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 II OF THE HOUSE OF REPRESENTATIVES' ARTICLES OF IMPEACHMENT

Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
Amos Jones
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: July 21, 2010

TABLE OF CONTENTS

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 files this Motion to Dismiss Article II of the Articles of Impeachment.[1]

Article II 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." (111 Cong. Rec. S1645 (Mar. 17, 2010), hereinafter "Article II.")[2]

If sustained by the Senate, Article II would create a new and dangerous precedent that would allow Congress to remove judges and other federal officials on the basis of their alleged conduct prior to assuming federal office. Such a standard would be a direct threat against the independence of the judiciary and would allow for reciprocal removals of judges by rivaling parties. Even in the absence of a prior indictment of such conduct, Article II expressly relies on conduct going back decades before federal service to claim a basis for removal. This clearly was not the intent of the Framers in their careful crafting of the impeachment clauses of the Constitution. From the beginning of this Republic, impeachments have been limited to conduct

---

[1] This Motion should be considered as a Motion to Dismiss under the Federal Rules of Civil Procedure, Rule 12(b)(6), and assumes the facts alleged in Article II. As stated, however, the allegations in Article II, and in the underlying Report of the House of Representatives, as prepared by House Impeachment Counsel, are factually incorrect, or contain overstatements, half-truths, and over-statements. This Motion takes the position that, putting all of that aside, the allegations in Article II do not state charges that are properly the subject of an impeachment.

[2] The allegations in Article II were raised repeatedly over a ten-year period. The FBI looked into the allegations before Judge Porteous's confirmation. The Metropolitan Crime Commission, an independent body, also examined these issues. According to documents from the Metropolitan Crime Commission, the FBI reportedly also looked into the allegations again soon after confirmation, including review under the Hobbs Act. Then, Judge Porteous was investigated with other Jefferson Parish judges as part of the Wrinkled Robe investigation. None of these investigations produced evidence to support a charge against Judge Porteous – as opposed to the Marcottes, who were indicted and ultimately agreed to plea deals offered by the government.

occurring while an individual was in the subject federal office as opposed to conduct that occurred prior to taking that position. As recognized by the Congressional Research Service, the Senate has never before applied the powers of impeachment to conduct occurring before the tenure in the office held at the time of the impeachment investigation.[3] Indeed, in prior cases, the Senate specifically has declined to convict on articles of impeachment based on conduct that was alleged to have occurred before the accused assumed the office that is the subject of the impeachment.

Despite this long-standing precedent, Article II focuses on conduct alleged to have occurred prior to Judge Porteous taking the federal bench. Indeed, in crafting Article II, the House reached back over 25 years (including 10 years before Judge Porteous took the federal bench) to find alleged impeachable conduct. Not only was the House contradicted by the precedent of this body, it was contradicted by the testimony of its own expert witnesses who warned that "[t]he State court stuff, well, that's arguably just State Court stuff" and that "there's not been any successful impeachment; that is to say, moved through the House and the Senate" based on events that took place prior to the person being a federal officer. (Hearing Before the Task Force on Judicial Impeachment of the House Committee on the Judiciary, December 15, 2009, at 47, 51-52, hereinafter "Dec. 15th Hearing.") The reasons for this are obvious. If the

---

[3] The Congressional Research Service concluded, in reviewing the issues underlying this case, that:

> …it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House solely on the basis of conduct occurring before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations.

Elizabeth B. Bazan & Anna C. Henning, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, Congressional Research Service, April 26, 2010.

Constitution could be used to impeach judges for conduct occurring prior to taking the federal bench, then impeachment could be wielded as a dangerous weapon for partisan or other improper purposes by effectively re-litigating, on a random basis, a judge's qualifications to hold office.

The House does little to disguise the fact that Article II depends entirely on "pre-federal" conduct, or conduct alleged to have occurred prior to Judge Porteous taking the federal bench. After its own constitutional experts failed to support a pre-federal article, the House added a brief, vague statement that "while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business." (Article II.) This is the only misconduct in Article II alleged to have occurred during Judge Porteous's federal judgeship.[4] The House Report concedes that, while on the federal bench, Judge Porteous could no longer set bonds for the Marcottes but nevertheless argues that because Judge Porteous conversed with the Marcottes at a cocktail reception, ate several restaurant meals with the Marcottes, and introduced the Marcottes to other State Court Judges on various occasions, he used the "strength" and "power" of his office improperly. (*See* Report 111-427 at 80-85, hereinafter "House Report.")

The House invites the Senate to convict Judge Porteous for nothing more than socializing and networking with friends whom the House finds disreputable. This sets a very dangerous precedent. If federal judges must fear impeachment merely for associating with people of whom the House disapproves, the risk of partisan abuse of the impeachment process increases exponentially. This could revive the specter of the "Impeach Earl Warren" campaign in the

[4] Article II also alleges that one of the bail bondsmen, Louis Marcotte, "made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." That, however, is not even alleged to be an action taken by Judge Porteous. Moreover, the exact language is also used in Article IV.

1950s and 1960s, in which the Chief Justice of the United States was threatened with impeachment because of his rulings on desegregation.

In effect, the House alleges that Judge Porteous's supposed attendance at a handful of lunches – over the course of seven years[5] – totaling an overall gift of approximately $246 (or an average of about $40 per lunch)[6] – amounts to an impeachable offense. As the House would have it, a half-dozen lunches with state bail bondsmen would be placed on a par with treason. Such an allegation makes a mockery of the constitutional standard and impeachment process.

Judge Porteous respectfully requests that the Senate dismiss Article II in its entirety as failing to state an impeachable offense.

FACTUAL BACKGROUND

Judge Porteous was elected Judge of the 24th Judicial District Court in the State of Louisiana in 1984 and remained in that position until October 1994. In August 1994, Judge Porteous was nominated by President Clinton to serve as United States District Court Judge for

---

[5] It is not at all clear that Judge Porteous even attended four of the six lunches the House Report alleges he attended where he supposedly exerted his "power and prestige" with other state judges. *See* House Report at 81. For four of the lunches, the best evidence the House presents is that the lunch bill includes a reference to "Abs" or "Abso" which the House believes references an order for Absolut vodka – a drink Judge Porteous is claimed to favor. This appears to require the Senate to take some form of judicial notice that so few people in Louisiana drink Absolut that an appearance of a reference to that libation on a lunch bill inevitably leads to the conclusion that Judge Porteous must have attended the lunch.

[6] The $246 figure was calculated based on the total bill divided by number of people who reportedly attended these lunches:

(1) 8/6/1997 Lunch $287.03 total bill – five attendees – Porteous's alleged share = $57;
(2) 8/25/1997 Lunch $352.43 total bill – ten attendees – Porteous's alleged share = $35;
(3) 11/19/1997 Lunch $395.77 total bill – ten attendees – Porteous's alleged share = $39;
(4) 8/5/1998 Lunch $268.84 – nine attendees – Porteous's alleged share = $29;
(5) 2/1/2000 Lunch $328.94 – eight attendees – Porteous's alleged share = $41;
(6) 11/7/2000 Lunch $635.85 – fourteen attendees – Porteous's alleged share = $45.

These receipts are attached as Exhibit 1 to this Motion.

the Eastern District of Louisiana. Judge Porteous was confirmed by the Senate on October 7, 1994 and began serving in that position on October 28, 1994.

Article II begins by vaguely alleging that Judge Porteous "engaged in a longstanding pattern of corrupt conduct…." (Article II.) Article II states that this conduct began "in or about the late 1980s **while he was a State court judge** in the 24th Judicial District Court in the State of Louisiana…." (*Id*.) (emphasis added). Article II further defines this conduct, alleging that Judge Porteous "solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit…." (*Id*.) The Article alleges that while Judge Porteous solicited and accepted these things of value, he took "official actions that benefitted the Marcottes…**while on the State bench**." (*Id*.) (emphasis added).

Article II fails to make a single specific claim regarding federal bench activity, but explicitly details the actions Judge Porteous is alleged to have taken while on the State bench (i.e. accepted "meals, trips, home repairs, and car repairs" and "setting, reducing, and splitting bonds…and improperly setting aside or expunging felony convictions..."). (*Id*.) The House then attempts to salvage the Article from purely pre-federal office allegations by tangentially alluding to the federal bench at various points in the Article. The Article alleges that the "pattern of corrupt conduct" continued while Judge Porteous was on the federal bench, but fails to allege any act other than that "Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business." (*Id*.) The Article does not provide any additional information regarding this use of "power and prestige." (*Id*.) As discussed above, the House Report provides only a handful of vague references to Judge Porteous interacting with the Marcottes on several occasions over the course of seven years.

Finally, Article II attempts to attribute the alleged bad conduct of Louis Marcotte to Judge Porteous by alleging that "Judge Porteous well knew and understood" that Louis Marcotte "made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." (*Id*.) The Article does not allege that Judge Porteous suborned false statements or made a single false statement himself. Even accepting as true the bizarre speculation that Judge Porteous was somehow privy to the FBI agents' full interview with Marcotte, such an allegation, if successful, would make impeachment the sanction for merely suspecting false statements made by others – a standard that would defy limitation or logic.

ARGUMENT

Article II should be dismissed for several reasons. First, as a matter of precedent, the Senate has never convicted an individual on the basis of conduct which occurred prior to the individual taking the office for which he was being impeached. Article II would create new and dangerous precedent – endorsing a standard that would allow judges to be removed for alleged conduct that occurred decades before federal confirmation. Worse yet, this new precedent would be forged in a case where the defendant has not even been indicted, let alone convicted, of such wrongdoing. The House has made such allegations in past impeachments, but the Senate has specifically declined to convict on such pre-office conduct grounds, recognizing that such allegations would directly contradict the intentions of the Framers and untether the standard of impeachment from its constitutional moorings.[7] In fact, the House's own constitutional experts

[7] By "pre-office" conduct, we refer to activity that occurs before a current judicial office; "pre-federal" conduct more specifically refers to activity that occurs before holding any federal judicial office.

revealed that they do not believe that the conduct alleged in Article II can give rise to a conviction in the Senate.

Once the pre-federal conduct is removed, Article II is trivial, alleging that Judge Porteous, in some unspecific manner, engaged in a supposedly "high Crime" or "high Misdemeanor" by accepting no more than a half-dozen lunches averaging about $40 apiece over roughly a seven-year period. Article II should be dismissed in its entirety.

I. By Alleging Pre-Federal Conduct, Article II Violates the Language and Intent of the Impeachment Clauses of the United States Constitution.

The Framers struck a delicate balance in crafting the impeachment provisions to allow for the removal of a president or a judge. Some delegates to the Constitutional Convention opposed such a power, particularly with regard to the President. The concern was that the legislative branch could usurp the needed independence of the Executive and Judicial branches. To avoid mischievous and arbitrary action by the Congress, the Framers adopted a high standard for removal, making it difficult, both procedurally and substantively, to remove a federal judge. In this system, the House and Senate have manifestly different functions, with the House serving more as a grand jury and the Senate serving as the adjudicatory body. *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 Chicago Press, 2d ed. 2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 99 (1999). In this capacity, as discussed below, the Senate has often rejected articles of impeachment that do not satisfy the constitutional standard or that contain insufficient facts upon which to base removal. The Senate has historically strived to maintain certain bright-line rules of impeachment. One of those lines has

been to confine impeachment of a federal judge to conduct while serving in the position for which the judge is being impeached, as opposed to "pre-federal" or "pre-office" conduct. This is an obvious and necessary distinction since Article III of the Constitution guarantees judges life tenure "during good behaviour" in office. (U.S. CONST. art. III, § 1.) Likewise, under Section 4 of Article II of the Constitution, the standard for impeachment refers to acts directly violating the oath of office in the cases of treason or bribery – neither of which is alleged in this case. Similarly, the meaning of "other high crimes and misdemeanors" historically has been confined to misconduct which occurred during a judge's tenure in office.

The record from the Federal Constitutional Convention reflects an intent by the Framers to confine impeachment to acts committed in office. Early language was tied directly to an officer's performance in office, allowing impeachment only for "malpractice or neglect of duty" which became, in the Committee of Detail, "treason, bribery, or corruption." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 78 (Harvard Univ. Press 1973). Ultimately, "corruption" was dropped by the Committee of Eleven.[8] *Id*. The additional Constitutional language, "high Crimes and Misdemeanors," was added after George Mason suggested on the floor of the Convention that "maladministration" be added to allow impeachment beyond the narrow categories of treason and bribery. *Id*. Madison remarked that "so vague a term [as maladministration] will be the equivalent to a tenure during the pleasure of the Senate," whereupon Mason substituted "high crimes and misdemeanors," which was adopted without demur. *Id*. at 91. Justice James Wilson, who had been a leading Framer, referred to

[8] Although Article II alleges that a basis for impeaching Judge Porteous is a purported "longstanding pattern of corrupt conduct" – after witnesses specifically denied he had been bribed – the Framers expressly rejected the concept of "corruption" as a proper ground for impeachment.

"malversation in office, or what are called high misdemeanors." *Id*. at 78. Alexander Hamilton, in Federalist No. 65, observed that:

> [t]he subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or, in other words, 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.[9]

The result was the current standard of "Treason, Bribery, or other high Crimes and Misdemeanors." (U.S. CONST. art. II § 4.)

The record from the Constitutional Convention reveals an exclusive focus on conduct in office. While it is accepted that the standard is not just limited to the abuse of judicial functions, it is limited to conduct during office.[10] The only exception recognized by one of the House's own expert witnesses – Professor Akil Amar – is the act of concealing facts during confirmation, which forms the purported basis for Article IV. (*See* Dec. 15th Hearing at 17-18, 45-47.) The impeachable act, in such an example, is concealment in the run-up to confirmation and not the substantive acts (all pre-federal) which are being concealed. Article II would combine the rejected "corruption" standard with pre-federal acts in direct contradiction of the language and underlying intent of Section 4 of Article II of the Constitution. If allowed, judges would be faced with precisely the open-ended standard that Madison wanted to avoid, serving "tenure during the pleasure of the Senate" since, on an arbitrary fashion dictated by partisan interests, they could be removed for acts going back decades before they became federal judges.

---

[9] Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives,* 68 TEX. L. REV. 1, 85-86 & n. 380 (1989).

[10] Some have suggested a "judicial function" doctrine limiting impeachment to official acts. Jonathan Turley, *The Executive Function Theory, the Hamilton Affairs, and Other Constitutional Mythologies,* 77 N.C.L. Rev. 1791, 1802 (1999); *see also* Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 268-77 (1998).

II. The Senate Has Convicted Judges Only For Misconduct Committed During Federal Service.

One of the House Managers' own experts stressed previously that "no one has ever been impeached, much less removed from office, for something he or she did prior to assuming an impeachable position in the federal government." GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS, at 108. Throughout the history of the United States, only fifteen federal judges have been impeached by the House of Representatives.[11] Of these fifteen, only seven have been convicted and removed from office by the Senate. An analysis of their cases shows that the Senate has removed from office only those judges who explicitly abused the official federal constitutional powers bestowed upon them while in the office for which they were being impeached:

1. Judge John Pickering was impeached in 1803 and convicted by the Senate in 1804 for allegedly rendering judgment on the merits of a case while refusing to hear relevant testimony offered by the attorney general, disregarding and attempting to evade federal law, and refusing to permit an appeal; further, he appeared on the bench while intoxicated. (*See generally* 13 Annals of Cong. 319-368 (1852).)

2. Judge West H. Humphreys was impeached and convicted by the Senate in 1862 for actions most akin to treason, incitement to revolt, and rebellion while sitting as a federal judge. Humphreys joined the Tennessee secession and served as a District Court Judge

[11] The following judges have been impeached by the House of Representatives: (1) John Pickering, Judge, District of New Hampshire; (2) Samuel Chase, Associate Justice, Supreme Court of the United States; (3) James H. Peck, Judge, District of Missouri; (4) West Hughes Humphreys, Judge, Eastern, Middle, and Western Districts of Tennessee; (5) Mark W. Delahay, Judge, District of Kansas; (6) Charles Swayne, Judge, Northern District of Florida; (7) Robert W. Archbald, Associate Justice, United States Commerce Court and Judge, Third Circuit Court of Appeals; (8) George W. English, Judge, Eastern District of Illinois; (9) Harold Louderback, Judge, Northern District of California; (10) Halstead Ritter, Judge, Southern District of Florida; (11) Harry E. Claiborne, Judge, District of Nevada; (12) Alcee Hastings, Judge, Southern District of Florida; (13) Walter Nixon, Chief Judge, Southern District of Mississippi; (14) Samuel B. Kent, Judge, Southern District of Texas; and (15) Thomas Porteous, Judge, Eastern District of Louisiana. *See generally* EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT, (Congressional Quarterly 1999).

in the Confederate States of America without retiring from the federal bench. (*See generally* Cong. Globe, 37th Cong., 2d Sess. 1062-2953 (1862).)

3. Judge Robert W. Archbald was impeached in 1912 and convicted by the Senate in 1913 for bribery and abuse of his position as a federal judge by inducing numerous litigants to allow him profitable financial deals, and hearing cases as a federal judge in which he had a financial interest. (*See generally* 62 Cong. Rec. S1105-1678 (1913).)

4. Judge Halsted L. Ritter was impeached and convicted by the Senate in 1936 for creating kickback schemes while a federal judge, continuing to work on a case as a lawyer while already a federal judge, evading federal income tax while a federal judge, bartering his federal judicial authority for a vote of confidence, and bringing his court into scandal and disrepute. (*See generally* 74 Cong. Rec. S1-684 (1936).)

5. Judge Harry Claiborne was impeached and convicted by the Senate for tax evasion in 1986. Prior to his impeachment, Claiborne had been convicted in court of criminal tax evasion for substantially under-reporting his income in 1979 and 1980 while he was a federal judge. The income he failed to report was the profit gained from bribes that Judge Claiborne had received. (*See generally* 99 Cong. Rec. S2-31 (1986).)

6. Judge Alcee L. Hastings was impeached in 1988 and convicted by the Senate in 1989 for conspiracy to solicit a bribe and perjury while a federal judge. (*See generally* 101 Cong. Rec. S1-77 (1989).)

7. Judge Walter L. Nixon was impeached and convicted by the Senate in 1989 for perjury while a federal judge. Prior to his impeachment, Nixon had been convicted in court on federal criminal charges of perjury and was serving a five-year sentence. Nixon's perjury conviction arose out of statements he made to a grand jury, which was investigating bribery charges alleging that Nixon accepted a gratuity in exchange for attempting to influence a state's drug prosecution against a business partner's son. (*See* 101 Cong. Rec. S10,673 (1989).)

Records of past impeachment proceedings also demonstrate that evidence relating to misconduct in a prior office falls outside the proper scope of an impeachment inquiry. The closest analogous precedent, Robert W. Archbald's impeachment in 1912, shows a clear rejection by the Senate of claims that a judge can be impeached for pre-office conduct, especially if the former office was in state court.

Archbald served as a district court judge in the Middle District of Pennsylvania from 1901 to 1911. *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 217-18 (Univ. of Illinois Press 1992). In 1911, Archbald was assigned to

a circuit judgeship on the United States Commerce Court, a federal judgeship. *Id*. at 218. During his time on the Commerce Court, Archbald was also appointed to, and confirmed for, a seat on the United States Court of Appeals for the Third Circuit. *Id*.

In 1912, the House of Representatives filed thirteen Articles of Impeachment against Archbald, alleging misconduct in his then-current circuit judgeship (Articles 1 through 6) as well as in his prior district judgeship (Articles 7 through 12).[12] The Senate convicted Archbald on Articles 1, 3, 4, 5, and 13, but acquitted Judge Archbald on the articles relating solely to Archbald's former office (Articles 7 through 12).[13] In so doing, many Senators formally denounced impeachment based on pre-office misconduct. For example:

- Senator Bryan (D-FL) stated that he was "convinced that articles of impeachment lie only for conduct during the term of office then being filled." (S. Doc. No. 1140, 62d Cong., at 1635 (1913).)

- Senator Brandegee (R-CT) stated: "I vote 'not guilty' on article 13 because it alleges offenses some of which are alleged to have been committed by the respondent while he was… [in an] office he does not hold at present and did not hold at the time the articles were adopted[.]" (*Id*. at 1647.)

- Senator du Pont (R-DE) stated: "My vote of 'not guilty' upon the articles of impeachment against Judge R.W. Archbald numbered 7, 8, 9, 10, 11, 12, and 13 was based, in the main, upon the fact that the offenses therein charged were alleged to have been committed…when he was not holding his present office." (*Id*. at 1647.)

- Senator Works (R-CA) stated: "I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to his present office." (*Id*. at 1635.)

---

[12] Article 13 was a "catch-all" count that charged Archbald with making a "regular business of profit" from the conduct alleged in the preceding articles. (*See* 62 Cong. Rec. S1647 (1913).) It specifically incorporated conduct from Archbald's district court judgeship, circuit court judgeship, and Commerce Court judgeship. For more detail regarding Article 13, see pages 15-16, below.

[13] *See* 62 Cong. Rec. S1647 (1913) at Index p. XIV (listing "guilty" and "not guilty" votes for each of the rejected articles).

- Senator M'Cumber (R-ND) stated: "[Articles 7-12] charge offenses committed while Judge Archbald was holding another and distinct official position…I therefore voted 'not guilty' on each and all of said articles[.]" (*Id*. at 1659-60.)

- Senator Catron (D-NM) stated: "[t]he charges (Nos. 7, 8, 9, 10, 11, and 12) against Judge Archbald of acts committed during the time that he was a district judge and before he became a circuit judge, in my opinion, have no validity in them…I do not believe that the House of Representatives had the right to go back of the present office held by Judge Archbald to hunt up any of his acts to charge against him so as to remove him from the office he now holds." (*Id*. at 1661.)

- Senator Crawford (R-SD) stated: "I find respondent guilty of misconduct, but it occurred before he became the incumbent of his present office…I do not believe impeachment can be sustained…for the reason stated." (*Id*. at 1655.)

Several Senators concluded that impeachment for pre-office conduct would violate the Constitution. Senator M'Cumber (R-ND) framed the issue as one of improper jurisdiction:

> [T]he purpose of the Constitution in providing for impeachment proceedings was to purge the official roll of the country of improper officers, and nothing further. The Constitution therefore provided that the judgment of the Senate should not go beyond removal from office . . . . [T]herefore **impeachment proceedings can not lie against a person for an act committed while holding an official position from which he is separated**.

(*Id*. at 1660) (emphasis added). Various Senators likewise held that the Constitution expressly precludes impeachment for pre-office conduct:

- Senator Catron (R-NM) stated: "Section 4 of Article II of the Constitution is restricted by the terms of that section to the actual President, Vice President, or any civil officer who is actually such at the time the charges are made, and, in my judgment, is limited to the acts done by him in that particular office." (*Id*. at 1661.)

- Senator Works (R-CA) stated: "[t]he Constitution provides, in express terms, that judges appointed 'shall hold their offices during good behavior.' Therefore if a judge has maintained his good behavior during that time he has done nothing to forfeit his office . . . [n]either can such misbehavior, committed before his appointment, warrant a judgment disqualifying him from holding office[.]" (*Id*. at 1635-36.)

- Senator Bryan (D-FL) stated that "the 'good behavior' required by the Constitution relates to the future and not to the past; to what the officer does after, and not to what the citizen had done before, he is nominated and confirmed." (*Id*. at 1635.)

Senators in the Archbald trial also noted that impeachment for pre-office conduct could lead to extreme partisan abuses. As Senator William J. Stone (D-MO) emphasized, impeaching Archbald on Articles 7-12 would create precedent subjecting all civil officers to impeachment for minor pre-office misconduct regardless of how long ago it occurred:

> It would not be difficult to conceive . . . [a case] where one who had been a district judge had been appointed to the Supreme Bench...who thereafter had served for many years . . . [and] under great pressure, when the country was in a state of high political excitement and when some supposed political exigency was influencing a partisan public opinion, a hostile partisan majority might hark back to some alleged misbehavior of the judge when he held the former minor judicial position.

See id. at 1652. Senator du Pont (R-DE) reiterated this point by stating: "[t]he legality of the impeachment, so far as such offenses is concerned, is questionable, and in any event a precedent fraught with danger is created." *Id*. at 1647; *see also id*. at 1634 (Senator Borah (R-ID), voting not guilty on Articles 7-12 "because of a doubt I entertain as to the law"); *id*. at 1675 (Senator F.M. Simmons (D-NC), voting not guilty on Articles 7-12 because "I felt it my duty to give the respondent the benefit of this doubt").[14]

By impeaching Judge Porteous for pre-federal conduct, the House of Representatives seeks to reverse the Senate's long-standing precedent as set in the Archbald impeachment. (*See* H.R. Res. 1031, 111th Cong., at 18 (2010).) Indeed, if Judge Porteous is convicted on the basis of Article II, it would repudiate the Senate's vote of "not guilty" on each and every article relating exclusively to Judge Archbald's pre-office conduct (Articles 7-12) and over-rule 206 years of Senate precedent.

---

[14] Other Senators expressed similar doubt, but chose to excuse themselves rather than vote not guilty. (*See* S. Doc. No. 1140, at 1632 (Senator Stone (D-MO), requesting excusal because "I have not reached a conclusion satisfactory to myself as to whether these alleged offenses [in Articles 7-12] could be reached by impeachment"); *id*. at 1634 (Senator Smith (D-GA),same); *id*. at 1636 (Senator Newlands (D-NV), same).)

Amazingly, the House Report ignores this persuasive and relevant history. Instead, it actually cites the Archbald precedent to support the notion that pre-office conduct is impeachable despite the Senate's express refusal to convict on the basis of such claims on constitutional grounds. (*See* House Report at 17, stating that ("[i]ncluding [pre-federal] conduct as a basis for impeachment is consistent with the impeachment of Judge Archbald…").) The House Report states: "The Archbald Impeachment Report specifically addressed the fact that Articles 7 through 12 were based on judicial conduct that occurred prior to Judge Archbald being appointed to the Circuit Court (from which removal was sought)." (*Id*. at 18.) What the House Report failed to emphasize was that the Senate declined to convict on those grounds; instead, the fact that Judge Archbald was acquitted of Articles 7-12, is buried in a footnote. (*Id*.)

Given the acquittal on Articles 7-12, the House Report urges reliance on Judge Archbald's conviction under Article 13 – described by the House as the "catch-all" Article. (*Id*. at 18, n. 72.) Article 13 in the Archbald impeachment proceedings read, in relevant part, as follows:

> That during the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court he…sought wrongfully to obtain credit from and through certain persons who interested in the results of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which [he was] a member.
>
> That the said Robert W. Archbald, being United States circuit judge and being then and there a judge of the United States Commerce Court…did undertake to carry on a general business for speculation and profit…for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and in furtherance of his efforts to compromise such litigation…willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce [relevant individuals]…to enter into various [] contracts and

> agreements in which he was then and there financially interested….[15]

The House Report's reliance on the conviction on the basis of Archbald's Article 13 is misleading, because several Senators expressly stated that their votes of "guilty" on Article 13 were based solely the Commerce Court misconduct. *See* S. Doc. No. 1140, at 1660 (Senator M'Cumber (R-ND), voting "not guilty" on Articles 7-12 because pre-office conduct is not impeachable, but voting "guilty" on Article 13 because "in doing so my vote was intended to express my conviction only as to those specific charges included in Article 13 upon which I had already voted 'guilty'"); *see also id*. at 1675 (Senator Simmons (D-NC), voting not guilty on Articles 7-12 because there was "doubt as to whether [senators] had the right to impeach the respondent for acts committed in an office which he no longer held," but voting guilty on Article 13 because "the charge contained therein was sustained if he was guilty of some of the material acts of misconduct therein charged while he was holding the office of circuit judge").[16] In regard to Article 13, Senator George Sutherland (R-UT), discussed the dilemma created by voting on an Article so general that it touched upon most of the charges leveled against Archbald. (*Id*. at 1642.) Sutherland noted that Article 13 included the various articles that preceded it, on some of which he had voted guilty and on some not guilty: "It occurs to me that I can not consistently vote upon this article one way or the other." (*Id*.) Eight other senators asked to be excused on the same grounds. *Id*.

---

[15] Report No. 946, dated July 8, 1912, at 32.

[16] It should be noted that Article 13 barely had the requisite two-thirds majority vote, and thirty-two senators were absent or abstained from voting. *Id.* at 1646-47 (listing 42 "guilty" votes, 20 "not guilty" votes, and 32 "absent or not voting"). In fact, if the votes of Senators M'Cumber and Simmons were switched for the reasons stated above, Judge Archbald would have been acquitted on Article 13.

The House Report also misconstrues the Archbald precedent by analogizing Archbald's pre-office conduct in a federal office to Judge Porteous's pre-federal conduct in a State office. The House Report argues that "the 'prescribed functions' of Judge Porteous's prior office as State court judge were 'of the same general nature' as the office of district court judge that he presently occupies, and were thus 'susceptible to the same malversations and abuse.'" (House Report at 18.) In contrast to Judge Porteous's position as a state court judge before becoming a federal judge, the Brief on Behalf of the House of Representatives for Archbald's impeachment emphasized the interchangeability of the federal district and circuit court offices, and noted that the senior circuit judge could "designate and appoint any circuit judge of the circuit to hold said district court." *See* S. Doc. No. 1140, at 1063 ("There is such a close interrelation between the duties and powers of United States **district** and **circuit** judges as to make the two offices substantially the same within the contemplation of the constitutional provisions relating to impeachments") (emphasis added). The Archbald Impeachment Report accordingly argued that Archbald held "civil office, within the meaning of the Constitution, of the same judicial nature as the office held by him at the time of the commission of the offenses." *Id.* This commonality of function and office is obviously different under our Constitutional system when the office in which the questioned conduct allegedly took place was a *state* judgeship and the office from which the impeachment occurs is a *federal* judgeship. (*See, e.g.,* LA. CONST. art. V, § 22 (requiring Louisiana States judges to be elected, rather than appointed.) The effort to fudge the difference between federal and state offices and requirements of conduct is both transparent and unavailing. To cross this constitutional rubicon would allow future judges to be impeached for any prior conduct that suggests some failing that, while expressly not treason or bribery, could be claimed to show a corrupt tendency.

III. The House's Own Experts Rejected Pre-Federal Conduct as a Proper Basis For Impeachment.

Realizing that impeachment of a federal judge for pre-federal conduct would be unprecedented, the House sought the support of three different law professors – Charles G. Geyh, Michael J. Gerhardt, and Akil Reed Amar – to testify that the alleged conduct "provides a sufficient basis for impeachment." (Dec. 15th Hearing at 1.)[17] The House labeled these witnesses their "experts" and used their testimony as the basis for passing the Articles. (*Id*.) While endorsing the theoretical basis for Article IV's impeachment for concealing prior bad acts at confirmation, the witness testimony directly refuted the premise of Article II that pre-federal conduct may be a proper basis for impeachment.

In his testimony, Professor Gerhardt notes that "whether or not somebody may be subject to impeachment conviction and removal for conduct done prior to occupying that particular position…can be a difficult question." (*Id*. at 24.) In fact, Professor Gerhardt, upon questioning by Judge Porteous's counsel conceded that "there's not been any successful impeachment; that is to say, moved through the House or the Senate" based on events that took place prior to the person being a federal officer. (*Id*. at 52.) Professor Gerhardt broke down such pre-federal into "three kinds of misconduct . . . "

1. 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;

2. Misconduct that is known at the time the judge is confirmed; and

3. Misconduct that is egregious but not known at the time of the judge's confirmation proceedings.

[17] Professor Geyh's testimony focused on the applicable Judicial Codes of Conduct, as opposed to the validity of charging and convicting on pre-federal conduct. Accordingly, his testimony will not be analyzed in this Motion.

(*See id*. at 29.) Professor Gerhardt concludes that "the Constitution clearly permits impeachment in the third circumstance **but not necessarily in either of the other two**." (*Id*. (emphasis added).) Gerhardt suggests that the first type of misconduct is by definition "unimportant, innocuous, or trivial," and, "[a]s 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." (*Id*.) In fact, much of what is alleged in Article II falls into this first category of misconduct that Professor Gerhardt identifies, including the acceptance of six lunches – valued at or less than $50 apiece – over a seven year period.[18] These lunches after Judge Porteous took the federal bench are among the variety of disparate allegations contained within Article II – a constitutional defect in and of itself[19] – intended to aggregate a series of acts which, individually and together, were not deemed sufficient to warrant any investigation, let alone a sanction, from the Louisiana State courts or the Louisiana State Bar.

In his testimony, Professor Gerhardt continued to explain that the "second type 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." (*Id*. at 30.) Professor Gerhardt finishes by arguing that only the "third kind of misconduct" – misconduct that is "egregious and not known at the time of confirmation" – is impeachable behavior because it is bad behavior that by itself demonstrates a level of "moral depravity and bad judgment that is completely incompatible with the responsibilities of a judge." (*Id*.) Professor Gerhardt states

---

[18] Judge Porteous does not necessarily accept the delineation and categorization of types of misconduct advanced by Professor Gerhardt but, for purposes of this motion, submits his own analysis of the facts as they apply to that framework.

[19] The aggregation of claims inherent in Article II and the other Articles is discussed in great detail in 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.

that it is his understanding "that Judge Porteous has been charged with misconduct that falls into this third circumstance." (*Id*.) Later Professor Gerhardt states "I'm pretty confident that they [the Senate] didn't know anything about this." (*Id*. at 46.) Moreover, Professor Gerhardt stated that "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." (*Id*.)

Contrary to Professor Gerhardt's supposition, discovery in this case shows that the underlying allegations in Article II were reported to and investigated by the FBI and submitted to the Senate before confirmation,[20] but were correctly found to be unsubstantiated and not warranting further action. Beginning on June 24, 1994, during its background investigation of Judge Porteous for his federal judgeship nomination, the FBI interviewed numerous witnesses. A review of the results of that background investigation, which was undertaken for the purpose of review by the Senate, reveals that the government was informed of the allegations of improper state court conduct contained in Article II. For example, the FBI was clearly aware that Judge Porteous maintained a relationship with the Marcottes. The FBI specifically interviewed Louis Marcotte during its background investigation of Judge Porteous, and Marcotte explained that he had known the Judge professionally and socially for the past ten years and that he sometimes went to lunch with Judge. (*See* PORT000000471, attached as Exhibit 2.) Moreover, confidential informants told the FBI that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PORT000000526, attached as Exhibit 3.) Based on

[20] While the House Managers supplied a general listing of all documents in their possession to defense counsel in the Hastings impeachment, Judge Porteous has been denied such limited discovery and House Impeachment Counsel have held back material that they deem unrelated to the Articles of Impeachment without concern for what the defense may find useful in establishing Judge Porteous's innocence. The American Bar Association and the Department of Justice have refused to directly provide documentation of their investigations into Judge Porteous to the defense. These matters are the subject of Motions for Assistance, which were previously filed with the Senate and are currently under review by the Committee.

this information, the FBI conducted additional interviews and further investigation and specifically sent an additional "note to DOJ" – all of which was provided to the Senate. (*See* PORT000000530, attached as Exhibit 4.) The additional information known to the Senate prior to Judge Porteous's confirmation is detailed in the chart below.

Claim in Article II	Information in FBI Background Investigation of Judge Porteous Provided to Senate Prior to Confirmation
Judge Porteous knew and was associated with the Marcottes.	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI that "he has known the candidate for approximately ten years" and that he "knows the candidate professionally and socially." (PORT000000471, attached as Exhibit 2.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous dined with the Marcottes	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI "that he sometimes goes to lunch with the candidate and attorneys in the area." (PORT000000471, attached as Exhibit 2.)
Judge Porteous accepted things of value from the Marcottes, including meals, trips, home repairs, and car repairs	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that the Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks" (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous set, reduced, and split bonds as requested by the Marcottes	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PORT000000526, attached as Exhibit 3.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge Porteous 'frequently sign[ed] bonds ahead of time for bondsmen." (PORT000000526, attached as Exhibit 3.). (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that the candidate "indirectly received $10,000 from an individual in exchange for the candidate reducing his bond." (PORT000000463, attached as Exhibit 5); the FBI interviewed an individual, whose identity has been redacted from discovery documents, who reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take $12,500.00 to get [the boyfriend] out of jail" and that "$10,000.00 of this would go to Judge Porteous for the bond reduction." (PORT000000524, attached as Exhibit 6.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Porteous was "paid to reduce a bond" in a different case and "had been given $1,500 to reduce a bond" in that matter. (PORT000000526, attached as Exhibit 3.) This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. (PORT000000530, attached as Exhibit 4.) (The Justice Department has refused to reveal the identity of this source to the defense.)
Judge Porteous improperly set aside or expunged felony convictions	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]." (PORT000000526, attached as Exhibit 3.) (The Justice Department has refused to reveal the identity of this source to the defense.)

Professor Gerhardt is not alone in believing that what the Senate knew prior to the confirmation would be material to impeachment proceedings based on pre-federal conduct. One of the House Managers, Congressman Gonzalez, stated that he was concerned about "[w]hat was the Senate was privy to." (Dec. 15th Hearing at 45.) He asked rhetorically, "How much did the Senate know?" (*Id*.) This concern was well founded and appears to be of even greater import in light of the information that House Impeachment Counsel now has made available to the defense, despite failing to cite it in the House Report.

Thus, even if the Senate were to conclude that the Porteous case did not fall into either of the first two Gerhardt categories, the case would not qualify for impeachment under the testimony of the House's own witnesses. Indeed, putting aside the fact that these allegations were known before confirmation, the Senate, according to Professor Gerhardt, would need to determine that the alleged misconduct rose to the level of "moral depravity," a high standard that would seemingly not apply to the alleged receipt of things of small value like meals, car maintenance, and the like. If accepting occasional lunches from professional associates in the small and closely connected legal community of Jefferson Parish, Louisiana, is a case of "moral depravity," not just courts but legislatures must be considered dens of depravity. In fact, both the House and Senate rules currently provide a general *de minimis* exception for gifts from private sources and allow for the acceptance of a gift (including the gift of a meal) if the gift has a value of below $50. House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, para. 1(a)(2). In fact, prior to 1996, there were no limits on the acceptance of free meals by members of Congress. (*See* House Ethics Manual, Cmte. on Standards of Official Congress, (2008 ed.), at 27-28.[21]) Judge

[21] The gift rules have changed repeatedly over the last several decades:

Porteous's acceptance of the gifts from the Marcottes each appeared to be of a value below or close to $50.00. As such, to convict Judge Porteous for the acceptance of these gifts, if they occurred, would assert evolving ethical standards that the Senate, acting as a jury in this matter, has rejected in its own ethical rules.

Finally, even if it is assumed that the acceptance of such gifts and other allegations in Article II did occur and was not disclosed to the Senate prior to confirmation, the third (and only impeachable) category for pre-federal conduct described by Professor Gerhardt would be the basis not of Article II, but Article IV. Professor Gerhardt concludes that "fraudulent suppression or misrepresentation of prior misconduct" is the most logical type of pre-federal behavior that would give rise to an impeachment of a federal officer. (Dec. 15th Hearing at 52.) Article IV alleges the failure to disclose such conduct. Article II seeks to remove Judge Porteous based on the underlying conduct itself. There is a fundamental difference. One act – the failure to disclose information about these acts – allegedly occurred during confirmation, as described in

---

- From 1968 to 1990, the gift rules restricted the ability "to accept gifts from persons with a direct interest in legislation" but otherwise did not place a limit on meals or gifts received by members of Congress.
- From January 1, 1992, through December 31, 1995, the gift rules prohibited the acceptance "of gifts worth a total of more than $250 from any source in any one year." Exempted from this limitation, however, were "gifts of food and beverages consumed not in connection with gifts of lodging, *i.e.*, local meals, without any restriction as to cost or the source of the payment."
- In 1996, the House approved a new gift rule "that imposed significant, new limitations" on the acceptance of gifts, including the elimination of the meal exemption. The Senate gift rule included a provision that "generally allowed the acceptance of any gift valued below $50, with a limitation of less than $100 in gifts from any single source in a calendar year." In 1999, the House amended its gift rule to incorporate this provision of the Senate rule, allowing acceptance of gifts, including meals, if valued below $50.

See House Ethics Manual, Cmte. On Standards of Official Congress, (2008 ed.), at 27-29. *See also*, Robert F. Bauer et al., *Lobbying Under the New Disclosure and Gift Ban Requirements* (Am. Law. Inst.- Am. Bar Assoc. Course of Study, Feb. 21, 1997).

Article IV. The other acts, described in Article II, allegedly occurred over the course of a decade-long State judgeship. Notably, Professor Gerhardt recognized that even the third category presents "a difficult question," but it is a question that is raised only by Article IV, not Article II. (*Id*. at 24.)

The House Managers' other expert, Professor Akhil Reed Amar, also identified only a couple of specific circumstances in which a judge can be impeached for pre-federal conduct: (1) an individual "who bribes his very way into [the impeachable] office," and (2) "a person who procures a judgeship by lying to the President and lying to the Senate." (*Id*. at 18.)

Like Professor Gerhardt, Professor Amar focuses on whether information was falsified at confirmation as opposed to the underlying pre-federal conduct. Indeed, when pressed, Professor Amar states that "**the State court stuff, well, that's arguably just State Court stuff**," indicating he did not believe that it, on its own, rose to the level of an impeachable offense. (*Id*. at 47 (emphasis added).)

Professor Amar does not identify any additional pre-federal or pre-office conduct that amounts to an impeachable offense and notably does not substantively discuss or apply his own standards to the conduct alleged in Article II. The House Managers probed whether Professor Amar would agree that an article of impeachment could be based solely on the pre-federal conduct as opposed to the failure to disclose information at confirmation. Professor Amar tellingly answered by describing Article IV, rather than Article II, in this exchange with Congressman Schiff:

> Congressman Schiff: 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?

> Professor 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…. He could have come forward, but he concealed it. And that undercuts his ability to be a judge.

(Dec. 15th Hearing at 35.) What Professor Amar described is the claim under Article IV relating to omission of disclosure, as opposed to the claim under Article II relating to the actual commission of the pre-federal acts. Moreover, like Professor Gerhardt, Professor Amar recognized that even an Article IV claim would be invalid if the allegations were known to the FBI or Senate. as they were in this case. Accordingly, both of the experts who focused on impeachment rejected the basis for Article II, just as the Senate has historically rejected such pre-office claims.

IV. The Post-Federal Conduct Alleged in Article II – Socializing and Networking – Involved No Dishonesty and Is Not an Impeachable Offense.

As discussed above, the only federal bench misconduct alleged in Article II is that Judge Porteous "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes's business. … Accordingly, [he] has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office." (Article II.)

The House alleges that Judge Porteous allegedly "attend[ed] meals with the Marcottes and other judicial officers," "receive[ed] the benefit of those free meals," and "provided the opportunity for the Marcottes to show off their relationship with him" thus constituting behavior "utterly lacking in honesty and integrity." (House Report at 20, 4.) In fact, Judge Porteous conferred no judicial benefit upon his longtime friends, the Marcottes, for their occasional

appearances with and gifts to him. The only benefit he is even alleged to have conferred on the Marcottes as a federal judge is the benefit of socializing and networking. (*See* House Report at 20 (premising the discussion of Judge Porteous's federal-bench conduct on the statement that his conduct "did not involve taking judicial actions to benefit the Marcottes" and conceding that **"there is no evidence** that Judge Porteous specifically communicated to these judges that he sought or intended for the Marcottes to form corrupt relationships with them . . . .") (emphasis added).) They simply went to lunch together.

In Article II, therefore, Judge Porteous is being impeached because the House disapproves of his personal associations, a remarkably slippery slope for a new standard of impeachment. It is a unsettling small step from penalizing a judge for his social interactions to penalizing him for his politics or his religion, if such were to be distasteful to some Members of Congress. This is not a far-fetched idea. The Senate has, at least, entertained movements such as the "Impeach Earl Warren" campaign over de-segregation.

For centuries, the Senate has maintained clear lines on the limits of impeachable conduct. Allowing Article II to go forward would render all of the precedent meaningless by allowing a judge to be removed on the basis of his role in forming unpopular social relationships. What is striking about this is that the House does not cite any specific violation of judicial ethics rules in Jefferson Parish or any past removal of a judge for similar social events or "unsavory" friends. Thus, the House would have the Senate remove a federal judge for conduct that occurred decades ago which the forum state does not deem worthy of sanction.

The most damning federal conduct that the House Report can allege is that Judge Porteous merely "brought strength to the table" when accompanying Louis Marcotte in business settings, a fact that may well have been lost on Judge Porteous who simply believed he was

dining with friends and acquaintances. (House Report at 79.) The House does not, and could not, claim a direct violation of any federal ethical rule for Judge Porteous to accept a handful of lunches from the Marcottes who were personal friends and had no business before his federal court.

To conclude that having poor judgment in one's personal relationships constitutes an impeachable offense would create a fluid and arbitrary line for future impeachments, making them subject to partisan mischief and mortally challenging judicial independence. Such a standard, potentially, would have subjected some of the leading jurists of the last two centuries to impeachment. For example, Justice Anton Scalia was criticized for accepting hunting trips with former Vice President Dick Cheney before ruling on a case in which Cheney's office was a party. *See* Gina Holland, *Justice Scalia: No Apologies for Hunting Trip With Cheney*, WASH. POST (Feb. 11, 2004) (*quoting* Justice Scalia as stating "It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."). Likewise, Justice Felix Frankfurter and some of his colleagues were accused of *ex parte* communications and other conflicts in leading cases. *See generally* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 737 (2002); *see also* David J. Danelski, *The Saboteurs' Case*, 1 JOURNAL OF SUP. COURT HIST. 61, 69 (1996). As Professor Stempel has summarized, the use of the power and prestige of one's office and the showing of favoritism, along with breaches of intra-bench confidentiality, have been deployed routinely by the most respected judges in American history:

> Justice William Johnson, President Jefferson's first appointment to the Court, regularly engaged in lengthy correspondence with Jefferson in which Jefferson sought to influence the internal functioning of the Court. In many of these letters, Jefferson sought to convince Johnson to work to return the Court to the earlier

> practice of seriatim opinions rather than the single majority opinion pioneered by Jefferson's arch-rival, Chief Justice John Marshall.…
>
> Justice Samuel Chase, appointed by President Washington in 1796, began his political career as a Republican but converted to the Federalist cause with such enthusiasm that while on the Court he actively and publicly campaigned for the presidency of John Adams. This and some celebrated episodes of intemperance on the bench sufficiently angered Congress that Chase was impeached and tried, but acquitted.…
>
> Justice Joseph Bradley, who served on the Court from 1870 until 1892, was… criticized for hearing a petition for appointment of a receiver brought by an old friend acting as counsel for the petitioner. His choice of receiver was also criticized by some who alleged misfeasance in the sale of the debtor's properties.…
>
> Justice Willis Van Devanter, a 1910 Taft appointee, delivered two opinions in cases involving former client the Union Pacific Railroad. Harding appointee Pierce Butler also delivered court opinions involving his former railroad client, the Great Northern Railroad.…
>
> A perhaps even more suspect extracurricular activity of Justice Frankfurter recently attained considerable attention when his protégé and former law clerk Philip Elman revealed in an interview that he and Justice Frankfurter had numerous conversations regarding internal court discussions. Justice Frankfurter was, in essence, informing Elman, then an Assistant Solicitor General for civil rights cases, of the positions of the Justices regarding segregation, and advising Elman as to how best involve the Government in the litigation chapter of the civil rights movement of the 1940s and 1950s.…
>
> Justice Abe Fortas's close 'kitchen cabinet' relationship with President Lyndon Johnson demonstrated that the problem of the advisor-Justice did not end with Justices Brandeis and Frankfurter. The weight of authority suggests that Justice Fortas was frequently advising the President on matters ranging from Vietnam War strategy to re-election planning. This seemingly was widely known in Washington and tolerated until Justice Fortas's financial dealings brought him under an unfavorable spotlight.

See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589, 622-24 (1987) (internal citations omitted).

Here, the House is seeking a conviction of Judge Porteous for acts that Congress has previously recognized do not constitute impeachable offenses. *See Hastings v. Judicial*

Conference of the U.S., 593 F. Supp. 1371, 1382 (D.D.C. 1984) ("Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense."). To seek impeachment and conviction here is to return to the prior English standard that allowed impeachment for ill-defined "divers deceits."[22] *See* Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938); *see also* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 11 (1999). The guarantee of life tenure and judicial independence means nothing if removal can occur on the basis of poor judgment in social acquaintances or, in the instant case, a small number of lunches during federal service.

CONCLUSION

Article II represents a new and dangerous precedent on many levels. It would erase centuries of precedent where the Senate has confined removal offenses to federal or in-office conduct. It would contradict the House's own experts on what constitutes an impeachable offense. It would remove a federal judge for alleged ethical misconduct as a state judge that Louisiana has never sought to punish. Finally, it would use impeachment to address acts that Congress, itself, has stressed should be dealt with in informal proceedings. Such a new standard would leave judges with little idea of what acts over decades of pre-federal conduct could be used as the basis for removal. It would produce the very situation that the Framers sought to avoid: judges serving at the pleasure of Congress, which can impeach for conduct not limited to their federal office or even period of federal service.

[22] "Diver deceits" appeared to refer to an alleged pattern of untrue or misleading statements or actions. Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938).

WHEREFORE, Judge Porteous respectfully requests that the Senate dismiss Article II in its entirety.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
John C. Peirce
P.J. Meitl
Daniel T. O'Connor
Amos Jones
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

Counsel for G. Thomas Porteous, Jr.
United States District Court Judge for the Eastern District of Louisiana

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:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl