is precisely why a body as important and as unusual and special as the House of Representatives is vested with the authority over impeachment, because you have got the ability to make those practical, important judgments that have to be made about what counts as an impeachment and whether or not a particular case merits impeachment.

The last question has to do with whether or not we have any precedents on point—I should say whether we have any precedents directly on point. I think the short answer is probably not. But I think that has to do with more the nature of Judge Porteous's misconduct than with anything else. The fact is that we are discovering or finding in this case a pattern of misbehavior that extends over such a long period of time that it is virtually unique in the annals of impeachment. And I think in terms of this case, the outcome is pretty clear. And I think we all share the view that this is an appropriate circumstance in which you may consider the possible impeachment of a Federal judge.

Thank you.

[The prepared statement of Mr. Gerhardt follows:]

PREPARED STATEMENT OF MICHAEL J. GERHARDT

Written Statement of

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Committee on the Judiciary Task Force on the
Possible Impeachment of Judge G. Thomas Porteous, Jr.

December 15, 2009

Introduction and Overview

I appreciate the invitation to appear today before the House Committee on the Judiciary Task Force pertaining to the possible impeachment of Judge Porteous. I have long been interested in constitutional issues relating to the federal impeachment process. I have written a book and several articles on the federal impeachment process, worked as a special consultant to the National Commission on Judicial Discipline and Removal, consulted with many members of Congress on past impeachment proceedings, and testified during President Clinton's impeachment proceedings as a joint witness in the special hearing held by the House Judiciary Committee on the history of impeachment. I have also long had been interested in the quality and composition of the federal judiciary; I have, among other things, written a book and several articles on the appointments process, testified in confirmation hearings, consulted with the Senate and the White House on several judicial nominations, and served recently as Special Counsel to Senator Leahy and the Judiciary Committee on the nomination of Sonia Sotomayor to the Supreme Court. It is an honor and privilege to participate in today's hearing in my personal capacity as a constitutional law professor.

In this Statement, I focus on four issues of particular concern to the Task Force. These issues are (1) whether a federal judge may be impeached, convicted, and removed from office for misconduct that is not indictable; (2) whether a federal judge may be impeached, convicted, and removed from office for misconduct committed prior to becoming a federal judge; (3) whether an impeachment proceeding is a criminal proceeding such that it would be covered by the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council; and (4) which if any impeachment precedents are useful for guiding the Task Force's deliberations.

I have previously written about and given substantial thought to each of these questions. First, there has long been widespread consensus among impeachment scholars and members of Congress that impeachable offenses are not restricted to indictable offenses but rather are political crimes. Political crimes are injuries to the Republic and breaches of the public trust that are not restricted to either indictable offenses or only the abuses of an office's formal powers or duties. Second, any egregious misconduct not disclosed prior to election or appointment to an office from which one may be impeached and removed is likely to qualify as a "high crime or misdemeanor." While murder would be one obvious example of such misconduct, it is not the only one. Another example is lying to or defrauding the Senate in order to be approved as a federal judge. Such misconduct is not only serious but also obviously connected to the status (and responsibilities) of being a federal judge. Such misconduct plainly erodes the essential, indispensable integrity without which a federal judge is unable to do his job. Third, an impeachment proceeding is not a criminal proceeding but rather a unique, political proceeding. Thus, the current proceedings are not affected – or restricted in any way -- by Judge Porteous' immunity agreement. Last but not least, the current proceedings are not affected, or deterred, in any way by the fact that there are no precedents directly on point. The fact that the charges made against Judge Porteous are different than those made against the officials who have been impeached and convicted says much more about the extent of his misconduct than it does about anything else. In any event, the charges made against Judge Porteous have enough in common with the grounds on which two other judges were impeached, convicted, and removed.

Consequently, I do not believe that any of these issues present any reasons whatsoever to keep the Task Force from moving forward in its impeachment proceedings against Judge Porteous.

I.

I understand that one matter of interest to Task Force members is whether the scope of impeachable offenses is restricted to indictable offenses – offenses that are statutorily prohibited as felonies and that the punish for the breach of which includes a substantial loss liberty. This question is not new; both constitutional scholars and members of Congress have extensively the question throughout the history of this nation. I will not review the literature here. It should suffice to say that the overwhelming weight of authority supports construing the phrase "Treason, Bribery, or other high Crimes or Misdemeanors" in Article II is not restricted to indictable crimes.

First, the language and examples that the framers and ratifiers used to describe the scope of impeachable offenses reflect their common understanding that the terms "high Crimes or Misdemeanors" in Article II refers to what the framer's generation understood to be "political crimes." They expressed their understanding of "political crimes" through such terms or phrases as "great offences against" or injuries to the Republic," abuses of authority, and breaches of the public trust. Almost all their examples were of misdeeds that were not liable at law, such as a president's entering into an unlawful treaty that benefitted foreign but not American interests. To the framers and ratifiers, the criterion for determining whether an offense was impeachable was not whether it had been proscribed through a specific criminal statute but rather the extent and nature of its injury to the State, abuse of power, or breach of the public trust.

Second, the most prominent, post-ratification commentators agreed that the scope of impeachable offenses were not limited to indictable crimes. Alexander Hamilton, James Wilson, and Joseph Story each explained that the offenses for which people could be impeached, convicted, and removed from office were political crimes. Hamilton the constitutional grounds for removal as consisting of "those offences which proceed from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[1] Wilson referred to such offenses as "political crimes and misdemeanors,"[2] while Story opined that impeachable offenses were "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."[3] Both Hamilton and Story believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation or codification. Story emphasized that no statute would be able to codify the range of misconduct that could qualify as impeachable, because "political offences are so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impractical, if it were not almost absurd to attempt it."[4] Story suggested that subsequent generations would have to define impeachable offenses on a case-by-case basis rather than through criminal statutes.

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[1] Alexander Hamilton, Federalist No. 65, The Federalist Papers 396 (Rossiter, ed. 1961).
[2] James Wilson, 1 The Works of James Wilson 426 (McCloskey ed. 1967).
[3] Joseph Story, Commentaries on the Constitution section 788, at 256 (Nowak & Rotunda 1987).
[4] Id, section 405, at 287.

If we turn, as Story suggested, to the practice of impeachment in order to determine the kinds of offenses for which people may be impeached, convicted, and removed from office, a clear pattern emerges: Of the 16 men impeached by the House of Representatives, only five have been impeached on grounds constituting an indictable offense, and one of those was Alcee Hastings, who had been formally acquitted of bribery prior to his impeachment. The House articles of impeachment against the nine others include misconduct that did not constitute indictable offenses, at least at the time that they were approved. Of the seven men (all federal judges) actually removed from office by the Senate, four were charged with and convicted of misconduct that did not constitute any indictable offenses. These four were Judges Pickering (public drunkenness and blasphemy); West Humphreys (supporting the Confederacy and failing to fulfill his duties as a federal judge); Robert Archibald (obtaining contracts for himself from persons appearing before his court and for adjudicating cases in which he had a financial interest or received a payment – offenses that were not indictable at the time); and Halsted Ritter (bringing "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein . . ."). The other three judges who have been removed from office – Harry Claiborne, Alcee Hastings, and Walter Nixon – were each charged with indictable crimes. Hence, the pattern of convictions indicates that impeachable offenses include, but are not limited to, certain indictable crimes. The common theme in these cases is not committing felonies but rather engaging in misconduct that is incompatible with being a federal judge and depriving the judge of the integrity required in order to maintain public confidence in his continuing to exercise the powers of an Article III judge. A felony might qualify as a political crime but a political crime does not have to be a felony.

II.

Another issue of interest to the Task Force is whether a federal judge may only be impeached, convicted, and removed for abusing their official constitutional responsibilities. What follows from this argument is that no federal judge may be impeached, convicted, or removed for misconduct committed prior to becoming a judge, because such misconduct is not, after all, among his current duties or responsibilities.

To appreciate why this argument and the premise on which it rests (that federal judges are only impeachable for their abuses of official duties) are mistaken, one should consider how the Constitution treats each of the following three kinds of misconduct. The first is misconduct that is committed prior to becoming a federal judge and that is both inconsequential and unknown (or undisclosed) at the time of a judge's confirmation proceeding. The second is misconduct that is known at the time the judge is confirmed. The third is misconduct that is egregious but not known at the time of the judge's confirmation proceedings.

I believe the Constitution clearly permits impeachment in the third circumstance but not necessarily in either of the other two. In the first circumstance, we are not dealing with misconduct that is consequential or serious; it is, by definition, unimportant, innocuous, or trivial. As such, it is the kind of misbehavior (if one wants to use that term), which no one would expect a nominee to disclose or that would, if disclosed, make any difference to the outcome. Moreover, something inconsequential is not a political crime. To be sure, some judgment might be required to determine whether something is inconsequential, but I have supposed that in this first scenario everyone would agree that the misconduct is not serious enough to be a breach of

the public trust, an injury to the State, or an abuse of power. Hence, it does not matter if it is known or not at the time of the judge's confirmation.

The second kind of misconduct is likely not to be impeachable, because the proper authority – the Senate – effectively ratifies the misconduct at the time it decides to confirm the judge. It does not matter, in this scenario, whether the misconduct is serious or inconsequential because the Senate has had the opportunity to assess its magnitude and relevance to its confirmation decision. By confirming the judge, the Senate has effectively ratified the previous misconduct or signaled that it does not regard the earlier misconduct as disqualifying.

The third kind of misconduct is different than either of the first two kinds. This third kind is egregious and not known at the time of confirmation. Such misconduct is, in other words, likely to be of sufficient gravity that it is an impeachable offense. It does not matter whether the conduct has any formal relationship to a judge's specific duties; it is bad behavior that by itself demonstrates a level of moral depravity and bad judgment that it is completely incompatible with the responsibilities of a judge. If we add to the facts that the nominee lied to the Senate about this bad misconduct, then the nominee has not only done something morally reprehensible but he has also engaged in misconduct that directly undermines the integrity of the confirmation process itself.

Say, for instance, that the offense was murder – it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process. The fact that a nominee would suppress or not bring this misconduct to light to either the President who is considering his nomination or the Senate which is considering his confirmation makes the misconduct all the more reprehensible. It clearly reflects such poor judgment and complete lack of regard for the Senate that it is an offence against the State and a breach of the public trust.

My understanding is that Judge Porteous has been charged with misconduct that falls into this third circumstance, and treating such misconduct as impeachable is consistent with the language of Article II. The latter provides that an impeachable official may be impeached, convicted, and removed from an office for certain kinds of misconduct; however; it does not say *when* the misconduct must have been committed. To be sure, the framers deliberately designed the impeachment process to distinguish it from the British system in which private citizens were subject to impeachment. It seems to follow that the misconduct of a private citizen – or someone who is not an impeachable official in the federal constitutional sense – is, at the time it was done, an impeachable offense. It might even seem odd to allow the Congress to transform such misbehavior later into an impeachable offense simply because the person's status changes later. Yet, this is not odd, if we recognize that once a person becomes a federal judge, he is plainly subject to the clause, which says, quite explicitly, that he may be impeached, convicted, and removed for "Treason, Bribery, or other high Crimes or Misdemeanors." The critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function as an Article III job. In Judge Porteous' case, the Task Force does not have to be concerned about whether some misconduct committed to his becoming a judge may, on its own,

serve as an impeachable offense. For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of information that would undoubtedly have changed the outcome in his confirmation hearing. His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.

In my book on impeachment, I had considered the question of whether a judge or some other impeachable official might be impeached for misconduct committed prior to assuming his current office. I wrote that there might be some difficult cases but "it is easy to imagine instances in which impeachable offenses could be based on present misconduct consisting of fraudulent suppression or misrepresentation of prior misconduct. Particularly in cases in which an elected or confirmed official has lied or committed a serious act of wrongdoing to get into [his] present position, the misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the present officeholder entered office and the integrity of that official to remain in office."[5] I continue to stand by this analysis. Judge Porteous' misconduct fits squarely into this analysis. There is no question that his defrauding the Senate undermined the integrity of his confirmation process and deprives him of the essential, indispensable integrity that he needs in order to continue to function as a federal district judge.

III.

Another concern of the Task Force might be that the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council bars using in these proceedings any of his testimony before that body or any evidence derived from that testimony. The agreement expressly immunizes Judge Porteous from having used against him in any "criminal" proceeding either the testimony he gave to the Fifth Circuit Council or any evidence derived from such testimony. Some members of the Task Force might wonder whether an impeachment proceeding is essentially the same as a criminal proceeding and thus none of Judge Porteous' prior testimony, or any evidence derived from it, should be used in the instant impeachment proceedings.

The problem is that an impeachment proceeding is NOT the same as a criminal proceeding. In fact, the framers designed the impeachment process as a unique, political proceeding. In his classic treatise on impeachment, the late Charles Black stressed this point,[6] as do I in prior writings.

The uniqueness of an impeachment proceeding is evident in both the language and structure of the Constitution. As I suggested over a decade ago, "[The Constitution expressly limits the punishments for impeachment [and conviction] to removal and disqualification from office, punishments that are unavailable in any other proceeding in our legal system. In addition, the Constitution does not entitle the target of an impeachment the right to a jury or to counsel; the president may not pardon a person convicted by impeachment (whereas he is able to pardon any other convicted official); the federal rules of evidence do not apply in an impeachment trial;

[5] Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 108 (2d edition 2000).

[6] See Charles Black, Impeachment: A Handbook 17 (1973).

and a conviction does not require unanimous agreement among the senators sitting in judgment."[7] Other critical differences are that the case is not tried before a jury of one's peers or a judge and the burden of proof is unique. In his classic treatise on impeachment, the late Charles Black explained that the unique, "hybrid" nature of an impeachment trial required that the burden of proof be unique (and thus not be the same as the standard of beyond a reasonable doubt that is required in criminal trials).[8] Indeed, the unique structure of the Senate has made it practically impossible for it to have a uniform burden of proof; instead, the Senate has long taken the (unique) "position that each senator should follow whatever burden of proof he or she thinks is best."[9] Indeed, the Senate has never approved this conception of impeachment and, in the late 1980s, flatly rejected the argument that impeachment proceedings are the same as criminal trials. A few years later, the National Commission on Judicial Discipline and Removal reached the same conclusion that impeachment proceeding are unique, political proceedings and are not structurally, or meant to be, the same as criminal trials.

IV.

A final issue raised in the present proceedings is whether there are any prior impeachment proceedings – any precedents – that would be useful guides to the Task Force. One argument that might be made on behalf of Judge Porteous is that he should not be impeached because no one has ever before been impeached, convicted, and removed in like circumstances. But, the fact that there are no precedents directing on point is of no consequence. There is no precedent of impeaching an official for murder, but this would not, I am sure, prevent the House and the Senate from considering such misconduct to be an impeachable offense and to proceed accordingly. The fact that the House has not proceeded before against a judge on grounds similar to those on which it is proceeding against Judge Porteous says much more about the nature and extent of his misconduct than it does about anything else. To refrain from acting would create a precedent that would be bad for the Congress and for the federal judiciary, since it would not only suggest a permissible level of corruption for federal judges but also provide an incentive for judicial nominees to refrain from disclosing bad behavior to the Senate.

Nevertheless, there are two impeachments that have some things in common with the instant case. In the first, the House impeached and the Senate convicted and removed Robert Archibald from office because of misconduct he had committed as a member of the Commerce Court whole he was serving as a judge on the Third Circuit. As David Kyvig explains in his important, recent treatise on impeachment, "None of the judge's conduct, if carried out by a private businessman, would have been indictable, but his use of judicial influence for personal gain provoked outrage. Among other things, Archibald had written letters on Commerce Court stationary encouraging the sale or lease of property on favorable terms to third parties who, in turn, rewarded the judge, their silent partner. In another instance, Archibald clandestinely corresponded with an appellant's attorney in a railroad case before his court, asked the lawyer for his opinion on the case, and then supported the successful appeal, all of which violated judicial ethics."[10] As Professor Charles Geyh suggests in his testimony to the Task Force, Judge

[7] Gerhardt, supra note 5, at 112.
[8] See Black, supra note 6, at 17.
[9] Gerhardt, supra note 5, at 113.
[10] David E. Kyvig, The Age of Impeachment: American Constitutional Culture since 1960 31 (2008).

Mr. SCHIFF. Professors, thank you very much for your testimony. I am going to start with a few questions, and then hand it off to my colleagues for their questions.

I want to ask you a very narrow question. You have all testified to the effect that conduct that takes place before someone is on the

Federal bench may be considered in determining whether an impeachment is warranted. In part, it may depend on whether the Senate was—I think, Professor Amar, in your written testimony you said whether the Senate was aware of the conduct, for example, or whether there was some kind of a fraud on the Senate.

The Senate, in the background interviews conducted through the FBI or in questionnaires or in testimony obviously can't ask a specific question, did you receive kickbacks from attorneys while you were on the State bench, because they don't know the conduct specifically to ask about, so they generally ask fairly general questions. I would like to acquaint you with some of the questions that were asked of the judge and ask you whether there was an affirmative obligation to disclose such that the failure to disclose would be considered a fraud on the Senate.

In the FBI background interview, the FBI agent reports Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment, or discretion.

Similarly, there was a question in one of the Senate questionnaires which said: "Please advise the Committee of any unfavorable information that may affect your nomination," and the judge's answer was: "To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination."

Similarly there was another question: "Is there anything in your background that, if it came out, could embarrass the President?"

Were these questions sufficient to raise an obligation of disclosure on the part of the judge such that the failure to disclose either the relationship with the bail bondsman or the kickback relationship with the attorneys would in your view constitute a fraud on the Senate sufficient to warrant his impeachment?

Mr. GERHARDT. I suspect we are all in accord on this. I think the answer is overwhelmingly yes.

I think that this is actually not a hard case, Mr. Chair. The fact is that, to begin with, you can use your common sense to simply look at the questions that were asked and look at the kind of misbehavior, the kind of conduct that wasn't disclosed, and understand that that is exactly the kind of thing the Senate would have wanted to know.

In fact, the behavior here isn't just accidental. It is not one or two circumstances. It is a pattern of misconduct that suggests a level of intent that is disturbing. And I suspect that it is exactly the kind of thing the President would have wanted to know, and it is also the kind of thing the Senate would have wanted to know. And I think the failure to disclose is an affront to both the President's nominating authority and Senate's confirmation responsibility.

I might just go one step further, if I may. I have actually thought about that question a lot, Mr. Chair. And I keep come back to the same thing. I think, what do I tell my students? We have the responsibility of educating law students. And if they are faced with a question like this and you don't impeach, they get the message that there is a level of corruption that is permissible, that there is a level of disclosure they don't have to make to accountable bodies.

The fact is that common sense suggests that there should have been disclosure. The very fact that these things weren't disclosed I think suggests, again, a disturbing level of intent but also a refusal to do something I think that is plainly required by those questions.

For example, would this information negatively impact the character of this judge? It is more than obvious the answer to that is yes. And the same would follow with every other part of that standard or that question that you mentioned.

And so I would like to tell my students that there is not a minimal level of corruption that is allowable for people to be a Federal judge. They are going to be applying for jobs and things like that. They are going to be asked questions like this. And in those circumstances they will have an affirmative duty to disclose anything along these lines. The same should be held true for people who hold high office, including Federal judgeships.

Mr. AMAR. I agree with everything that my friend has said, and I would add a few additional points.

First, I think one could take the position that mere affirmative—excuse me, the mere failure to disclose something like this is itself impeachable just because it is such serious information that is being withheld. But you don't need to go that far, because here there actually are misrepresentations, lies. There are questions that are broad, but there are questions, and he actually gave false answers to them where I think he actually was under an affirmative obligation to disclose. But you don't even need to go that far.

Second, again, we are not talking here about criminal prosecution. There are criminal cases with Federal District Court opinions where questions were asked of comparable breadth and people actually didn't quite tell the whole truth. We just all took oaths to tell not just the truth but the whole truth. And there are criminal prosecutions that are going forward, in the Kerik case and other cases, where there was a comparable misrepresentation.

Here, though, it is so much easier, it seems to me, because we are not talking about putting him in jail, we are talking about withdrawing the very position that he wrongfully got through these lies and that he never would have gotten had he been truthful, had he told the whole truth, as was his obligation.

Third, yes, the questions were broad, partly because it is impolite to be more specific, especially without any basis for this, but everyone knows what is actually at the core of the question. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery.

And what he lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone. There is a pattern. And to the extent that you are even just focusing on his misrepresentations and lies and fraud before the Senate, don't give him the benefit of the doubt, because even—because it is part of a larger pattern.

So I don't think—the hearings, Michael is absolutely right, it would really be unfortunate if you had to ask specific questions of a green eggs and ham variety. Were you a crook in a box? Were

you a crook with a fox? Were you a crook in the rain? On a train? You know, we know what those questions at their core was about, and he lied at the core. There is vagueness at the periphery, but this was really central.

Mr. SCHIFF. Professor, let me refine my question a little further if we could. We don't always have the opportunity to—this is a former law student's revenge here, being able to question the professors with hypotheticals nonetheless.

We have conduct here that occurred both prior to Judge Porteous being on the Federal bench, conduct that in many cases bleeds into while he is on the Federal bench, a continuation of relationships and the corrupt relationships, and then we have the false statements to the Senate. But let me ask you a narrow question. Let's say that all we had were misconduct of the nature that you have become familiar with that pre-dated his service on the Federal bench, wasn't within the knowledge of the Senate. But let's remove the affirmative duty to disclose and the questions of the Senate, and let's just focus on the conduct that took place before he was on the Federal bench. Do you believe that conduct in and of itself would be a basis for impeachment? Is there ample precedent or any precedent that conduct that solely predates the Federal bench in and of itself is a sufficient basis to impeach?

Mr. AMAR. His concealment of this—if he had told everyone about it and been confirmed anyway, then in effect there is a kind of res judicata in the Senate itself that, having been given the facts and fairly adjudicating whether they want this person to hold office, but when he withholds that information from the Senate, even if he had never been asked a direct albeit broad question, there is a certain kind of concealment that was in his own—you know, he was the master of his own fate. He could have made different choices. He could have come forward, but he concealed it. And that undercuts his ability to be a judge.

Anyone who comes forward just knows now once these facts come to light, you know, how is any litigant, how is any lawyer going to be able to feel that this person is a fair and honest, impartial—is not selling justice?

And all he had to do in the *Liljeberg* case, for example, was recuse himself. All he had to do here, if he doesn't want all this to come to light, is just not allow his name to go forward. But he did. And by allowing his name to go forward, I think he actually then was under a certain duty not to conceal this stuff. It is a kind of obstruction. And when he insists on hearing the *Liljeberg* case rather than simply recusing himself, he had easy outs actually if he wanted to keep this in the deep past.

Mr. SCHIFF. Let me ask you, if I could—I have two more questions, and I am already over my time, but maybe you could start with one of them.

One is, I would like to get your thoughts on the bankruptcy issues. If you assume the facts are that the judge filed a bankruptcy petition in a false name, did so on the advice of his counsel, corrected the false statement a couple weeks later or some weeks later, then during the bankruptcy violated the bankruptcy court's order by incurring additional debt by borrowing money, markers at

casinos, by taking out another credit card, are those allegations sufficient for an article of impeachment?

Mr. GERHARDT. If I may, I think the answer to both of your questions is yes.

We should keep in mind that a Federal judge is a public symbol of the law. And in the circumstances in which we have got—the circumstances that we have got, we can look at that past behavior and, as it comes to light, if we are talking about the first example you gave, that is clearly the kind of behavior which undermines his ability to maintain that position of being a public symbol of the law.

Say somebody is a Federal judge and was a war hero, and then it turns out that later it is disclosed he was guilty of all sorts of war crimes. I think that is a circumstance in which you could probably say, look, that clearly undermines his integrity and the symbol, the confidence people would have in him because it changes your view of him. It changes your understanding of his moral, in a sense, qualities or qualifications to be a judge.

In terms of the last—the second example you gave, I think the answer to that is going to be yes as well, because I think that in a circumstance like that, again, it is not just that it fits into a pattern of failing to follow the law or to do the right thing, it also reflects a level of disdain for the law that I think is just simply incompatible with being a Federal judge.

Mr. SCHIFF. Professor Geyh, you want to have the last word on these issues?

Mr. GEYH. Sure. Really two follow-up points, one to a point that Akhil made before. I think that even if we take the confirmation proceedings out of the equation and simply focus on his behavior as a State court judge, I think, you know, accept the hypothetical, for example, that a judge is discovered while a State judge to have committed serial murder—to me, no one in their right mind would suggest that that wouldn't be disqualifying of Federal service simply because it had occurred while he was a State court judge. From there you simply have to ask yourself whether the conduct as a State judge is sufficiently egregious to rise to an impeachable standard.

And I would call your attention to Mike's point that we are really talking here about a political crime in which the focal point is whether this judge has violated the public trust. And, to me, a quid pro quo arrangement with bail bondsmen, accepting kickbacks for curatorships, is the kind of corruption that fairly may be characterized as a violation of the public trust. Who cares if it occurred before?

And if you are looking for precedent, in my line of work, in States all over the country it is quite common for a judge to be subject to disciplinary proceedings, which can include removal, for conduct that they engaged in not just when they were a judge in the current term, but in a previous term, in a previous incarnation as a judge of a different sort, and when they were in private practice. So, to me, I am quite comfortable with that notion.

As to the bankruptcy point, whether it is impeachable, it just seems to me that if a judge is not going to take the law seriously, first by filing under a false name and then by going so far as to

essentially flout orders of the Court in that proceeding, that strikes me as the kind of behavior that this Committee is well within its rights to think of as the kind of behavior that violates that public trust, which is the operative standard for defining a impeachable crime or misdemeanor.

Mr. SCHIFF. Thank you.

Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Let me ask each of you to take us briefly through the meaning, in your view, of the phrase "treason, bribery, and other high crimes or misdemeanors"—if I am quoting that correctly—"treason, bribery, and other crimes and misdemeanors against the United States".

What does that mean, particularly high crimes and misdemeanors? Is that, as some have argued, former President Ford when he was in the House of Representatives maintained that an impeachable offense was whatever Congress said it was? Do you agree with that?

Mr. AMAR. With respect, no. He is a graduate of my law school, his portrait hangs right below my office and a great man, and he might have had a different view once he became President of the United States.

And the reason—and Michael's book is very good on just that question. A person—here is why it is clear that that can't be the standard. Imagine a President who vetoes a bill in good faith because he thinks it is bad for the country. That could never be the basis of an impeachment. A good-faith—no bribe, no—because if it were, it would undermine the very structure of the Constitution. In order to overturn the veto, you need two-thirds of the House and two-thirds of the Senate. In order to impeach the vetoer, you only need a majority of the House and two-thirds the Senate. And it can never be the case that you could basically get around the veto override provisions by impeaching the person merely because you disagreed with the veto.

Mr. GOODLATTE. I hear you.

So now take it to the next step, which is, if it is not that, what is high crimes and misdemeanors?

Mr. AMAR. It is not criminal on the other side. And that has been very well established, as Michael's book and others show. I think really almost all the experts are of that view. So this is pretty easy, because this is akin to bribing your way into office. So that is a pretty easy thing, whether criminal or not.

I used an example borrowed from Charles Black, who you have heard invoked. I will just mention it, because I want you to know that I wrote this in 2005, just because it might have a certain contemporary resonance. An impeachment standard transcending criminal law technicalities made good structural sense. A President who ran off on a frolic in the middle of a national crisis demanding his urgent attention might break no criminal law, yet such gross dereliction of duty imperiling the national security and betraying the national trust might well rise to the level of disqualifying misconduct.

I mention that just because again this is before anything happened in South Carolina and all the rest. It is 2005. But it is non-

criminal, but it is basically gross dereliction of duty, a betrayal of the public trust.

Mr. SCHIFF. You didn't mention Argentina in your——

Mr. AMAR. Charles Black actually in this book instead talks about going off to Saudi Arabia to have four wives, actually, and says that is an impeachable offense. I am not making that up.

Mr. GOODLATTE. Professor Gerhardt?

Mr. GERHARDT. I agree with everything Professor Amar has said, including South Carolina. No. I am from North Carolina. I am quite fond of South Carolina, I should add.

What I want to just amplify is the fact that there has been so much effort to understand those words that you have asked about. What do these words "high crimes or misdemeanors" mean? And I think we have settled on a pretty widespread consensus that they refer to what I was talking about earlier as political crimes.

And if you read the Constitution convention, ratification convention, the people supporting the Constitution are using the same phrases over and over again. They are talking about crimes against or injuries to the Republic, offenses against the Republic. They are talking about breaches of the public trust, abuse of power.

The one thing that is also helping to explain why they are using all those phrases is they didn't want to tie it down. They didn't want it to be anchored down to some kind of codification, because they knew that it had to adapt to circumstances as they arose. And that is precisely what we have learned over time in this country, that the Congress develops a common law of impeachment, so to speak, that it deals with one case at a time, and it deals with each case on its merits.

The fact that we don't have anything on all fours with this current case is of no real importance or consequence. What is important is that, as Professor Amar and Professor Geyh were pointing out, you have a pattern of misbehavior here which I think undermines the ability to function as a Federal judge. It robs the person of all the qualities and all the qualifications they need to function as a Federal judge. That would seem to fit very neatly into what the Framers meant by that phrase.

Mr. GOODLATTE. Professor Geyh?

Mr. GEYH. I am kind of reminded of a line from Forrest Gump: Stupid is as stupid does. And I think in this case impeachment is as impeachment does.

And one of the things that I would add to the mix—and I should say there is a self-interested aspect to this. When academics write, they worry that, apart from their mother, no one reads their work, so this is an exciting opportunity.

But one of the things that I looked at in the impeachment context was to look not just at the 13 formal impeachments but the 80 investigations that have gone forward, many of them culminating in resignation of the affected judge, which to me means something. And I think it is useful to note that the kinds of behavior over time that have resulted in impeachment inquiries culminating in resignation include things like favoritism, like abuse of administrative power, like grossly intemperate behavior, abuse of office resources, and so on. So that there really is a little bit more precedent there. It is not binding, and it is not really as complete

in the sense that we didn't see it through to completion, but it is not irrelevant in trying to get a feel for what an impeachable crime and misdemeanor means.

Mr. AMAR. And the very first impeachment resulting in a conviction of a Federal judge is of Judge Pickering, and he violated no criminal law, but he was——

Mr. GOODLATTE. I think we are sold on that point.

Mr. AMAR. And convicted of intoxication and indecency on the bench and abusing power.

Mr. GOODLATTE. Thank you.

Let me ask another question, and we will start with Professor Gerhardt.

In evaluating Judge Porteous'spre-Federal bench conduct, what is the significance of the fact that the conduct at issue with Judge Porteous involved acts taken as a State judge in his judicial capacity? Would that be more important than, for example, other private misconduct he might have taken prior to ascending the Federal bench?

Mr. GERHARDT. I think the basic answer is going to be yes, but I think this is an area where you can't come up with hard-and-fast rules. But I think the fact that he was a State judge, a job, a position, as Professor Amar has suggested, that is quite analogous to the one he was about to get in the Federal system is one in which you could sort of find very good evidence as to whether or not he has the qualities that we expect a Federal judge not just to have but to maintain. So we could look to that past behavior as a State court judge and ask, to what extent is he behaving in this job in the way in which we would expect a Federal judge to behave?

That is precisely why the Senate would have wanted to know this. It is precisely why the President would have wanted to know it. And it is quite significant—and nobody probably knows this better than Judge Porteous—had he told the President about this, of course, he wouldn't have been nominated. Had he told the Senate about this, of course, he wouldn't have been confirmed. That tells you something.

Mr. GOODLATTE. If no one has any disagreement with that, let me go on to another question. Did it amount to a fraud on the Senate in his failing to disclose his prior conduct?

Mr. GERHARDT. In a word, yes.

Mr. GOODLATTE. Yes? We all agree with that?

Did his failure to disclose his prior conduct prohibit the President and the Senate from effectively exercising their constitutional duties to vet him? I think you just answered that in the affirmative.

Mr. GERHARDT. I will state it out loud. Yes, sir.

Mr. GOODLATTE. Yeah, you may want to——

Mr. AMAR. Yes.

Mr. GEYH. Yes.

Mr. AMAR. And just on that one earlier point about misconduct as a State judge, that is why he is being basically nominated. So the fact that he was a State judge is absolutely essential to his being a Federal judge today.

Mr. GOODLATTE. You have earlier commented on Judge Dennis"s dissent in the Fifth Judicial Circuit Council opinion. And Judge Winters in his response to that dissent stated that the fifth circuit

dissenters tend to view each of Judge Porteous'sacts and the applicable rules in isolation from the others. Judge Winters wrote that the better way of looking at that conduct was the various acts must be viewed as a whole and the applicable laws and canons as a coordinated scheme.

Think through for the Committee here, if you would, how you would approach articles of impeachment. Would you have one catch-all article of impeachment? Would you have several articles of impeachment addressing each of these areas of conduct? Professor Geyh?

Mr. GEYH. Certainly you can have both. It seems to me that you are well within your rights to identify the *Liljeberg* scenario, the bankruptcy scenario, the bail bondsman scenario as free-standing, impeachment-worthy events and still have an omnibus provision which, in at least one impeachment, won the day.

And from an ethics perspective it seems to me that, you know, courts everywhere look at discrete misbehavior in isolation fundamentally different than they do patterns of conduct and to disregard that fundamental point is to miss the point.

What would make a potentially difficult case, if you view it each in isolation, becomes an easy case when you look at the behavior in composite.

Mr. AMAR. There are two kinds of patterns. My colleague, Ralph Winter, talks about how the disclosure requirements and the recusal rules and the rules about not taking cash—not taking favors from parties sort of all fits together in a part of one reinforcing scheme. I think it is a beautiful refutation of Judge Dennis. So that is one kind of pattern within a transaction in, say, *Liljeberg*.

But then there is the chronological pattern across the years. And, at the very least, when looking at the misrepresentations, it does suggest you shouldn't give, as fact finders, the benefit of the doubt to Judge Porteous because there is a pattern, and he has abused any rights to have you give him the benefit of the doubt. That he shades the thing in *Liljeberg* by sort of being very misleading and false in his answers to Counsel Mole and does the same thing in the bankruptcy proceeding and does the same thing—and so as fact finders, you are I think entitled to draw inferences and see the pattern.

And I agree with Professor Geyh that if there were a criminal analogy here, it would be RICO. It would be a continuing criminal enterprise in which there is I think you said a whole greater than the sum of the parts. So I think you could do belt and suspenders, the individual counts and a catch-all count.

Mr. GOODLATTE. Professor Gerhardt?

Mr. GERHARDT. And I certainly agree with that.

I mean, just to reinforce what each of my colleagues have just said, I think—you could, I think, has an individual article that focuses on each episode of misconduct, but there is also the fact that they are not isolated from each other. They are not isolated from each other either in fact or in significance. It is particularly when you pull them together that you find that it is the same kind of misconduct over time. It is the same refusal to disclose, the same intent to hide, to defraud. In one case, it is bankruptcy; in another case, it is the Presidential nominating authority; in another case,

it is the Senate confirmation authority. There is a pattern here, and that pattern is not good for the Federal judiciary.

Mr. GOODLATTE. Thank you. Thank you, Mr. Chairman.

Mr. SCHIFF. Thank the gentleman.

He yields back. Who seeks recognition? Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I have one question that I would like to pose to all three of the gentlemen, and thank you for your testimony. Professor Gerhardt, it seems that we have been in this setting before.

Mr. GERHARDT. Yes, ma'am.

Ms. JACKSON LEE. And thank you. And it is good to see you again.

There is some question about the Justice Department's decision not to proceed in any prosecution, or at least has not made a determination of the individual before us, Judge Porteous. And I would ask the three of you your interpretation of how we should be impacted by the fact that the Justice Department has not moved forward on the case. Professor, and if the three of you could answer that, I would appreciate it.

Mr. GERHARDT. I think it has no impact. I think it is of no real consequence.

As I mentioned earlier, this is not a criminal proceeding; and so the charge that the House has got is very different than the charge that a prosecutor has got. The burden of proof is very different, the judgment is different, and so you have the power to consider the evidence under whatever burden you think is appropriate. And you wouldn't be bound in any event by what the Justice Department did, even if it sought a conviction. And the important thing I think is to make an independent judgment. And so the Constitution allows that, I think expects that. And so I don't think the failure of the Justice Department to do anything is of—any real consequence.

Ms. JACKSON LEE. Thank you.

Professor Amar?

Mr. AMAR. Here are a few additional reasons I think for Michael's bottom line, which I share.

Several of the counts here are themselves not criminal offenses, so of course they wouldn't have been ruled on by the Justice Department, but they are very clear cases, episodes for impeachment. Here all that is being done is removing a position that the judge never should have had in the first place. It is not like putting someone in prison, taking away their very life. It is not even retributive. It is just preventative of future wrongdoing and restorative in a way. He should never have had this position in the first place.

Now, if you were persuaded that on the facts of some of these other transactions he actually was not guilty of anything, well, that, of course, would bear on your judgment. If you actually had some findings, which I don't think we do have, in his favor, made by some investigator that certain witnesses were not reliable, well, then that might actually very much influence your view of those episodes and to that extent perhaps your view of the whole pattern and credibility and all the rest.

Mr. GEYH. Same point as Akhil just made. It just seems to me that there are lots of reasons for not prosecuting someone. Some of them will exonerate the person involved, and that makes a big dif-

ference. Some of them are the statute of limitations just ran out, which has very little to do with whether he engaged in the underlying conduct. And, as an ethical matter, it may affect whether he technically violated the law. I don't think it should, but it doesn't affect the fact that he engaged in a serious impropriety, and the only reason he hasn't been subjected to criminal conduct is they have limited resources or they have made a discretionary call.

It seems to me that this body still has a responsibility to step up in those situations where you conclude that theunderlying conduct was unacceptable, regardless of whether another branch of government chose to prosecute.

Ms. JACKSON LEE. Very quickly, and I think my Chairman asked this question earlier, and I have been asking this question. In the 1994 application for Judge Porteous for a Federal bench, there was that famous sentence that says, is there anything that you need to share with the President that would be embarrassing? And I don't know if it was slash embarrassing or some other word. And I've asked this question before, and I would like the scholars to answer in as brief as possible, that very answer of "no," how do you couch that in terms of both our work, and I know I think I heard you say the Senate needed to have information, but was there a consciousness of thought? Was this person thinking that those were my personal matters that I gambled or stretched the relationships with bail bondsmen? What does that no mean to you.

Mr. GERHARDT. That "no" is quite problematic. And I would analyze it two different ways. I mean, the first is I do think there's an obligation to answer that question and to answer it honestly. And the honest answer would be forthcoming with information.

And there's no secret about what that question is seeking. Common sense alone I think would suggest to us what's the kind of information that ought to be revealed.

But I might just go one step further. But all of us have studied the process of judicial appointments. And the other thing to keep in mind is that question gets asked not just in writing, but it's going to get asked in person, over the phone. It's going to get asked more than once in the process of being considered for nomination. So even if it doesn't show up in a form like that, there's a problem, and there's a failure to disclose. This just makes it all the more problematic because there's a formal requirement, and the failure to answer is clear evidence of the defrauding of the Senate in this circumstance.

Mr. AMAR. And it's not—the "no" covered up not just mere private failings; you know, back in the third grade, I dipped Suzie's pigtails in an ink well. This isn't just private; it's misconduct as a judge. It's taking cash in envelopes from lawyers who have cases before you. And the only reason—and don't be too tender. He was not in some trap here. All he has to do is simply say, I do not wish to be considered for this position. This is not like some independent council going after you, and now you're in a kind of a perjury trap or anything like that where there's the "exculpatory no" doctrine, which the Supreme Court has rejected by the way. It's nothing like that at all.

If you don't want to put yourself in an awkward position, don't put yourself forward in this way. And he did more than merely con-

ceal. He lied. There was a pretty direct question. At the heart of the question is, are you an honest government official? Because you're being asked now to—you're asking us to give you position as an even more powerful government official. That's at the heart of the question. It's not some peripheral thing. And he just straight out lied.

Mr. GEYH. It bears emphasis that the kind of conduct we're talking about is not simply private behavior here. This is a judge who stands accused of taking kickbacks from curatorships he's appointing to friends. This is a judge who is accused of engaging in quid pro quo relationships with bail bondsmen. If those events did not trigger a yes response to that question, you know, in all innocence, I didn't think that's what you meant, the man has no moral compass whatsoever. I mean, it just seems to me it's very difficult to conceive that someone asked that question would not recognize that these are the kinds of events for which answers are sought and to step away from the process.

Mr. GERHARDT. If I may, I just want to add one thing that simply reinforces what's been said.

Just imagine what happens if you don't act here. What kind of precedent does that set? It says to people that you may take this road in the nomination process and confirmation process. That is to say, you may undermine the integrity of those processes because it's okay; that's a level of corruption we can tolerate. It seems to me that the answer here is quite clear: That's not a level of corruption we should tolerate.

Ms. JACKSON LEE. Chairman, thank you.

And I thank the witnesses for the clarity in their answers.

And I would simply say, Mr. Chairman, as I yield back to you that this seat that I hold in the 18th Congressional District for some reason seems to find its way along this pathway. My predecessor Barbara Jordan was in the Nixon impeachment, and I certainly didn't imagining that I would be participating in one in the 1990's.

And I sought the answers for clarity because people may not understand the impeachment proceeding in the 1990's blurred a lot of answers and questions. And some would make the point, well, no one has prosecuted in this instance, and so what is the basis of your moving forward. And I think the clarity of what levels of integrity and responsibility one has, the handling of Federal documents is important because we have to make deliberative decisions and not take this very high act of government lightly.

And I think it's important as we do this in a studious and deliberative way, and I thank the Chairman and the Ranking Member for presenting this to us in this manner.

I yield back and thank you.

Mr. SCHIFF. The gentlewoman yields back, and I thank the gentlewoman.

And I just mention to the professors, in terms of the fact pattern that we've asked you to analyze, along the lines of what you've been describing, we had testimony I think last week from one of the bail bonds people that when he asked the judge to set aside a conviction of one of his employees, the judge indicated that he would only do so after his confirmation, so prior to taking the

bench but after confirmation, which I think indicates a knowledge that these things could have affected and indeed would have affected his confirmation process.

Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I heard someone say earlier today on the panel that, or indicate on the panel, that an impeached and convicted judge loses certain benefits that he would otherwise, he or she would otherwise be entitled to. Can you follow up on that?

Mr. GERHARDT. Well, as you know, there are two sanctions available. One is removal from office. The other is disqualification, which would affect the benefits. So it would only be if the House chose to use both sanctions that in fact it would result in the circumstance you describe.

Mr. JOHNSON. Disqualification, can you go into that?

Mr. GERHARDT. There have been two people in the history of this country who have been both removed from office and disqualified. Essentially these two punishments or these two sanctions are among the things that make impeachment unique. No other body in a sense has the power to do those things, to remove somebody from office or to go further to disqualify them from certain pensions, certain benefits and also perhaps from the opportunity to serve again in the Federal Government. The choice as to which sanction should be used, one or both, is up to the House.

Mr. AMAR. So with respect—in the case of Judges Archibald and Humphreys, I'm actually reading from Professor Gerhardt's book, the Senate imposed not just the automatic verdict upon guilt of removal from office but basically said these two people are forever disqualified from ever again holding a public office. You know, so they're basically ineligible to be appointed by a later President and confirmed by a later Senate. Their impeachment verdict bars them from, disqualifies them from public office holding, which actually is not to be equated with a Membership in the House or Senate. Those aren't Federal officerships, and so that's a different situation. You are still constitutionally eligible to serve as a Representative Or Senator, but you're disqualified to hold a future office if the Senate so determines at the end of its process.

When it pronounces guilt, it has the choice of just simple removal or removal plus disqualification. It can't go further than that. It can't throw you in jail. It can't chop off your head. The power of an impeachment court is limited to removal and disqualification.

Mr. JOHNSON. Thank you. No further questions.

I yield back.

Mr. SCHIFF. I thank the gentleman.

Can I just, Mr. Gonzalez, if I can just follow up with a question, because my understanding, Professor, and correct me if I'm wrong, is that the disqualification goes to whether they can hold further offices, but that upon impeachment without disqualification but just the impeachment itself, you lose the pension, et cetera, that goes with the job. That was my understanding.

Mr. GERHARDT. I think that that's probably right, though I suspect Professor Geyh would know that better than I.

I'm sorry Charlie, but I think there are requirements, obviously, for meriting the pension, but I would have to look more specifically

at the particular requirements to really be sure whether you would actually lose those benefits just upon removal.

Mr. SCHIFF. Thank you.

Mr. Gonzalez.

Oh, I'm sorry, Professor Amar.

Mr. AMAR. To the extent that Professor Geyh mentioned that there are lots of previous precedents of people resigning during the impeachment investigation process, and I believe maybe in the case of Kent, that that happened recently. And to the extent that Judge Porteous, the pattern here suggests that, well, he's a gambler; maybe he thinks he's just gambling with House money here. He's got nothing else to lose. The criminal prosecution is off the table. He's taken up a lot of taxpayer time and money, and your valuable time.

So I might take the position that if he were impeached and removed, I would be very interested in whether there could be any clawback under civil statutes in a proceeding instituted by the Justice Department—I haven't investigated and researched this—about basically all the money that he was paid as a Federal judge, you see really he didn't deserve it. He should never have been a Federal judge from day one. And this is part of the ill-gotten gain of his fraud.

And if an impeachment court were to rule in an impeachment verdict that his very acquisition of the office was fraudulent, not just pension and future payments, but maybe even past things might be on the table. And that might actually create—I mean, it's just an interesting thing to think about just in terms of plea bargaining, so to speak, and inducing resignation.

Mr. SCHIFF. Thank you, Professor.

Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

And thanks to the witnesses. It's been very informative, and we appreciate your testimony today.

You've been called here in the instant case, but, obviously, what your testimony today and what we do may be looked upon by different witnesses prospectively, as you have referred to what has transpired in previous impeachment proceedings. So my question, even though it relates to the instant case, obviously has application I assume in the future depending what this Committee and what the House and then what the Senate would do if we move in a certain direction.

In the broader sense, you are really looking at separation of powers. And it's a very unique situation, and I think we have to be very careful when we proceed. In this particular case, I mean, there are so many instances that we could move forward on and such. And I think you were pointing out, you can do it very generally. You can also have it very specifically and so on.

Something that has concerned me during this discussion is: What was the Senate privy to? How much did the Senate know? Now, in this case, I mean, there's so much going on that you can probably make a representation that the Senate was not aware of, never was able to inquire. But is the Senate really restricted as to the type of questions and inquiry that can be made during the confirmation process? My memory serves me that many things are discussed, as-

sociations with individuals, associations with organizations, to the point where you can determine whether someone may even be a racist.

So I'm just going to add, the first question is: What are the limits of a Senate confirmation? To what extent can we rely that, to some degree, questions were made, and maybe not in this particular case as to all of the allegations, but some? That's the first question. The second one is: At what point do we quit looking backwards? If a judge is on the Federal bench for 10, 15 years and something is discovered: How far back do you go?

Because the ultimate question, and this is the third one, have you ever had impeachment proceedings and trial predicated more on a political basis than what I would refer to as something less than political in nature? As I said, if you look at the potential, what could occur—not that it has occurred, but the potential it could occur—and especially in modern times, could you have something that is completely politically motivated? Because I mean you see this happening today, maybe not in impeachment proceedings, and the danger that that would pose? And would it be preferable to be as narrow and specific as possible so that there's not a broad interpretation that could be misused/misinterpreted in the future?

Mr. GERHARDT. Those are great questions, and I will try to answer them as briefly as possible. I think the short answer to the last question, I think, is it probably is a good idea to be narrow to try to deal with the case in front of you, not to worry about the next case. That's how the common law typically or often evolves, and that's how impeachment itself has evolved over time.

But in terms of the specific questions, first of all, what did the Senate know? I'm pretty confident they didn't know anything about this.

I also know from personal experience having worked in the Senate side, while I'm here today in my personal capacity, that there is voluminous disclosure requirements. The fact that this information wasn't found suggests that someone wanted it to be hidden. And that in itself, as I've said before, is disturbing.

The Senate tries to be as thorough as possible. And their questions are designed, as Professor Amar and Professor Geyh have suggested, to try and elicit as much information as they can about somebody's character, about their integrity, to be able to serve and to be fit to serve as a Federal judge.

I don't think the Senate knew this information. I'm confident had the Senate known it, it would not have done what it did.

The second question is how far do you—when do you stop looking backwards? I can't answer that question. I think the evidence is, in a sense, what it is. You're in a better position to make a determination about when, in a sense, you found enough. The very fact that you feel like there's a morass out there of evidence or swamp of it is itself rather disturbing and, again, tells you something about the nature of this case.

And the last question is the concern about a purely politically motivated impeachment. That's precisely why the Framers designed the process the way they did. They divided impeachment authority between the House and the Senate. They required a majority in the House, a super majority in the Senate. And that was

purposeful, because they wanted to make it difficult. They wanted to ensure at the end of the day, if there were a removal, it would likely consist of a bipartisan consensus. In order to get two-thirds in the Senate, you would have to reach that point; you couldn't just do it on party lines.

The Framers understood that. So they were trying to create a process that was both fair and thorough, and there are various safeguards along the way, including the division of authority between the House and the Senate.

Mr. AMAR. On the three questions, on the issue—just to begin at the end, yes, I think it's wonderful if this doesn't—if impeachment process is not political. And I think Professor Gerhardt just nailed it; the best way to do that is to be bipartisan. And I haven't sensed as a witness any whiff of any kind of partisanship in this. And I think if the impeachment managers who go forward reflect both political parties, that will be evidence to the country that this is not a political thing. It's not left, right, Republican, Democrat.

I share the—on the second, about sort of when is the past buried, here we have ongoing and affirmative concealments. The past is reemerging—the State court passed in the *Liljeberg* case on the Federal bench—and so there's a kind of ongoing concealment that's relevant to one's duties as a Federal judge. And so the past really doesn't stayed buried when you're basically committing ongoing misconduct analogous to obstruction, a covering up past misdeeds.

So it's not quite like Jean Valjean and having stolen a loaf of bread a long time ago and having led a wonderful life in between, and then somehow it comes back to haunt you.

On the most narrow basis for impeachment, I share Mike's instinct. My own thought was for me the easiest—there are so many things here, but if we talk about the bankruptcy, well, that's arguably private. The State court stuff, well, that's arguably just State court stuff.

But I think the clear misconduct in the confirmation process itself is very clean and also shows that this isn't really punitive; you're not actually taking away something that was ever rightfully his, you know, punishing him for something deep in his past. He never should have gotten this position. He got it only because he lied. Someone else was entitled to this in effect, and he took it out of the hands of someone who would have, you know, been a more honest candidate. And that's a pretty narrow basis actually for this, not remotely punitive.

Mr. GEYH. Two quick points. One is, you asked about how far back impeachable behavior can go. And it seems to me that the answer has got to be, that depends on the behavior. I mean, if the standard that you're looking to deal with is whether the judge is currently unfit for office, in other words, that he has committed a political crime that violates the public trust, then you would look, you know, at what that behavior is and whether it impacts your current assessment.

For example, if a 60-year old judge is discovered to be the second coming of Bernie Madoff in his 30's, that may well be the kind of behavior that you would look at and say, my God. Despite the fact that it occurred decades ago, it is criminal behavior of an extraor-

dinary sort that would justify us looking at that for impeachment today.

The political impeachment point, I'll offer one embellishment, which is that there's a trajectory here with politicized impeachments. When Justice Chase was impeached really in the very early days, it was for political purposes. People were furious with his decisions. The party in power was going after a judge from the party out of power. And there are episodes of politicized impeachments in the early stages; for example Judge Peck.

And later they all failed, and I think they failed for reasons that Mike refers to. And you know, I think it's telling that in the last 15 years, we've had some Members of this body arguing for the impeachment of judges because they don't like their decisions, and those really never left the chute. And I think the reason is that we have norms in place for over 200 years that say, we're not going to go there. None of them have succeeded, and we're not going to start now, and particularly if we focus and keep impeachment proceedings focused on this kind of matter—no one is going after this judge because of the decisions he's made—that we're focusing on targeting specific behavior that falls into conventional notions of misconduct, I think we're fine.

Mr. GONZALEZ. Thank you very much.

Thank you, Mr. Chairman.

Mr. SCHIFF. Thank you. The gentleman yields back.

Judge Porteous'sattorney Mr. Westling is now recognized for 10 minutes to question witnesses.

Mr. WESTLING. Thank you, Mr. Chairman.

Gentlemen, I don't think I'll have too many questions.

I wanted to start with Professor Amar, if I may. You commented on the fact that impeachment from a procedural point of view is not the same as a criminal trial, and in particular, you address the issue of the application of the Fifth Amendment self-incrimination clause. I note that the way that it's worded both verbally here today and in your written testimony says "should not apply in all respects." Are there certain respects in which you think it should apply?

Mr. AMAR. I'm not sure that it should apply at all. But doctrine does distinguish between using the fruits, the derived fruits of compelled testimony on the one hand and using testimony, compelled testimony itself, on the other. So, for example, in the Miranda context, the doctrine is for unintentional Miranda violations, and Miranda is connected to the self-incrimination clause under Supreme Court doctrine. If someone was improperly Mirandized, the fruits are admissible, but the statement itself is actually itself often not admissible. And so one could actually distinguish between the compelled testimony itself and the fruits.

Here's another distinction in the doctrine. The doctrine in compelled self-incrimination says that the jury is not to draw any adverse inferences from a defendant who stands mute, and indeed, a defense attorney is entitled to an introduction from the judge to that effect. That goes beyond what the Fifth Amendment's words say. It's a later development and, in my view, partly because the rules of evidence don't really apply, for reasons that Mike Gerhardt has explained in great detail. That's another sort of aspect.

So I myself think perhaps none of the Fifth Amendment, in fact, self-incrimination should apply. Due process, yes; other basic fairness, yes. But it's possible to imagine sort of a less exuberant position that compelled testimony should be excluded, but the fruits are allowable, and adverse inferences are allowable.

Mr. WESTLING. Thank you.

Gentlemen this is a question for all three of you, and it, again, relates to the Fifth Amendment issue. Are you all aware of any case in the past involving impeachment where immunized testimony of a judge who is the subject of the impeachment has been used as evidence in that case?

Mr. GEYH. I am not.

Mr. GERHARDT. I am not either, but I don't think it has, as you know, any significance.

Mr. AMAR. Nor am I.

Mr. WESTLING. Thank you. Now, I want to turn to——

Mr. AMAR. And I am also not aware of precedents at least that are held in high regard. I don't know any in fact in which Article III judges have tried to interfere with ongoing impeachment proceedings on any pretext.

Mr. WESTLING. I appreciate that. There's always room for levity, I hope.

Gentlemen, you've discussed at some length your view that the judgeship here involving Judge Porteous was procured in part due to his failure to disclose certain things. I think the opinion has been as well that he may have actually lied or made misrepresentations.

I'm not going to quibble with those statements. I understand your testimony. I suppose the question that I have is, if the Senate were aware of allegations of the type that were not disclosed and investigated them and found that they were not valid in some way, would that change your answer about the impact of Judge Porteous'sstatements?

Mr. GERHARDT. Can I just ask a clarification? You meant at the time of the confirmation, they investigated and found?

Mr. WESTLING. That's correct.

Mr. GERHARDT. I have—I will probably give you two separate answers.

I mean, one is I think that it is possible if the Senate is made aware of information and they proceed in light of it after doing factfinding, they've effectively ratified it, that they've effectively made their decision that that's not disqualifying information.

But there's also a question about the nature of the factfinding. In other words, a lot just depends upon what it is the Senate looked at. In other words, let's say they looked at one thing, didn't find a problem, but didn't look in another direction where there was a problem. So it becomes complex; that is to say, what did they know, and when did they know it?

Mr. WESTLING. Does anybody have anything to add or a different viewpoint?

Mr. AMAR. They're in a very good position to decide what they thought they were being told and not being told, so I think this is not—this is an impeachment of someone who became a judge by a vote of the Senate. And what this House is allowing is the Senate

to have a revote, and they're not going to do it lightly. They don't—it requires a two-thirds vote, which is a very important safeguard in the process.

So if—I suppose if someone subject to the confirmation process were affirmatively told, yes, we know about all of this, and we're okay with it, and we just want you for the record to say a certain thing, well, then it might be unfair then to say, ah, but the one thing that you said was a little misleading in isolation because it was in the context of some largerunderstanding in which we all knew that certain things were not within the main scope of the question. So if there were a larger context behind the question.

But you know, I basically think the question was at its core, have you been an honest public servant? And there was an affirmative misrepresentation. And it's hard for me to sort of imagine facts that would change that. It would change my view of the Senate quite a lot if you told me, oh, well, there's some background understanding that when we asked you, you know, X, what we really mean is not X. And you know, unless we say Simon Says or Mother May or something, you're supposed to not understand that we mean these words in their pretty obvious straightforward sense.

Mr. WESTLING. I would note, I guess, in following up on that, that I think the supposition by the panel, understandably based on the facts that have been presented, is that certain events have taken place, and they have a certain character to them.

What is less clear to me is whether that was what the Senate investigation revealed. Clearly, FBI agents went out and interviewed people. They looked into allegations, and they made a report back. And I guess what is fair to say is that nobody in this room really knows what the content of that investigation was, what its findings were or what the conclusions were. Is that a fair statement?

Mr. AMAR. I suppose. I have to confess, my own tendency is to be pretty skeptical when wrongdoers try to put other people on trial rather than to own up to their own responsibility for their own gross misconduct. And so I balk, with all due respect, at sort of trying to basically blame the Senate for this sort of thing.

I believe actually there was an affirmative—in answer to Chairman Schiff's question earlier, we don't need to go that far. But I actually think there's affirmative obligation for someone in this situation to actually come forward, even before being asked with this, and that any honorable person, you know, decent person, would actually understand that. And so, you know—and so I don't think actually the thrust of a defense that tries to sort of blame others for not having done the investigation moves me very much. It actually seems chutzpah to me.

Mr. GEYH. I have a hard time imagining what kind of information would have been elicited behind the scenes that would cause me to think differently about these relatively straightforward questions that Judge Porteous answered in the negative. I'm left to think there are obvious answers here that aren't being made, and I can't imagine what would change my mind about that.

Mr. GERHARDT. I would echo those comments. I think that it's probably fair to infer that the Senate was not aware of the information. The fact is that, you know, we ought to remember. I mean,

people have talked about the confirmation process being much—not just more intrusive, that is to say, it doesn't just seek more information; it's become more embattled. And the kind of information that would clearly in a sense stop a nomination I think would be some evidence of wrongdoing or some other egregious misconduct. So it's I think almost unimaginable, at least to me, that there would be any revelation of misconduct of the sorts we've been talking about that would simply cause the Senate to look the other way or to treat it differently. The fact is we're setting precedents all over the place. And if that were true, then the Senate will have to be accountable for having set a precedent I think that is a very dangerous one.

Mr. WESTLING. I, perhaps, should clarify. My suggestion in no way was that the Senate knew about this and determined to go forward despite knowing it. I think my question is simply one of, we know there was an investigation. What we don't know is whether it concluded there was credibility to any of these allegations. And I would suggest to you for your comment that while we sit here today with a different record before us, it's largely based on years of a Department of Justice investigation that has muted facts over time.

Mr. GERHARDT. It's a fair point. Although I would also suggest that there's nothing that precludes the Senate if it has an opportunity to do another investigation, to reach a different judgment. That's the nature of the impeachment process. In fact, the appointment process and impeachment process are separate processes. And so the Senate may be fully entitled, fully empowered to do its own factfinding, do a separate factfinding, or act upon different facts revealed at a different time that have come to light since its last action.

Mr. AMAR. And I was not aware that the Justice Department took a close look at the representations made during the confirmation process. Maybe they were. But when I just look at the pieces of paper in front of me, and I see a pretty direct question and a pretty direct misstatement in response, a lie, a fraud, a falsehood, it's hard for me to imagine facts that would change my mind about that.

Mr. GERHARDT. In fact, I might even take note that the vetting process with respect to judges includes not just the Justice Department looking at a nominee but also the FBI and of course later the Senate. So there are many opportunities for this information to have come to light. And again, the likelihood is that they didn't, and it didn't. That tells us something about the quality of the process. And so in some respects, I'm very concerned about the undermining of the integrity of the confirmation process.

Mr. WESTLING. Mr. Chairman, I note my light is on. May I proceed.

Mr. SCHIFF. Yes, of course.

Mr. WESTLING. Thank you. A couple of more questions and, hopefully, we'll be able to wind this up, at least from my perspective. The first is that there's been some discussion by the panel about impeachment based on conduct occurring prior to one's swearing in as a Federal officer, and there's been testimony on that regard. I'm simply interested in knowing whether there has ever been a prior

impeachment based on events that took place prior to the person being a Federal officer.

Mr. GERHARDT. No. I mean, there's not been any successful impeachment; that is to say, moved through the House or the Senate.

But again, I don't know that that's of any significance. I think that the fact is that, you know, you've got to take the evidence in the case that you've gotten. As I supposed in my written testimony, imagine somebody had committed a murder before they were ever nominated to a particular office. But if that fact had not been disclosed to the Senate, it wouldn't preclude the House later from saying that's egregious misconduct, completely incompatible with the office that you now hold. In fact, it's a breach of the public trust for you to actually—for that information not, in a sense, to have disqualified you.

Mr. AMAR. There are not very many impeachment precedents, but there is constitutional text. There is constitutional history. There is constitutional structure. There is common sense.

Here's what I wrote on this very question in 2005, based on an article, based on I think a presentation I made to the Federalist Society, actually, in 1998 or 1999: "In the case of an officer who did not take bribes but gave them, paying men to vote for him, the bribery would undermine the very legitimacy of the election that brought him to office."

So that's pre-office-holding misconduct, straight in the middle of the impeachment clause—treason, bribery or other high crimes and misdemeanors—so if you commit bribery in order to get your position, of course that's impeachable. And that's before you've been commissioned as an officer.

And that's just pretty obvious whether there actually has been—now, there may have been some resignations or something when this came to light. But maybe, you know, part of it is, very few people in the past have had the audacity to try to sort of make, the chutzpah, to try to make this argument once it came to light that you procured your very office by false pretenses, and now you're hanging on to the thing and taking taxpayer money. Have you no sense of shame?

Mr. GERHARDT. I think there are a couple of things. One is that I think the modern process, the modern vetting process, both in terms of nominations and confirmations, has been much more thorough. And thus it becomes significant if it doesn't stumble across something.

But since Akhil has begun this precedent, I will follow it as well and just note something else that I had written over a decade ago that seems quite pertinent today. I wrote that there might be some difficult cases on the lines that you were talking about, possibly impeaching somebody for a prior criminal misconduct before they entered office. But "it's easy to imagine instances in which impeachable offenses can be based on present misconduct consisting of fraudulent suppression or misrepresentation of prior misconduct. Particularly in cases in which an elected or confirmed official had lied or committed a serious act of wrongdoing to get into his present position. The misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the

present officeholder entered office and the integrity of that official to remain in office."

Mr. GEYH. There is a litany of behaviors that people could engage in that everyone would agree are impeachable that haven't occurred yet. I'm not sure, with the possible exception of West Humphreys, I don't even think—has anyone been convicted of treason per se? And everyone would agree it's an impeachable offense. It hasn't happened. Does that mean it really has been written out of the books? No.

Mr. GERHARDT. There is, as it turns out, a first time for everything. And that would have been true for the first time the President vetoed something. It would be true for the first time that a judge got impeached for bribery. That would have been the first time that that would have happened. And so on.

So the fact that this might be the first time that we're actually looking at prior misconduct doesn't mean that we shouldn't. It means we should be careful. That's what we're doing here today. But I think that there's a nexus between that misconduct and the fitness of that person to continue to serve in office.

Mr. WESTLING. And my final question is for you, Professor Geyh.

If you could just explain briefly the interplay between the impeachment mechanism and the Judicial Discipline Act that typically is used to evaluate and discipline judges for certain kinds of behavior. Why is one used? Why is the other used? How do they relate to one another?

Mr. GEYH. I think when Congress decided to go ahead with the Judicial Conduct and Disability Act, it was because of the perception that there is a lot of misconduct that's going forward that really doesn't rise to the level of impeachable conduct. And so when you engage in conduct prejudicial to the expeditious administration of justice, the statute says that you can go through this process going forward at the Judicial Council level culminating in sanctions ranging from mild slap on the wrist to public censure, and at the most extreme level, what has happened here going on up to the Judicial Conference with a recommendation that Congress investigate for impeachment purposes.

To my way of thinking, the same conduct can work its way through the process separately or independently. In other words, it's quite possible, if the Judicial Conference chooses not to look at something, that this body may choose to do it independently, and that would be perfectly acceptable.

The standards are different. I mean, there it's the expeditious administration of justice that's really the focus, and here it's high crimes and misdemeanors. But certainly high crimes and misdemeanors interfere with the expeditious administration of justice and you have that kind of overlap.

Mr. WESTLING. Thank you, Mr. Chairman.

I have no further questions.

Mr. SCHIFF. Thank you, counsel.

Just one other question, and we're going to try to finish before we head off to vote.

A follow-up to one of Mr. Westling's questions. I assume that your view, the views you've expressed would be the same if the fact pattern were such that during the background process for the Sen-

ate confirmation, the FBI was made aware of certain rumors about Judge Porteous that they investigated and were unable to corroborate because witnesses were not honest with them.

We heard testimony from a bail bondsman who said that he basically didn't tell the FBI about any of the conduct because he knew it would adversely affect his confirmation. And he was immediately asked by the judge basically, what did they ask you? What did you say?

If the FBI investigator wasn't able to corroborate, but nonetheless, during the course of subsequent investigation, the allegations were demonstrated to be true or the judge admitted the allegations, I assume that would not affect your judgment; that wouldn't be sufficient notification to the Senate to change your view of things.

Mr. AMAR. In my view, it would make the situation even worse. And I think Professor Geyh may have mentioned this a little bit in his testimony. If there were evidence that Judge Porteous communicated with other witnesses—people who were being questioned by the government officials and then tried to find out what they had actually said, and that very much bears on his credibility—whether it rises to a level of conspiracy, bears on his credibility about what then he is saying and not saying. That again suggests sort of a level of purposeful deception here that, if anything, makes the thing worse in my mind, more corrupt.

Mr. GERHARDT. I had tried to suggest something along those lines in answering Mr. Westling's question. I think the fact that there might have been an investigation might be of no real significance. A prior investigation isn't a free pass because the facts can change. You know, new facts can come to light.

And if we have a prior investigation that's been done but basically either was not able to substantiate something or find something because it was being suppressed, that shouldn't preclude Congress from reopening the investigation in light of other evidence. That's I think precisely what this process is all about.

Mr. GEYH. I'm in the same place on this one. It seems to me that if a nominee lies under oath for the reasons that Professor Amar spoke of, that is a serious matter.

But I get a little uneasy about the notion of going into the business of estoppel, you know estoppel arguments that somehow the House of Representatives is estopped from doing something because the Senate did it differently or badly. It seems to me that this body has an independent duty to investigate. I mean, certainly it's going to be perhaps affected by whether the other body thought long and hard about a matter and came to a conclusion. But to me, the more fundamental point is, did he lie under oath? If so, that gives rise to a lot of concern.

Mr. GERHARDT. I seem to recall, I didn't study this for today, but I seem to recall, in the late 1980's, the Senate expressly rejected the opportunity for estoppel in at least one of those 1980's impeachment trials.

Mr. AMAR. And with respect, that's why—I wasn't just trying to be flip in the last words of my testimony. There are about six different issues about as to which this little lawyer's joke keeps coming into my head; you know, that's great, Your Honor, does this mean I can keep the money? Because what's being, you know, put

forth here is keeping the ill-gotten gain just because you've managed to get lucky enough to escape Justice Department prosecution or have escaped the scrutiny of the Senate the first time around. It's audacious.

Mr. SCHIFF. Do any of my colleagues have any further questions?

Seeing none, in closing, I would like to reiterate that the Task Force invited Judge Porteous to testify before us, but he has declined.

In addition, the Task Force afforded the opportunity for Judge Porteous and his counsel to request that the Task Force hear from a witness or witnesses that they would wish to call.

Judge Porteous'scounsel has informed the Task Force that they would not avail themselves of this opportunity.

The written statements of the witnesses today were made part of the record.

And I want to thank the witnesses for their testimony today. I really appreciate your time, Professors, and the opportunity to question professors. So it's just been a nice turn, but it's fair play.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials. This hearing of the Impeachment Task Force is adjourned.

[Whereupon, at 12:17 p.m., the Task Force was adjourned.]