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

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

JUDGE G. THOMAS PORTEOUS, JR.'S PRE-TRIAL STATEMENT

Judge Porteous respectfully submits the following Pre-Trial Statement pursuant to the Senate Impeachment Trial Committee's (the "Committee") Order Designating Contents of Pre-Trial Statements dated August 26, 2010 (the "Order").

1. Statement of the Case

On March 11, 2010, the House of Representatives approved four articles of impeachment against Judge Porteous. Unlike all other modern judicial impeachments, Judge Porteous was impeached without ever being charged, let alone convicted, of a single criminal act. Indeed, while federal prosecutors extensively investigated numerous individuals in the New Orleans area, including judges, they determined not to bring any criminal charges against Judge Porteous. This was not because of a lapse of the statute of limitations – in fact, Judge Porteous signed at least three tolling agreements to waive the statute of limitations on a host of possible criminal charges – but because of "the government's heavy burden of proof in a criminal trial, and the obligation to carry that burden to a unanimous jury; concerns about the materiality of some of Judge Porteous's provably false statements; the special difficulties of proving *mens rea* and

intent to deceive beyond a reasonable doubt in a case of this nature, and the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters."[1]

This absence of express criminal charges has led to the kind of vague references to a variety of acts that constitute, at most, the appearances of impropriety or minor violations of bankruptcy or disclosure rules. None of the Articles allege that Judge Porteous committed treason or bribery or received kickbacks as a judge. Instead, the House has made, and can be expected to continue to make, vague references to offenses, such as "kickback" and "bribery," as if they had been alleged by the House in voting out the Articles of Impeachment, when in fact they were not. Three of the four Articles seek to remove Judge Porteous largely on the basis of conduct that allegedly occurred while he was a state court judge, although it is generally agreed that such "pre-federal" conduct should not be a basis for removing a federal judge. In some cases, the subject conduct is alleged to have occurred as many as 25 years ago. The House has pursued impeachment despite the fact that Judge Porteous will retire in a matter of months and has already been severely sanctioned by the Fifth Circuit for the appearance of impropriety created by his actions. If removed on the basis of an appearance of impropriety, the Senate would set a dangerously low and ill-defined standard for future impeachments – the very danger that the Framers sought to avoid in carefully crafting the impeachment language.

The absence of any prior criminal trial means that this case comes to the Senate with a highly disputed record. The House has been permitted to introduce into the record many hours of testimony that the House managers developed during the Fifth Circuit and House Judiciary Committee proceedings. In both, Judge Porteous's ability to cross-examine witnesses called to testify against him was severely constrained, either by the Fifth Circuit's requirement that he

[1] *See* Letter dated May 18, 2007, from the Justice Department to Fifth Circuit Chief Judge Edith Jones, at 1 (HP Ex. 004).

proceed without counsel or by the House Judiciary Committee's limitations on cross-examination.[2] Now, before the Senate Committee, Judge Porteous is limited to only 20 hours within which to challenge express and implied allegations by the House and present his defense, versus the extensive record from other proceedings upon which the House may rely.

After the Senate allowed Judge Porteous to take four depositions from a longer list of requested depositions, however, the defense was able to elicit testimony that directly contradicted prior representations in the House Report. Indeed, the defense has established that certain allegations stated in the Articles of Impeachment simply did not occur. For example, Judge Porteous is accused of failing to reveal a brief conversation with Louis Marcotte on various forms related to his nomination. The record now shows, however, that this conversation took place weeks ***after*** those forms were completed. Likewise, core House witnesses have contradicted allegations attributed to them in the House Report. While these facts were known before the submission of the House Report as the basis for the impeachment vote, members of the House were never informed. On other issues, in the short period in which current counsel has represented Judge Porteous, the defense has been able to establish that the House members were given "facts" that are not only without any documented basis, but are contradicted by available court records.

A trial of this kind would normally takes weeks or months in an actual court of law. (Indeed, even with a prior trial, former Judge Alcee Hastings's Senate impeachment trial lasted 18 days.)[3] While the defense has had to reduce its witness list in light of the 20 hour limit, Judge

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[2] *See* House Impeachment Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009) (Congressman Schiff stating that the House's impeachment inquiry "is not a trial, but is more in the nature of a grand jury proceeding.").

[3] *See* CRS Rpt. 7-5700, at 18-21, *The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data* (Apr. 9, 2010). It must be noted that while there

Porteous will be calling eye-witnesses who not only directly contradict the allegations of the House, but also expert witnesses who will show that many of the alleged acts occur commonly and rarely result in sanctions, let alone an impeachment and removal of a judge.

Article I – The Alleged Denial of Honest Services

Article I alleges that Judge Porteous deprived the public and litigants of "honest services" by failing to recuse himself from presiding as a District Court Judge in the case of *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, Inc.*, No. 93-cv-1794 (E.D. La.) (the "*Lifemark* case"), failing to disclose enough information about his relationship with a lawyer representing one of the parties to that litigation, and later accepting a monetary gift from that lawyer. The Article is invalid both legally and factually.

While the House staff was aware that the Supreme Court was about to hear a challenge on the scope of the honest services claims, it chose to craft Article I based on the same theory. A few weeks ago, the Supreme Court found that it is unconstitutional to charge someone under the theory contained in Article I. *See Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010). The defense has asked for an opportunity to be heard on this issue in a still pending motion to dismiss (as well as three other motions raising threshold constitutional questions), but the flawed basis of the honest services claim undermines the viability of Article I as the basis for removal at trial.

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

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are only four Articles of Impeachment against Judge Porteous, those aggregated Articles contain more than 20 different allegations, each of which would have been a separate Article in earlier proceedings.

former law partners Jacob Amato and Robert Creely, whose firm was one of the counsel for a party in the *Lifemark* case; and (b) after denying that recusal motion, accepting cash and other "things of value" such as meals and entertainment from Messrs. Amato and Creely while that case was still under advisement. There is no allegation of a *quid pro quo* in connection with those things provided to Judge Porteous. Although Judge Porteous issued an opinion, ultimately reversed, in part, by the Fifth Circuit, there is no express allegation that the Judge's opinion was influenced by gifts extending over decades of a personal relationship. At most, this Article seeks to remove a judge on the basis of an appearance of impropriety, for which Judge Porteous has been sanctioned by the Fifth Circuit. To convict him in an Impeachment for such actions, no matter how inexcusable, would erase centuries of decisions by the Senate to maintain a clear and high standard for the removal of a judge.

In addition, while House members were told that lawyer Amato believed that Judge Porteous sought a percentage of curatorships that he assigned to Amato's partner Creely, Amato testified he recalled being told something along these lines by Creely, but that he had no independent knowledge of those dealings by Creely with Judge Porteous. In fact, however, this critical allegation was directly refuted by Creely himself when, for the first time, he was subject to a full deposition by the defense. There, Creely testified that (1) there was never any relationship between these gifts or loans of money to Porteous and the curatorships Judge Porteous granted to Creely (and to numerous other lawyers), (2) he did not want assignments of the low-paying curatorships, and (3) he gave as gift money periodically to Judge Porteous only because they were long-standing and close friends. He has further testified that, whatever gifts Creely provided to his old friend, those gifts had no influence on Judge Porteous's rulings since, for most of those few times that Creely appeared before Judge Porteous, Porteous ruled adverse

to Creely's clients.

The Article alleges no bribery, high crime, or high misdemeanor. It relies, instead, on the refusal of a judge to recuse himself from a single case in decades of judging as the grounds for removing that judge from office. That comes perilously close to removing a judge because of his judicial decisions, not because of his conduct. The recusal motion in the *Lifemark* case was brought by an attorney who stated in the hearing that he was already aware that Judge Porteous was "very, very close" friends with the attorneys in the case. The record will also show that Judge Porteous himself acknowledged the close relationship. Moreover, if Judge Porteous really was as corrupt as the House makes him out to be, he could have substantially enriched himself or another lawyer with whom he was close friends (Mr. Gardner), who was brought into the case by one of the lawyers who filed the recusal motion (Mr. Mole) simply because he was a friend of Judge Porteous. Mr. Mole has admitted that he wrote a contract to bring in Gardner that offered Gardner $100,000 (in addition to a retainer payment of $100,000) if Judge Porteous recused himself. If Judge Porteous could be influenced in his decision by a gift of a relatively small amount of money from Mr. Amato, as the House alleges, he could have achieved much richer rewards (or enabled Mr. Gardner to do so) by recusing himself. Instead, Judge Porteous, with friends representing parties on both sides of the case, ruled in the case as he saw fit, after the case had bounced from judge to judge, without resolution, for years. In so doing, he ruled against the client of Mr. Gardner, one of his closest friends. Indeed, Mr. Gardner was a closer friend to Judge Porteous and his family than Mr. Amato.

Article I fails to recognize that recusals are left largely to the discretion of the trial judge and that prior controversies over such recusals have rarely resulted in a sanction, let alone an impeachment. There are compelling reasons why Judge Porteous did not want to add his name

to the long list of judges who had allowed the *Lifemark* case to linger for years without resolution. One can disagree with his ultimate ruling or his decision to remain in the case, but his decision on recusal was consistent with the views of many judges in similar circumstances. In the end, such a disagreement is woefully insufficient as a basis for removal, would elevate a matter that is usually handled internally in a given court to a full Senate trial, and would create a precedent of impeachment based on a judge's rulings rather than his acts of misconduct.

Article II – Alleged Pre-Federal Misconduct as a State Judge

In Article II, the House impeached Judge Porteous on the basis of pre-federal conduct that goes back decades before he became a federal judge. The Article alleges that, as a state court judge, Judge Porteous engaged in conduct with certain bail bondsmen – Louis Marcotte and Lori Marcotte (brother and sister) – whereby he "solicited and accepted numerous things of value" and also took "official actions that benefitted the Marcottes." Not only was this conduct never the basis for a criminal charge, but the Fifth Circuit did not even include this conduct as part of its investigation and sanctioning of Judge Porteous.

In addition to the fact that removal of a judge based on pre-federal conduct is clearly contrary to the constitutional impeachment process and standard, the defense will show that none of Judge Porteous's conduct violated any rule of judicial ethics. For example, the House has repeatedly relied on lunches which the Marcottes had with a large number of state judges, including Judge Porteous. The defense will show that, at the time, there was no judicial rule prohibiting such free lunches and, indeed, the current rule in Louisiana prohibits only the acceptance of lunches worth more than $50. Thus, even today, a state court judge could attend these same lunches and be in full compliance with applicable judicial rules, depending on the amount spent for the lunch. Moreover, the witnesses will show that it was routine and viewed as

appropriate and acceptable for judges to accept gifts from the Marcottes and others – a practice that was widespread in the state court. This fact was also never revealed to the members of the House of Representatives before their vote. Finally, the evidence will show that many of the factual allegations made to the House members are demonstrably untrue, including the suggestion that Judge Porteous increased the number of bonds handled by the Marcottes that he set or modified shortly before he went on the federal bench.

The fact is that Judge Porteous was an outspoken advocate for the use of bonds and split bonds. A respected judge and former prosecutor, Judge Porteous believed that such bonds were essential – particularly when inmates were otherwise simply being released on their own recognizance as a result of federal court orders barring overcrowding in the Jefferson Parish jails. In Gretna, where Judge Porteous sat as a state court judge, the Marcottes handled an estimated 95 percent of bonds and all judges issuing such bonds necessarily dealt with the Marcottes. Judge Porteous strongly supported the use of bonds, and often spoke to other judges to encourage them to use bonds, as a way to ensure that criminal defendants later appeared in court to answer the charges against them.

Not only does Article II seek to remove Judge Porteous on the basis of conduct that occurred before he was a federal judge, it also seeks to remove him on conduct that was common in that part of Louisiana. The House is seeking to convert the Senate into an enforcer of state rules although the Louisiana judicial ethics officials themselves did not view that conduct as violative of state rules. Article II further seeks to remove a judge based on alleged acts that occurred decades ago and about which the facts are contested. Witnesses will establish that in a small state court environment it was common for judges, lawyers, and bail bondsmen to be friends and to interact informally inside and outside of the courthouse.

The alleged conduct of Judge Porteous was indistinguishable from virtually all of the judges in Gretna, including judges who remain on that court today. Moreover, witnesses will show that many of these practices continue to this day as a normal part of small-town practice. If such conduct as a state judge can be used decades later to remove a federal judge, the Senate would convert the impeachment standard into an arbitrary and unpredictable measure of good behavior as a federal judge.

Article III – Alleged Violations of Bankruptcy Laws

Article III accuses Judge Porteous of "knowingly and intentionally making material false statements and representations under penalty of perjury relating to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case." The House identifies five particular categories of statements and actions that underlie this assertion: using a false name and post-office box in the initial Chapter 13 petition; concealing assets such as cash on hand and a tax refund; concealing preferential payments to a casino and a bank that had issued a credit card to Judge Porteous's wife; concealing gambling losses; and incurring debts after the confirmation of his Chapter 13 plan and before receipt of his discharge.

The allegations in Article III, even if true, amount to nothing more than reliance on the advice of counsel and honest mistakes about the state of Judge Porteous's finances at the time of his bankruptcy filing, the appropriate means of commencing a Chapter 13 bankruptcy case, and the management of his affairs afterwards. The language "knowingly and intentionally" used by the House is modeled after the standard needed to justify criminal prosecution for bankruptcy fraud – for example, the requirement that conduct be committed "knowingly and fraudulently" is repeated frequently in 18 U.S.C. § 152 – which cannot be sustained by any credible evidence. Indeed, apparently for this reason, the Department of Justice decided not to prosecute Judge

Porteous despite a lengthy and thorough investigation into his bankruptcy case. The Senate should reject the House's attempt to characterize minor and immaterial errors in a Chapter 13 bankruptcy case as meeting the constitutional standard of high crimes and misdemeanors. Errors of the sort made by Judge Porteous and his late wife are duplicated by Chapter 13 debtors around the country hundreds if not thousands of times each day.

Judge Porteous, of course, does not suggest that inaccuracies in bankruptcy filings are to be encouraged. In this case, however, the evidence will show that Judge Porteous sought counsel, followed the advice of his counsel, completed his court-approved Chapter 13 plan, and paid more than $50,000 to his unsecured creditors. The Chapter 13 trustee – the party principally responsible for the administration of Chapter 13 cases – interviewed Judge Porteous, objected to the initial plan filed by Judge Porteous, required more funds to be paid to creditors, concluded that the amended plan met the standards for confirmation under Chapter 13, and otherwise fulfilled his responsibility to maximize the return to creditors. The evidence will not show that any of the errors alleged by the House were the result of an intent to deceive, nor will it demonstrate that Judge Porteous's creditors were materially harmed by the inaccuracies in his bankruptcy filings. Instead, the evidence will show that such inaccuracies are common in bankruptcy and fall well below any reasonable interpretation of a high crime or misdemeanor warranting removal.

Many of the House's allegations in Article III proceed from inaccurate premises. For example, cash in a Chapter 13 debtor's bank account at the time of a bankruptcy filing is not turned over to a trustee, nor does it otherwise inure to the benefit of creditors. A slight inaccuracy in a Chapter 13 debtor's report of a bank balance, therefore, is of absolutely no consequence to the bankruptcy system. Nor is the existence or amount of gambling losses that a

debtor may have incurred in the past. Except in the most extraordinary situations – and gambling issues are far from extraordinary among debtors – Chapter 13 does not concern itself with the *reasons* a debtor finds himself or herself in financial distress. The bankruptcy system does not rely on newspaper reports to inform creditors that a bankruptcy case has been filed; rather, creditors receive formal notice of a variety of matters as prescribed in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

The undisputed evidence in this case will show that Judge Porteous's use of a pseudonym on his original Chapter 13 petition was the idea of his attorney, and the process was specifically designed so that creditors would receive only the correct identifying information that was included in the amended petition. Moreover, nothing in Chapter 13 prohibits a debtor from incurring debt after the filing of a petition or the confirmation of a plan. The language in the confirmation order in Judge Porteous's case may well have been meant to protect him, his wife, and their creditors from the consequences of unpaid post-confirmation debt – a subject that is dealt with in the Bankruptcy Code – but there was no such unpaid debt in his case. Even under the House's broad interpretation of the confirmation order, therefore, any violation of its provisions simply was immaterial.

Article IV – The Failure To Disclose Embarrassing Facts At Confirmation

Article IV seeks Judge Porteous's removal on the basis of pre-federal conduct going back decades, this time under the guise of a failure to disclose such conduct during confirmation. The Article alleges that Judge Porteous "knowingly made material false statements about his past" by failing to state affirmatively that he (1) received a portion of curatorship fees given to the law firm Amato & Creely while a state judge (as alleged in Article I); and (2) accepted "things of value" while benefiting the Marcotte bail bonds company while a state judge (as alleged in

Article II). Additionally, Article IV alleges that Judge Porteous should be removed from office because he failed to state affirmatively that he suspected that Louis Marcotte may have given misleading statements to the FBI in a conversation in which Judge Porteous did not participate.

The standard that the House seeks to impose is purely subjective: did Judge Porteous fail to disclose information that he, Judge Porteous, thought would be embarrassing to him or to the President? Assuming Judge Porteous thought he had done nothing wrong or inappropriate, he naturally would think that none of his actions would be embarrassing to him or to President Clinton. Even if the Senate comes to the conclusion that Judge Porteous acted improperly, it cannot conclude that Judge Porteous thought those actions were improper (and therefore "embarrassing") without concluding that Judge Porteous acted with intent to deceive. There is no basis for such a conclusion.

The evidence will show that much of the allegations contained in this Article are simply misrepresented or demonstrably untrue. For example, while Judge Porteous was impeached for failing to mention his conversation with Louis Marcotte, the defense has been able to establish that this conversation occurred ***after*** these forms were completed and, therefore, could not have been included in Judge Porteous's disclosures. Moreover, a statement by Marcotte, one of a nominee's references, that he gave a judge a "clean bill of health" is hardly a matter that warrants a special submission from a nominee. The House impeached Judge Porteous on the basis of his alleged failure to answer affirmatively a question on whether he knew of anything that would embarrass the president. Testimony will also show, however, that this question is universally answered in the negative and that it is common for nominees to omit financial, ethical, and even criminal histories from their background reports – omissions that have occurred in dozens of past cases without resulting in any negative action taken against nominees either before or after

confirmation. Furthermore, the evidence will show that Judge Porteous's issuance of bonds and curatorships was in line with the actions of all state judges in Jefferson Parish at the time and did not violate any state ethical code. Finally, it will be shown that the basic allegations contained in Article IV were known to both the FBI and the Senate Judiciary Committee *before* Judge Porteous's confirmation. These allegations were investigated by the FBI and specifically raised by Senate staff members and found to be insufficient to warrant any negative action on the nomination. Moreover, not only were curatorships and bonds matters of public record that Judge Porteous did not take any action to conceal, they were common practices in this small state courthouse and continue to this very day.

2. <u>Final Witness List</u>

Below is Judge Porteous's final witness list, which includes for each listed witness a brief description of that witness's anticipated testimony, as well as a statement of each listed expert witness's qualifications.[4] Per the Committee's Order, Judge Porteous will provide an estimate of the duration of testimony to be elicited from each witness, and the order in which he anticipates calling those witnesses, by September 8, 2010.

(1) John M. Mamoulides

> Judge Porteous anticipates that former Jefferson Parish District Attorney Mamoulides will testify about Judge Porteous's appointment to the state bench, his experience and relationship with Judge Porteous as a state court judge, the practice of setting and modifying bonds in Jefferson Parish, the manner in which Assistant District Attorneys interacted with state court judges in Jefferson Parish (including Judge Porteous), and the overall relationships between state court judges and other participants in the Jefferson Parish legal system during the relevant time period.

[4] This final witness list contains the following changes from the witness list that Judge Porteous filed on August 5, 2010: (1) the addition of Darcy Griffin, Timothy Porteous, and one custodial witness to testify with regard to selected bond forms, and (2) the omission of Dianne Lamulle, Suzette Lacour Powers, Susan Hoffman, James Barbee, and Peter Ainsworth.

(2) Judge M. Joseph Tiemann

Judge Porteous anticipates that Judge Tiemann will testify about his experience and relationship with Judge Porteous, as well as the practices of Jefferson Parish judges, during the relevant time period, in setting and modifying bonds, assigning curatorships, and interacting with others participants in the legal system.

(3) S. J. Beaulieu, Jr.

Judge Porteous anticipates that Mr. Beaulieu, the Chapter 13 Trustee who oversaw the Porteouses' bankruptcy proceeding, will testify about the facts and circumstances regarding that bankruptcy, including an overview of the history of the bankruptcy case, the applicable legal standards, Mr. Beaulieu's communications with Judge Porteous, his instructions to Judge Porteous, his evaluation of the seriousness of the mistakes made by Judge Porteous during the bankruptcy proceedings, his experience with other bankruptcies, and his communications with Judge Porteous's bankruptcy counsel and others with regard to the Porteouses' bankruptcy proceeding.

(4) Henry Hildebrand

Judge Porteous anticipates that Mr. Hildebrand will testify as an expert with regard to the allegations in Article III and Chapter 13 bankruptcy cases generally, including applicable legal principles, standards, and practices relating to personal bankruptcies during the relevant time period. Mr. Hildebrand's qualifications as an expert include his extensive experience serving as a current Chapter 13 Trustee. Mr. Hildebrand's curriculum vitae is attached as Exhibit 1.

(5) Judge Ronald Barliant

Judge Porteous anticipates that Ronald Barliant will testify as an expert with regard to issues related to Article III, including applicable legal principles, standards, and practices relating to personal bankruptcies during the relevant time period. Judge Barliant's qualifications as an expert include his experience as a United States Bankruptcy Judge for the Northern District of Illinois (from 1988 to 2002) and as a practicing bankruptcy lawyer. Judge Barliant's curriculum vitae is attached as Exhibit 2.

(6) Professor Rafael Pardo

Judge Porteous anticipates that Professor Pardo will testify as an expert with regard to the issues related to Article III, including applicable legal principles, standards, and practices related to personal bankruptcies during the relevant time period. Professor Pardo's qualifications as an expert include his experience as an academic researching and writing in the areas of bankruptcy law and practice, as a volunteer in a consumer debt clinic, and as a practicing bankruptcy lawyer. Professor Pardo's curriculum vitae is attached as Exhibit 3.

(7) Michael Porteous

Judge Porteous anticipates that Michael Porteous will testify with regard to his court delivery service, his interactions with Louis and Lori Marcotte, and his and Judge Porteous's personal history and relationship with individuals in the Jefferson Parish legal community.

(8) Timothy Porteous

Judge Porteous anticipates that Timothy Porteous will testify with regard to his and Judge Porteous's personal history and relationship with individuals in the Jefferson Parish legal community, including Robert Creely, Jacob Amato, Don Gardner, and Leonard Levenson.

(9) Professor Dane S. Ciolino

Judge Porteous anticipates that Professor Ciolino will testify as an expert with regard to issues related to the legal traditions, practices, and ethical standards in Jefferson Parish and the State of Louisiana during the relevant time period, including the assignment of curatorships and the relationships between state court judges and other participants in the legal system. Professor Ciolino's qualifications as an expert include his experience as an academic researching and writing in the areas of judicial ethics and as a participant in various aspects of the Louisiana attorney discipline system. Professor Ciolino's curriculum vitae is attached as Exhibit 4.

(10) Professor G. Calvin Mackenzie

Judge Porteous anticipates that Professor Mackenzie will testify as an expert with regard to the federal nomination and appointment process, the use of SF-86's, FBI background checks, and Senate confirmations. Professor Mackenzie's qualifications as an expert include his experience as an academic researching and writing in the areas of presidential appointments and the federal appointment and confirmation process. Professor Mackenzie's curriculum vitae is attached as Exhibit 5.

(11) Robert Rees

Judge Porteous anticipates that Mr. Rees will testify with regard to the facts and circumstances surrounding the setting aside of Aubrey Wallace's simple burglary conviction and the expungement of related records, as well as the general practices in Jefferson Parish regarding the setting aside of convictions and expungements during the relevant time period.

(12) Melinda Kring (Pourciau)

Judge Porteous anticipates that Ms. Kring will testify with regard to her work at Bail Bonds Unlimited, her observations of the Marcottes, their interactions with Judge Porteous, and their interactions with other judges and state and federal officials.

(13) Adam Barnett

Judge Porteous anticipates that Mr. Barnett will testify with regard to his experiences and observations working with the Marcottes and his interactions with Judge Porteous concerning the setting and modifying of bonds.

(14) Daniel A. Petalas, Esq.

Judge Porteous anticipates that Mr. Petalas, an attorney with the Public Integrity Section of the Department of Justice, will testify about the government's investigation into Judge Porteous, the decision not to prosecute Judge Porteous, and communications that Mr. Petalas had with members of the Fifth Circuit Special Investigatory Committee and Mr. Beaulieu.

(15) Darcy Griffin

Judge Porteous anticipates that Ms. Griffin will testify with regard to her experience working as a clerk in the Twenty-Fourth Judicial District Court in Jefferson Parish, Louisiana for Judge Porteous and other state court judges. Ms. Griffin's testimony will relate to her duties, including the handling of bond requests and research related to criminal defendants' prior records in preparation for setting and/or modifying bonds. Ms. Griffin will also testify about her communications with Judge Porteous, members of Judge Porteous's staff, the Marcottes, and jail officials regarding the bond process. Ms. Griffin may also testify about court records and her current experience as a supervisor of criminal clerks in the Twenty-Fourth Judicial District Court.

(16) One custodial witness to testify with regard to selected bond forms

Judge Porteous anticipates calling one custodial witness (who is as yet unidentified, but will likely be an individual assisting the defense) who will testify with regard to a series of bond forms related that bonds that Judge Porteous set and/or modified during the relevant time period, which Judge Porteous expects to obtain shortly from the Twenty-Fourth Judicial District Court in Jefferson Parish, Louisiana.

The House has indicated that it plans to call the following witness, which, if not called by the House, will likely be called by the defense.[5]

(17) Jacob Amato, Jr.

(18) Robert Creely

(19) Louis Marcotte

(20) Lori Marcotte

(21) Joseph Mole

(22) Donald Gardner

(23) Michael Reynolds

(24) Bruce Netterville

(25) Ronald Bodenheimer

(26) Leonard Levenson

(27) William Greendyke

(28) Claude Lightfoot

(29) Rhonda Danos

(30) Bobby Hamil

(31) DeWayne Horner

In addition to calling these witnesses, Judge Porteous respectfully reserves the right to testify in his own defense if he so chooses. Judge Porteous further reserves the right to call additional witnesses, as needed, during the evidentiary hearing for purposes of providing rebuttal or impeachment evidence.

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[5] *See* House of Representatives' Witness List, filed with the Committee on August 5, 2010. Since the House has indicated that it will call these witnesses, and has previously provided descriptions of their anticipated testimony, Judge Porteous has not included duplicative descriptions.

3. Exhibit List

Attached as Exhibit 6 is a numbered index of the exhibits that Judge Porteous intends to offer at the evidentiary hearing. Judge Porteous is today providing one electronic copy of these exhibits to the Committee,[6] as well as to the House. Since Judge Porteous is still in the process of collecting materials that he may seek to use at the evidentiary hearing, he respectfully reserves the right to amend and supplement this Exhibit List with later-obtained materials.

4. Prior Testimony

Judge Porteous wishes the offer into evidence and direct the Committee's attention to the following prior testimony:

(1) Robert Creely's August 2, 2010 Senate Deposition Testimony;

(2) Jacob Amato's August 2, 2010 Senate Deposition Testimony;

(3) Louis Marcotte's August 2, 2010 Senate Deposition Testimony;

(4) Lori Marcotte's August 2, 2010 Senate Deposition Testimony; and

(5) Claude Lightfoot's October 30, 2007 Fifth Circuit Testimony.

Since Judge Porteous does not know what prior testimony the House will seek to offer into evidence, or whether the House will attempt to designate excerpts or portions of prior testimony, Judge Porteous respectfully reserves the right to counter-designate additional prior testimony to ensure that all such testimony is not taken out of context or designated selectively.

5. Legal Matters

The following legal principles should guide the Committee's receipt, consideration, and evaluation of evidence during the forthcoming evidentiary hearing.

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[6] Per an August 30, 2010 communication from Committee Staff, Judge Porteous will provide the Committee with two hard-copies of these exhibits by September 8, 2010.

A. Burden of Proof

The House, in its role as prosecutor before the Senate, bears the entire burden of proof. To carry that burden, the House must prove, first, that the conduct alleged in the Articles of Impeachment actually occurred. This first obligation is especially important in this case where, unlike every other modern impeachment, there was no prior indictment, let alone a trial, and thus no prior adjudicated record. Second, the House must prove that that conduct warrants the imposition of the ultimate constitutional sanction available against a federal judge – namely removal of Judge Porteous from his constitutional office. Should the House fail to carry this heavy burden, as Judge Porteous expects it will, the Senate will be obligated to reject the Articles of Impeachment and acquit Judge Porteous.

Although Judge Porteous, as the accused, is not required to come forward with any evidence, he intends to put forward a robust defense and prove at the evidentiary hearing that a number of the House's allegations are simply untrue. Judge Porteous further intends to prove that much of the conduct relied upon by the House in seeking his removal from office is neither criminal nor in any way improper. Each of these showings will fatally undermine the House's case and expose its failure to carry its extensive and exclusive burden of proof.

B. Standard of Proof

Neither the Constitution nor the Senate's Rules mandate a particular standard of proof by which Senators must judge the evidence presented during an impeachment trial. Instead, the applicable standard is left, as it is often phrased, to "the conscience of each Senator." *See* CRS Rpt. 98-990, at 5-6, *Standard of Proof in Senate Impeachment Proceedings* (internal quotations omitted). Nevertheless, given that the impeachment process pits two co-equal branches of government directly against one another and threatens a federal constitutional officer with the

most severe constitutional sanction that may be visited upon him, the Senate has maintained a high standard of proof – rejecting all but seven prior judicial convictions. Each Senate is expected to "mind the line" in preserving a clear and high standard for removal so as not to undermine the independence of the American judiciary.

The impeachment process was specifically designed to be complex, cumbersome, and exacting. This design ensures that legislative intrusions into the business and personnel of the federal judiciary are minimal, occur as rarely as possible, and are reserved for only the most egregious cases – where the evidence of extreme wrongdoing is clear. These safeguards are necessary to preserve judicial independence, as well as the Constitution's carefully constructed system of checks and balances.

Therefore, in evaluating the proffered evidence in this case and deciding whether that evidence justifies Judge Porteous's removal from office, Senators should apply a strict standard of proof akin to the "beyond a reasonable doubt" threshold employed in criminal proceedings. While this is not a "criminal proceeding" *per se*, the text of the Constitution repeatedly describes the impeachment process in criminal terms. Specifically, the Senate has the "sole Power to <u>try</u> all Impeachments, at which "no Person shall be <u>convicted</u> without the Concurrence of two thirds of the Members present," and for which conviction shall lie only for "Treason, Bribery, or other <u>high Crimes and Misdemeanors</u>." U.S. CONST. art. I, § 3, cl. 6 & art. II, § 4 (emphasis added). The Senate's own rules similarly speak in criminal terms, requiring that each Senator vote either "guilty" or "not guilty" with regard to each article of impeachment.[7] The gravity of this terminology ("try," "convicted," "high Crimes and Misdemeanors," "guilty") – none of which was lightly chosen, and none of which should be lightly ignored – strongly suggests that each

[7] *See* Rule XXIII of the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials.

Senator adopt an exceedingly high standard of proof and be absolutely certain that conviction and removal is warranted before voting to remove Judge Porteous from his federal, constitutional office.

Moreover, a stringent standard of proof is particularly necessary in this case to ensure that the Senate does not become a "fall-back" venue, for use where – as here – criminal prosecution has been specifically declined. The Federal Bureau of Investigation and U.S. Department of Justice, Public Integrity Section, conducted an extensive criminal investigation into Judge Porteous. Following that searching inquiry, the government specifically declined to bring *any* charges against Judge Porteous. As a result, Judge Porteous was never criminally indicted, nor ever criminally tried. Nonetheless, the House elected to pursue impeachment proceedings against Judge Porteous on the basis of the very same conduct investigated – and determined to be insufficient to warrant criminal prosecution – by the FBI and DOJ. It would, therefore, be inequitable and create dangerous precedent for Senators to apply any standard of proof lower than that that would have applied had the government elected to pursue criminal charges against Judge Porteous. If anything, it should be more – not less – difficult to impeach and remove a federal judge via impeachment than to indict and convict that same judge in a criminal proceeding.

C. Motions to Dismiss Articles I, II, III, and IV

Each of the House's four Articles of Impeachment fails to state an impeachable offense. Accordingly, on July 21, 2010, Judge Porteous moved to dismiss Articles I, II, III, and IV. All of these motions remain pending. Judge Porteous hereby incorporates those motions by reference and respectfully renews his request that the Senate dismiss the Articles of Impeachment. In view of the Committee's indication that Judge Porteous's motions to dismiss

will not be ruled upon prior to the evidentiary hearing, however, Judge Porteous further requests that the Senators review his motions to dismiss and consider and evaluate the evidence proffered by the House in light of the arguments raised therein. Judge Porteous has requested (and again requests) the opportunity to be heard on these constitutional questions before a decision is made whether to refer the questions to the full Senate. Alternatively, he requested (and again requests) the opportunity to argue these motions separately to the full Senate so that the Senators can be fully briefed on the threshold and important constitutional issues raised by these Articles.

Respectfully submitted,

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Dated: September 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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