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

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

JUDGE G. THOMAS PORTEOUS, JR.'S
MOTION TO DISMISS ARTICLE I OF THE HOUSE
OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

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NOW BEFORE THE SENATE, comes Respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests that the Senate dismiss Article I of the Articles of Impeachment lodged against him by the House of Representatives on the ground that it fails to state any cognizable ground for impeachment. In support, Judge Porteous states as follows.

INTRODUCTION AND SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Article I should be dismissed.

Respectfully submitted,

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Dated: July 21, 2010

CERTIFICATE OF SERVICE

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

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