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 IV 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
Ian Barlow
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

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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 files this Motion for Dismissal of Article IV of the Articles of Impeachment because it states improper grounds for impeachment.

INTRODUCTION

Article IV alleges that Judge Porteous "knowingly made material false statements about his past" by failing to state affirmatively that he (1) received a portion of curatorship fees given to the law firm Amato & Creely while a state judge (as alleged in Article I of the Articles of Impeachment); and (2) accepted "things of value" while benefiting the Marcotte bail bonds company while a state judge (as alleged in Article II of the Articles of Impeachment). Additionally, Article IV alleges that Judge Porteous should be removed from office because he failed to state affirmatively that he suspected that Louis Marcotte may have given misleading statements to the FBI in a conversation in which Judge Porteous was not a party.

Article IV alleges that Judge Porteous omitted information in response to general questions asking him whether he could identify any matters that: (1) "could cause an embarrassment" to him or President Clinton if publicly known; (2) could be used to "influence, pressure, coerce," "blackmail," or "compromise" him; (3) would "impact negatively on his character, reputation, judgment, or discretion;" or (4) would unfavorably "affect his nomination" as a federal judge. (111 Cong. Rec. S1645 (Mar. 17, 2010.), hereinafter "Article IV.") Article IV concludes by arguing that Judge Porteous's failure to disclose this information deprived the Senate and the public of information that would have had a material impact on his confirmation. (*Id*.)

Article IV is nothing more than the House's effort to employ a belt-and-suspenders strategy, reasoning that if they cannot convince the Senate that the pre-federal conduct alleged in Articles I and II provides valid grounds for impeachment, they surely can persuade the Senate that Judge Porteous's omission of these alleged offenses during the nomination process is, on its own, an impeachable offense.[1] The House's effort in Article IV to force the Senate to reconsider the same allegations raised elsewhere in the Articles of Impeachment in a different context demonstrates the House's own uncertainty of the viability of the charges in Articles I and II.[2]

Impeachment standards were designed to create objective and clear lines of what conduct would require removal of a federal judge. The standards raised in Article IV are purely subjective and provide no means by which judges can gauge whether their conduct is proper or could become the subject of an impeachment. In the criminal context, such charges have been found to be unconstitutionally vague. Article IV is nothing more than a statement by the House that, in the House's view, Judge Porteous *should* have been embarrassed by the facts alleged in Articles I and II.

If Judge Porteous were convicted on the basis of Article IV, the Senate would be asserting the right to remove a judge because it believes that a judge should have viewed an

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[1] This is for good reason – the first two Articles are legally deficient. Article I (the Honest Services Article) is defective after the Supreme Court's ruling in *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010) and fails to identify any misconduct other than an *appearance* of impropriety – an allegation not rising to the level of an impeachable offense. (*See* Motion to Dismiss Article I, being filed concurrently herewith.) Article II (the Pre-Federal Article) seeks to reverse Senate precedent by broadly and dangerously expanding the list of impeachable offenses to include alleged misconduct that occurred prior to an accused entering an impeachable office. (*See* Motion to Dismiss Article II, being filed concurrently herewith.)

[2] For an example of the House attempt to reach, through Article IV, what they doubt they can reach through Articles I and II, see the last charges in Article IV which allege that "[a]s Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench." (Article IV.) This exact language is also used in Article II.

uncharged and unproven allegation to be "embarrassing" – and it would make such an act of omission the constitutional equivalent to treason.[3] While full disclosure is to be encouraged, there is a long list of prominent government office holders who have failed to disclose information that someone else may have considered to be embarrassing or unfavorable. None of them has ever been sanctioned, let alone impeached, in the past.[4] Imposing the sanction of removal from office for failing to disclose information that someone else later considers to be embarrassing would set a standard of conduct for office holders that is both impossible to adhere to and a goldmine for partisan mischief. Such a hopelessly vague standard would gut the well-crafted language of the impeachment clauses and directly contradict the intent of the Framers in limiting removal to a showing of "high crimes and misdemeanors." (U.S. CONST. art II, § 4.) Moreover, such a move would directly subject millions of federal employees to the impeachment process through their simple failure to fully catalog all embarrassing moments in their lives during their own background checks.

Finally, the premise of Article IV is factually and logically flawed. The alleged false statements cannot – given the nature of the allegations – be readily proven by the House. Moreover, much of the information that the House alleges that Judge Porteous failed to disclose was made available to the Senate by the FBI and other sources, in connection with Judge Porteous's confirmation. Thus, Article IV's claim that the Senate was "deprived" of this information is incorrect.

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[3] As the Senate is aware, the Constitution enumerates the following offenses as being impeachable – "treason, bribery, or other high crimes and misdemeanors." (U.S. CONST. art. II, § 4.)

[4] In addition, counsel for Judge Porteous is unable to locate any decisions upholding a false-statement prosecution predicated on the amorphous request for disclosure of "embarrassing" information.

Article IV suggests that Judge Porteous concealed facts that the House readily admits took place in the open – lunches at high-profile restaurants, trips with other judges and lawyers, and the assignment of curatorships through official Court activities.[5] If Judge Porteous believed these alleged activities were inherently corrupt, embarrassing, or would have subjected him to some type of improper pressure, he would have seemingly concealed these activities.[6] Instead, the fact that Judge Porteous specifically took no action to conceal these alleged activities suggest that, if they occurred, he did not find them embarrassing or that which might negatively impact his character and reputation.

FACTUAL BACKGROUND ON ARTICLE IV

Article IV alleges that "[i]n 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana," Judge Porteous "knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Investigation in order to obtain the office of United States District Court Judge." (Article IV.) The House then defines the alleged false statements:

> (1) On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered 'no' to this

[5] The House is likely to admit that these alleged activities took place in the open but that Judge Porteous concealed the fact that (1) he received money from Amato & Creely in the same time frame as the assignment of the curatorships, and (2) he took official actions on behalf of the Marcottes in the same time frame as the receipt of things of personal value. The House has not alleged in the Articles of Impeachment, however, that the alleged receipt of things of value from Amato & Creely or the Marcottes are related on any type of quid pro quo basis to Judge Porteous's official actions. As such, the House should not be allowed to backend their way into a bribery or kickback allegation after specifically choosing not to pursue one through the Articles.

[6] Judge Porteous admits that this specific argument is not a sufficient reason to warrant dismissal of the Article. Nonetheless, the fact that the factual underpinnings of the Article are illogical is evidence of the overall weakness of the Article.

> question and signed the form under the warning that a false statement was punishable by law.
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> (2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.
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> (3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees," Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination." Judge Porteous signed that questionnaire by swearing that "the information provided in this statement is, to the best of my knowledge, true and accurate." (*Id*.)

The House argues that these statements were, in fact, false because Judge Porteous was well aware of and should have responded to the questions above in the affirmative in light of the following information:

- His relationship with Jacob Amato and Robert Creely;
- That he had appointed Robert Creely as a curator in "hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm";
- His relationship with Louis and Lori Marcotte;
- That he had solicited and accepted numerous things of value from the Marcottes while at the same time taking official actions that benefitted the Marcottes;
- That Louis Marcotte made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench.

(*See id*.) The Senate argues that Judge Porteous's failure to disclose these facts "deprived the United States Senate and the public of information that would have had a material impact on his confirmation." (*Id*.)

Judge Porteous is not accused of hiding much of this information, which was publicly known, but of not finding it "embarrassing" or the potential subject of coercion. He has publicly acknowledged his friendship with these individuals, and the curatorships he granted to Creely &

Amato – and a number of other lawyers in Jefferson Parish – were also in the public record. Moreover, these basic allegations were not only raised in his background investigation but also were inquired into in two known FBI investigations, including the Wrinkled Robe investigation that resulted in the conviction of two Jefferson Parish judges.[7] Judge Porteous was never indicted for any unlawful conduct or subject to bar charges in Louisiana.

The alleged Marcotte conversation with the FBI (which the House claims Porteous knew of and knew to be false), referenced in Article IV, took place after Judge Porteous filled out his SF-86 form, supplemental SF-86 form, and Senate questionnaire, and after he spoke with agents in his first background check. Judge Porteous signed his SF-86 on April 27, 1994.[8] He signed a supplemental SF-86 on April 27, 1994. He completed his initial interview with the FBI on July 8, 1994. It was not until August 1, 1994, however, that Louis Marcotte was interviewed by the FBI, and he allegedly claimed he told Judge Porteous that he had given him a "clean bill of health" shortly after the FBI Interview.[9] Thus, Judge Porteous has been impeached for withholding information about an alleged conversation that had not even occurred when he filled out the forms referenced in Article IV.

ARGUMENT

I. A Federal Judge Cannot Be Impeached Based on His Subjective View That Prior Associations Were Not Relevant to His Confirmation.

The impeachment standard resulted after multiple drafts and focused debate by the Framers, who specifically sought to avoid ambiguous standards for removal of a president or a

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[7] In addition to Wrinkled Robe, Metropolitan Crime Commission records indicate that the FBI looked into the allegations with the Marcottes for possible Hobbs Act violations. (*See* October 25, 1994 Intelligence Report, attached as Exhibit 1.)

[8] Reference to the initial SF-86 is not included in Article IV.

[9] Judge Porteous was re-interviewed by the FBI on August 18, 1994. However, there is no record of his being asked about the Marcottes during this re-interview.

judge. They were reacting to the English standard by which the Parliament could impeach individuals for such vague terms as "divers deceits."[10] *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 Framers first crafted the impeachment standard to allow removal for "malpractice or neglect of duty." RAOUL BERGER, IMPEACHMENT, THE CONSTITUTIONAL PROBLEMS, Harvard Univ. Press, 78 (1973). The Committee of Detail, however, narrowed the standard to "treason, bribery, or corruption." *Id*. Ultimately, "corruption" was considered too ambiguous a term and was dropped by the Committee of Eleven. *Id*. George Mason then suggested that the term "maladministration" be added, but James Madison objected that such a term was dangerously vague. *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." *Id*.

Article IV would return the Senate to the unpredictability of the English standard of "divers deceits." It invites this and future Senates to remove a judge based on whether the Senate believes a specific judge should have believed a fact to be embarrassing to the President or to himself. If an allegation based on someone else's concept of embarrassment would support impeachment, the specificity of "treason," "bribery," and "high crimes and misdemeanors" would be lost. Any judge could be accused of divers deceits in failing to list every possible allegation that might be raised even when he did not consider them relevant to the confirmation.

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[10] "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).

Courts have rejected as the basis for criminal prosecutions the type of vague, untethered allegations that make up Article IV. For example, in *United States v. Kerik*, Bernard Kerik, the former New York City Police Commissioner and nominee for Secretary of the Department of Homeland Security, was charged in a fifteen count indictment, which included allegations that Kerik lied to the White House when he sought membership in the Academe & Policy Research Senior Advisory Committee to the White House Office of Homeland Security, among other positions.[11] *See* 615 F. Supp. 2d 256 (S.D.N.Y. 2009). The questions to which Kerik allegedly provided false answers to included:

- [W]hen asked whether there was anything embarrassing that he [Kerik] wouldn't want the public to know about, Kerik told a White House official, "Nope! It's all in my book."
- Similarly, when asked whether there was any other information, including information about other members of his family, that could be considered a possible source of embarrassment to him, his family, or the President, Kerik stated, "Not to my knowledge."

Id. at 272 n.19. The U.S. District Court for the Southern District of New York, in framing its analysis, noted "[w]here a question is so vague as to be fundamentally ambiguous, [] it cannot be the predicate of a false statement, regardless of the answer given." *Id*. at 271 (citing *United States v. Watts*, 72 F. Supp. 2d 106, 109 (E.D.N.Y. 1999) (noting an answer to a fundamentally ambiguous question "may not, as a matter of law, form the basis of a prosecution for perjury or false statement").) The court further noted that "[t]his proscription holds even where the answer is unquestionably false or fraudulent." *Kerik*, 615 F. Supp. 23 at 271.

[11] On December 3, 2004, Kerik was nominated by President Bush to succeed Tom Ridge as United States Secretary of Homeland Security. On December 10, 2004, after a week of press scrutiny, Kerik withdrew acceptance of the nomination. Kerik stated that he had unknowingly hired an undocumented worker as a nanny and housekeeper who had used someone else's social security number. *See* Mike Allen and Jim VandeHei, *Homeland Security Nominee Kerik Pulls Out*, WASH. POST (Dec. 11, 2004).

Because the word "embarrassing" was used in several of the questions, the court in *Kerik* analyzed the meaning an application of the term in the context of background checks and applications for federal employment:

> Plainly the meaning of the term "embarrassing," . . . is open to interpretation. What is embarrassing to one person may not be embarrassing to the next. If an individual withheld some innocuous but potentially embarrassing secret -- such as one's contentious divorce or one's prescription medication -- it is hard to believe that a federal prosecution [let alone an impeachment] would follow.

Id. at 273. The court then delved into a more specific analysis, stating:

> this Court agrees that the term "embarrassing" is not fundamentally ambiguous *per se*. For example, a question about "embarrassing educational history" or "embarrassing business dealings" would not be fundamentally ambiguous because it provides the answerer with clarity about the specific information sought by his examiner.

Id. The court then stated that the more general questions posed to Kerik, such as "whether there was anything embarrassing that he would not want the public to know about," were more troubling. *Id*. at 273-74. "In contrast" to the more specific questions listed above, the court stated that "this level of abstraction renders the term 'embarrassing' fundamentally ambiguous." *Id*. at 274. The court pointed out:

> The question does not explicitly limit the context to "associations" or specific affiliations. Rather, the question is more like a fishing expedition, seeking *anything* that might embarrass an applicant. Despite the laundry list of answers the Government wishes Kerik would have supplied, it does not follow that Kerik necessarily understood the question in precisely this way.

Id. The court concluded that the two questions posed to Kerik provided "no greater clarity." *Id*. Thus, the court found that these two questions were "fundamentally ambiguous." *Id*.

The questions posed by Article IV as the basis for Judge Porteous's allegedly false answers or omissions are largely identical to the "fundamentally ambiguous" questions posed to Kerik, which the court in that case found so troubling.

In order to refute the Southern District of New York's decision in *Kerik*, the House may point to *United States v. Cisneros*, 26 F. Supp. 2d 24 (D.D.C. 1998), which predates *Kerik*. In that case, Henry Cisneros, the former Secretary of Housing and Urban Development, was indicted for making false statements to federal officials in connection with his nomination to the cabinet post. *Id*. at 24. When Cisneros was asked whether there was "anything" in his "personal life that could be used by someone to coerce or blackmail" him and whether there was anything "that could cause an embarrassment to [him] or to the President if publicly known," Cisneros replied that "that there was no basis upon which he would be subject to coercion or blackmail." *Id*. at 32. At that time, Cisneros was allegedly making payments to his former mistress in order to ensure her public silence about the extramarital affair and his previous payments to her. *Id*.

Cisneros moved to dismiss the claims related to the alleged false statements on the ground that the question in SF-86 was vague because it did not define the terms "coerce," "blackmail," or "embarrassment." *Id*. at 40. Judge Stanley Sporkin of the United States District Court for the District of Columbia found that "[t]he meaning of Cisneros' statements is a matter that is within the province of a jury to determine." *Id*. at 42.

The *Kerik* court distinguished the statements at issue in *Kerik* with those present in *Cisneros*. The *Kerik* court noted that "this issue must be done on a case-by-case basis" but stated that:

> [t]he Cisneros court spent the overwhelming bulk of its analysis on the terms "coerce" and "blackmail," and rightly so given the facts of that case. However, the false statement charges against Kerik are cloaked only in terms of "embarrassment," and, absent any further clarifying context, those questions are impermissible as a matter of law.

615 F. Supp. 2d at 274 n.24. Ultimately, in September 1999, Cisneros negotiated a plea agreement, under which he pleaded guilty to a misdemeanor count of lying to the FBI, and he

was fined $10,000. The jury was never asked to consider whether the questions posed to Cisneros were deficient due to vagueness. Cisneros did not receive jail time or probation. The House never began impeachment proceedings against Cisneros. Notably, Cisneros was pardoned by President Bill Clinton in January 2001. Judge Porteous was also asked about items that might be used to coerce or blackmail him but the facts of his case are far different than that of Cisneros. Cisneros was allegedly making payments to a secret lover for the purpose of keeping her quiet – the epitome of a case ripe for blackmail. In the instant matter, it is unclear who would have attempted to blackmail or coerce Judge Porteous and for what reason. Many of the alleged acts of misconduct occurred in the open, as opposed to the private confines of a hotel room, as in Cisneros.

Thus, not only is Article IV based on a highly subjective test of what constitutes embarrassing or noteworthy facts, but also it relies on language that the federal courts have rejected as unconstitutionally vague. While this is not a criminal proceeding, the standard for removal must be sufficiently clear to give adequate notice to federal judges of what conduct would justify removal. Judges should not be removed from office on the basis of vague charges that they, as judges, would find an inadequate basis on which to convict a person standing before them at the bar. The Framers made it both procedurally and substantively difficult to remove a federal judge – specifically rejecting vague terms and standards for impeachment. Absent such bright-line standards, Federal judges would be left at the mercy of the shifting views and allegiances of Congress. No judiciary can long remain independent when its members can be removed based on such subjective and politicized claims.

II. Given the Nature of the Alleged False Statements, the House Cannot Prove that They Were Demonstrably False.

Furthermore, the false statements that Article IV alleges Judge Porteous made in connection with his nomination to the federal bench, given their vague, ambiguous, and nebulous nature, are incapable of being proven false by the House. As such, Article IV should be dismissed.[12]

Both the Supplemental SF-86 and the Senate Questionnaire pose very specific questions. (*See* Supplemental SF-86, attached as Exhibit 2, asking "Please list all of your interests in real property"; *see also* Senate Questionnaire, attached as Exhibit 3 asking "Were all of your taxes current as of the date of your nomination?"). There is no allegation in Article IV that Judge Porteous answered any of these questions incorrectly or incompletely. Instead, Article IV is based on the most generally worded and subjective questions in either document.

On his Supplemental SF-86, Judge Porteous was asked whether there was anything in his personal life that could cause embarrassment to him or President Clinton.[13] (*See* Supplemental SF-86, attached as Exhibit 2.) This vague question necessarily asks for Judge Porteous's subjective opinion and speculation regarding the meaning and application of the term "embarrassment" or what causes any particular individual to feel "self-conscious or ill at ease." *See* The American Heritage Dictionary (4th ed. 2001). The Senate has every right to ask about

[12] Such a dismissal would also help ameliorate the fact that Judge Porteous has been limited to just a five-day evidentiary hearing – a fraction of the time afforded prior nominees like ex-Judge Alcee Hastings. If this proceeding is to be conducted in such an abbreviated fashion, it would be highly beneficial to eliminate one or more Articles that are facially invalid. Judge Porteous recognizes that, in the past, certain Motions to Dismiss were not resolved until after the evidentiary hearings. It is unclear if that is the Senate's intention in this proceeding.

[13] During his background check, Judge Porteous was also allegedly asked whether he was concealing any activity or conduct that would impact negatively on his character and reputation. This question is analogous to inquiries regarding whether he would be embarrassed if certain information were disclosed. (*See* FBI Interview of Judge Porteous, dated July 6, 1994, bates labeled PORT000000291-96, attached as Exhibit 4.)

criminal or unethical acts, as well as to inquire generally about other items of interest that the subject may find or believe to be embarrassing to himself or to others. But if a nominee is asked for his subjective view of what might prove embarrassing to the nominee himself or to the President or which could be used exert influence over the nominee, the Senate should be prepared to accept the nominee's own view of what may be embarrassing to him or others. The Senate should not remove a judge holding a lifetime appointment merely because the Senate disagrees with the nominee's own interpretation of such open-ended and subjective questioning.

As the *Kerik* court noted, this question is "fundamentally ambiguous" as there is no act that is definitively "embarrassing" – embarrassment is a subjective belief that differs from person to person. As such, there is no proof that the House has produced or can elicit that will show that Judge Porteous had the opinion or belief at the time of his confirmation that any given act would be embarrassing to him or to President Clinton.

Judge Porteous was also asked, on his Supplemental SF-86, whether there was anything in his personal life that could be used by someone to coerce or blackmail him. (*See* Supplemental SF-86, attached as Exhibit 2.) Similarly, during his background check, an FBI agent reported that Judge "Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or . . . would impact negatively on [his] judgment, or discretion"[14] (collectively, these activities will be referred to generally as "influence"). (*See* FBI Interview of Judge Porteous, dated July 6, 1994, bates labeled PORT000000291-96, attached as Exhibit 4.) Notably, neither question qualifies the inquiry by including "attempts" by a third-party to influence Judge Porteous. Instead they require Judge

[14] This allegation is not even based on a transcript or a document signed by Judge Porteous. Instead, it is a summary of an oral conversation between an FBI agent and Judge Porteous, rendering it even more susceptible to ambiguity or imprecision.

Porteous to have known or believed that he would, in fact, be influenced if a third-party knew and used such information. Judge Porteous responded to both questions by not identifying any activity or conduct. Therefore, for the House to be successful in proving that these responses were actually false, it would have not only to prove the underlying allegations (contained in Article I and II), but also to show that Judge Porteous held the belief that his own actions, judgments, or rulings would be influenced. There is no basis in the House's evidence to substantiate such allegations.

Finally, Judge Porteous was asked, on the Senate Judiciary Committee's "Questionnaire for Judicial Nominees" to "advise the Committee of any unfavorable information that may affect your nomination." (Senate Questionnaire, attached as Exhibit 3.) Judge Porteous responded with a qualified answer, stating "To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination." *Id.* Contrary to the House's apparent view of what he *should* have believed, Judge Porteous simply did not view his past associations with his former partners or with the Marcottes to be unfavorable. He openly dined with the Marcottes and was open about his friendship with Amato & Creely both as a state and federal judge. (*See e.g.*, Transcript of Hearing regarding Lifemark Hospital's Motion to Recuse, where Judge Porteous stated in open Court, "Let me also make one statement for the record if anyone wants to decide whether I am a friend with Mr. Amato [], I will put that to rest, for the answer is affirmative, yes" attached as Exhibit 5.) He was never charged with, and has not been accused of, any illegal act before or after his confirmation. Indeed, the FBI was aware of the basic allegations raised years later by the House and did not deem them to raise material problems for the confirmation. Like the questions regarding "embarrassment," this query asks for Judge

Porteous's subjective belief regarding the impact any certain information may have on his own nomination.

Asking a nominee what information "may affect" a nomination is maddeningly vague. While it may generate information not otherwise disclosed, it leaves it in the hands of the nominee to determine what may or may not affect that person's nomination. Such a question runs the gamut of potential political and legal issues. As explained by the Kerik court, "[w]here a question is so vague as to be fundamentally ambiguous, . . . it cannot be the predicate of a false statement, regardless of the answer given." 615 F. Supp. 2d at 271.

Article IV is an open invitation to the Senate to substitute its collective judgment for Judge Porteous's evaluation of what he found to be embarrassing or inappropriate. It invites the Senate to aspire to levels of insight of which no ordinary person is capable. No trial of impeachment should hinge on such pure speculation.

III. Congress Has Never Instituted Impeachment Proceedings Against Individuals For Failing to Disclose Information.

As discussed in other motions being filed concurrently herewith, Congress has applied the meaning of "high crimes and misdemeanors" by voting to impeach judges only when their alleged conduct has included abuses of constitutionally entrusted powers. No one has ever been convicted by the United States Senate in an impeachment for failing to disclose facts during the nomination process. There have been numerous occasions where previously undisclosed information, potentially embarrassing to a federal civil officer (including Supreme Court Justices, federal judges, and cabinet secretaries), has been discovered after confirmation, but for which no impeachment proceedings were instituted:

- In 1937, President Roosevelt nominated Hugo Black for an opening on the United States Supreme Court. *See* Howard Ball, *Hugo L. Black: Cold Steel Warrior*, Oxford Oxfordshire: Oxford University Press 5 (1996). During the confirmation hearings,

rumors swirled regarding Black's prior membership in the Ku Klux Klan. *Id*. at 94-95. Senator William E. Borah, Republican of Idaho, made the only statement in Black's behalf on the Klan question. "There has never been at any time one iota of evidence that Senator Black was a member of the Klan," Borah told his colleagues. He said that Black, in private discussion before the nomination, had stated that he was not a member of the Klan. No one, Borah said, had suggested any source from which evidence might be obtained. For himself, the Idaho senator said he would vote against any man whom he knew to be a member of a secret organization of the nature of the Klan. After six hours of debate, the Senate voted 63-16 to confirm Black. *See* Ball at 94. The next month, the Pittsburgh Post-Gazette investigated Black's KKK past and definitively revealed Black's involvement in the Klan. *Id*. at 96. Vacationing senators were tracked down and asked whether they would have voted for Black if they had known of his former membership. Some said they had been "misled"; others passed it off as a "tempest in a teapot." Weeks later, Black addressed the nation by radio, admitting that "I did join the Klan." The Congress never instituted impeachment proceedings against Justice Black, who continued to serve on the Court for the next thirty-four years.

- Prior to his appointment to the Supreme Court, Chief Justice William H. Rehnquist purchased properties in Arizona and Vermont which contained discriminatory deed restrictions. *See* Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, N.Y. TIMES, Aug. 1, 1986. The restriction on the Vermont property prohibited the sale or lease of the property to "members of the Hebrew race." *Id.* The Arizona property contained a restrictive covenant barring sale to "any person not of the White or Caucasian race." *Id.* This was not discovered until he was already a member of the Supreme Court. *Id.* The Chief Justice was called to testify before the Senate Judiciary Committee and stated that he would get rid of the covenants. *Id.* Chief Justice Rehnquist was never impeached. *See* Chief Justice Rehnquist has Died, http://www.cnn.com/2005/LAW/09/03/rehnquist.obit/index.html (last visited July 18, 2010).

- In March 2010, it was discovered that Attorney General Eric H. Holder, Jr. had failed to disclose during his confirmation hearings his work on several briefs, including one on behalf of enemy combatant Jose Padilla,. *See* David Davenport, *Hard Questions for Holder*, WASH. TIMES, Mar. 19, 2010. Holder characterized this as an oversight. *Id.* Holder has not been impeached. *See* Office of the Attorney General, http://www.justice.gov/ag/ (last visited July 18, 2010).

- Andrew Cuomo was the Secretary of Housing and Urban Development under President Clinton. *See* Sam Dealey & James Ring Adams, *Banking on Andy Cuomo: HUD Secretary and Rising Democratic Star Andrew Cuomo Wants to Go Places – Assuming He Can Leave Some Baggage Behind*, THE AMERICAN SPECTATOR, Jan. 1999. Cuomo neglected to list a suit brought by a savings and loan association and settled only two months before his confirmation hearing, in response to a question on the Senate Banking, Housing, and Urban Affairs Committee Statement for Completion by Presidential Nominees. *Id.* The question read: "Give the full details of any civil or criminal proceeding in which you were a defendant, or any inquiry or investigation by a

Federal, State or local agency in which you were the subject of an inquiry or investigation." *Id.* In the suit, federal banking regulators had investigated Cuomo and fellow investors for possible change-in-control violations. *Id.* Cuomo was confirmed (*id.*) and was never impeached. *See* Andrew Cuomo, http://www.andrewcuomo.com (last visited July 18, 2010).

- Gerald Carmen was the head of the General Services Administration under President Reagan. *See* Gregory Gordon, *GSA Head Says He Forgot to Mention Loan*, UNITED PRESS INTERNATIONAL, Jul. 16, 1982. Carmen did not include a $425,000 federal loan in stating his finances to a Senate committee before he was confirmed. *Id.* William Roth, Chairman of the Senate Governmental Affairs Committee, demanded an explanation from Carmen, who claimed it was an oversight. *Id.* Carmen was never impeached, and served as Administrator until 1984, when President Reagan appointed him U.S. Permanent Representative to the United Nations in Geneva. *See* Gerald P. Carmen, http://people.forbes.com/profile/gerald-p-carmen/31618 (last visited July 18, 2010).

- Jay Bybee was confirmed to the Ninth Circuit by the Senate on March 13, 2003. *See Sen. Leahy Issues Statement on Nomination of David Nahmias*, U.S. FED NEWS, Sept. 30, 2004. After his confirmation, it was discovered that Judge Bybee had signed a controversial memo advising President Bush to ignore laws forbidding torture. *Id.* Senator Patrick Leahy indicated that had Judge Bybee's role in sanctioning cruel, inhumane, and degrading treatment and abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise to follow the law. *Id.* Judge Bybee has not been impeached.

- William F. Baxter was the Assistant Attorney General in charge of the Antitrust Division in 1982. *See* Andrew Pollack, *Baxter Role Upheld in I.B.M. Case*, N.Y. TIMES, June 18, 1982, at D1. Baxter dismissed a thirteen-year old antitrust case against I.B.M. *Id.* Baxter did not disclose his past dealings with I.B.M. during his Senate confirmation hearings, which included aiding the evaluation of expert witnesses in a different case, research funded with an I.B.M. grant, and arguing on I.B.M's behalf before officials of the European Economic Community, which also had an antitrust suit pending against the company. *Id.* Baxter was never impeached. *See* Michael M. Weinstein, *W.F. Baxter, 69, Ex-Antitrust Chief, is Dead,* N.Y. TIMES, Dec. 2, 1998.

- G. William Miller served as both Chairman of the Federal Reserve Board and Treasury Secretary under President Carter. *See* Lawrence L. Knutson, THE ASSOCIATED PRESS, Feb. 1, 1980. It was revealed that a corporation of which Miller was chairman spent $600,000 to entertain Pentagon officials without informing stockholders, as required by federal law. *Id.* Miller claimed the payments were not improper because they were not illegal, but the SEC claimed that Miller knew at the time that the firm had failed to disclose the spending. *Id.* Although the expenditures were not illegal in themselves, Pentagon officials operate under regulations prohibiting them from being on the receiving end of such entertainment from potential defense contractors. *Id.* This matter did not come up during his confirmation hearings to head the Federal Reserve Board.

Id. Miller was never impeached, and resigned at the end of President Carter's term. *See* G. William Miller, http://www.ustreas.gov/education/history/secretaries/gwmiller.shtml (last visited July 18, 2010).

- William J. Casey, Director of the Central Intelligence Agency, did not disclose his stock holdings in three corporations in the financial disclosure report he filed with the Senate Select Committee on Ethics during his confirmation proceedings in 1981. *See* Edward T. Pound, *Casey Tells Federal Ethics Agency He Omitted Three Stock Holdings*, N.Y. TIMES, July 31, 1981, at A11. His interest in the companies were valued at approximately $75,000, and he claimed his failure to report was "just an oversight." *Id.* Casey was never impeached, and he resigned as director of the CIA because of his failing health. *See Shultz Among Mourners at Casey's Wake*, L.A. TIMES, May 8, 1987.

- Federico Pena had already been confirmed as Transportation Secretary when he acknowledged that he had failed to pay Social Security taxes for a baby-sitter who looked after his children in 1991. *See* Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, ASSOCIATED PRESS, Jan. 14, 2009. He promised to pay back taxes, was never impeached, and kept his position for President Clinton's first term. *Id.* Pena was then tapped as Energy Secretary, and resigned after one year to return to private life. *See* Matthew L. Wald, *Pena Resigns as Energy Secretary, Citing Concerns for Family*, N.Y. TIMES, Apr. 7, 1998.

There are also numerous other instances where a federal nominee failed to disclose certain information at the initial stages of his or her nomination, only then to have the information discovered by a third-party and disclosed by that party or whereby sufficient pressure was apparently placed on the nominee so that nominee disclosed the information at a later date. In each of the examples listed below, the Senate confirmed the individual despite the lack of full and timely disclosure of relevant material:

- Justice Stephen G. Breyer was a candidate to succeed Justice Byron White in 1993. *See* Aaron Epstein & Angie Cannon, *Consensus-Building Skills Gave Nominee the Edge*, THE MIAMI HERALD, May 14, 1994 at A13. Prior to a nomination, it was revealed that he had failed to pay Social Security taxes for a household helper. *Id.* Justice Breyer later paid the tax, but President Clinton nominated Justice Ruth Bader Ginsburg instead. *Id.* Justice Breyer was subsequently nominated and confirmed the next year as Justice Harry A. Blackmun's replacement. *Id.*

- Justice Sonia Sotomayor failed to disclose to the Senate Judiciary Committee a document she had authored arguing that the death penalty was "racist" and a violation of the present "humanist" thinking of society. *See* Pete Winn, *Sotomayor Failed to*

Disclose to Senate Memo in which She Argued Death Penalty is "Racist", June 5, 2009, http://www.cnsnews.com/news/print/49218 (last visited July 18, 2010). The Judicial Confirmation Network stated that the memo should have been disclosed as required under Question 12(b) of the Senate questionnaire. *Id.* Justice Sotomayor also did not reveal that she was a member of an allegedly gender-exclusive club – from which she subsequently resigned. *See* Sotomayor Resigns from Women's Club, http://www.cnn.com/2009/POLITICS /06/19/sotomayor.womens.club/index.html (last visited July 18, 2010). Republican senators had called for more information about her participation in the club. *Id.* Justice Sotomayor was subsequently confirmed by the Senate. *See* Amy Goldstein and Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009.

- Timothy Geithner was confirmed as Treasury Secretary despite his failure to pay payroll taxes for four years. *See* Jack Kelly, *Culture of Corruption II: What Happened to Obama's Promise to Clean Up Washington?*, PITTSBURGH POST-GAZETTE, Feb. 8, 2009. These errors were discovered by the IRS in an audit and during the vetting process. *See* Jonathan Weisman, *Geithner's Tax History Muddles Confirmation*, THE WALL STREET JOURNAL, Jan. 14, 2009. He also employed an immigrant housekeeper whose work-authorization papers expired during her tenure working for Geithner. *Id.*

- Justice Ruth Bader Ginsburg initially failed to list as a gift on her financial disclosure forms a $25,000 initiation fee for a country club near Washington. *See* Neil A. Lewis, *Ginsburg Hearings End in a Secluded Meeting*, N.Y. TIMES, July 24, 1993. The Woodmont Country Club routinely waived fees as a courtesy to members of the federal bench. *Id.* Justice Ginsburg said that she regretted not listing the waived fee as a gift on the form. *Id.* Justice Ginsburg was subsequently confirmed. *See #48 Ruth Bader Ginsburg, The 100 Most Powerful Women*, Aug. 19, 2009, http://www.forbes.com/lists/2009/11/power-women-09_Ruth-Bader-Ginsburg_D8D7.html (last visited July 19, 2010).

- Griffin B. Bell won confirmation as Attorney General from the Senate in 1977. *See* Spencer Rich & John M. Goshko, *Bell Wins Approval in 75-21 Vote; Bell is Confirmed as Attorney General; Attorney General May Face Clash on Ousting Kelley*, WASH. POST, Jan. 26, 1977 at A1. Some senators had questioned Bell's civil rights record and challenged his judicial ethics. *Id.* Bell's nomination was vigorously opposed by several civil rights groups. *Id.* Bell was criticized for failing to disclose for six years that he had received free memberships in two Atlanta clubs that excluded blacks and other minorities and for failing to disqualify himself from a 1976 case involving a similar club. *Id.*

- Judge Alex Kozinski was a nominee in 1985 to the Ninth U.S. Circuit Court of Appeals. *See* Chris Chrystal, *Levin: Kozinski Lacks Judicial Temperament*, United Press International, Nov. 2, 1985. Senate confirmation stalled because of allegations by former employees that he was harsh, cruel and demeaning. *Id.* Senator Carl Levin stated Judge Kozinski misled the Judiciary Committee by claiming an excellent working relationship with his former staff when six people had filed affidavits that he

treated employees unfairly. *Id.* Another allegation stemmed from his lack of disclosure about the circumstances surrounding his firing of Mary Eastwood, his predecessor at the Office of Special Counsel. *Id.* Eastwood testified that Judge Kozinski was "less than honest" with the panel by implying she had dropped her appeal of the firing when she had not, and by failing to disclose that she eventually won with back pay. *Id.* The Senate still confirmed Judge Kozinski. *See* Robert L. Jackson & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Judge*, L.A. Times, Nov. 8, 1985.

- John Dalton was Secretary of the Navy from 1993 to 1998. *See* Secretary of the Navy The Honorable John H. Dalton, http://www.navy.mil/navydata/people/secnav/dalton /daltbio.html (last visited July 18, 2010). When the White House announced his nomination, it concealed his leadership role in a savings and loan failure that cost taxpayers more than $100 million. *See* Editorial, *Senate Secrecy and Secretary Dalton*, N.Y. Times, July 27, 1994 at A20. The Senate confirmed him unanimously, without debate, even though he had been charged by federal regulators as having shown "gross negligence" in running the bankrupt Seguin Savings Association. *Id.* While the Senate executive committee may have known some of this information, it was never shared with most Senators prior to the confirmation hearing. *Id.* Dalton was never impeached, and retired in 1998. *See New Navy Secretary Selected, Sources Say*, L.A. TIMES, July 22, 1998.

- Prior to her confirmation, Secretary of Labor Hilda Solis failed to disclose her ties to the pro-labor union organization, American Rights at Work. *See Sen. Kyl Issues Statement on Rep. Solis Confirmation as Secretary of Labor*, U.S. FED NEWS, Feb. 25, 2009. She corrected her House disclosure forms only after the issue came to light, raising questions about her motivations to set the record straight, according to Senator Kyl. *Id.* Solis was confirmed by the Senate. *Id.*

As these examples highlight, the Senate has routinely dealt with nominees who failed to fully disclose information that the Senate as a whole, or individual Senators, believed to be relevant and material. Moreover, the Senate had previously determined, on numerous occasions that if they were privy to certain material prior to a nomination, even if its was not fully disclosed by the nominee, the confirmation of that individual would not necessarily be denied. Logically, impeachment is an inappropriate remedy for omissions that would not prevent confirmation.

Despite the fact that the non-disclosures of other nominees listed above range from the failure to fully list stock holdings to the failure to admit prior membership in the Ku Klux Klan,

Congress has never sought to use the extreme measure of impeachment. No one excused such failures to disclose and indeed they were rightfully rooted out. Such failures of disclosure have occurred with regularity and illustrate how easy removal from office could become if Members could reach back into confirmation documents and remove an unpopular judge or civil official for an alleged failure to disclose. Notably, the failure of disclosure alleged in this case pales in comparison to some of the allegations listed above. The House's own self-selected expert, Professor Akhil Reed Amar, agreed: "not all evasive or even downright false statements in the nomination and confirmation process deserve to be viewed as high misdemeanors." (Dec. 15th Hearing at 18.)

IV. Prior to His Confirmation, the Senate Was Aware of Many of the Alleged Facts the House Claims Judge Porteous Failed to Disclose.

Article IV concludes by arguing that "Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate . . . of information that would have had a material impact on his confirmation." 111 Cong. Rec. S1645 (Mar. 17, 2010). As such, the House premises the impeachability of the alleged false statements on the importance they would have played during the confirmation process. The House's argument fails, however, if the omissions were not material or if the Senate was otherwise aware of the facts in question.

In fact, prior to Judge Porteous's confirmation, the Senate was well aware of many of the facts or allegations that Judge Porteous purportedly failed to disclose. For example, the House alleges that Judge Porteous's alleged false statements by way of omission resulted in the Senate being deprived of the following information:

- Judge Porteous "accepted numerous things of value, including meals, trips, home repairs, and car repairs for his personal use and benefit."
- Judge Porteous took "official actions that benefitted the Marcottes."

- Judge Porteous "appointed Creely as a curator in hundreds of cases."[15]

(Article IV.) In fact, the Senate was made aware, or purposefully chose not examine these facts.

For example:

Accepted Things of Value

- 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 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- 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 7.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- Prior to his confirmation, the FBI interviewed an individual, who asked that his identity remain anonymous, who stated that the candidate "indirectly received $10,000 from an individual in exchange for the candidate reducing his bond." (PORT000000463, attached as Exhibit 8.) Also, 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 to get [the boyfriend] out of jail" and that "$10,000 would go to Judge Porteous for the bond reduction." (PORT000000524, attached as Exhibit 9.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

Took Official Actions that Benefitted the Marcottes

- Prior to his confirmation, the FBI interviewed an individual, who asked that their 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 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

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[15] There was also no reason for Judge Porteous to raise his alleged receipt of a portion of curator funds because it is simply not true. More importantly, Creely specifically testified that there was not a *quid pro quo* relationship between the curatorships and the gifts of cash that he provided to Judge Porteous. (*See* Creely Fifth Circuit Testimony at 209-210, stating "It had nothing to do with 'Look, why don't you give me these and I'll give you that back,' or 'Do something for me and – you know, and I'll give you this back.'")

- The FBI was also told by an anonymous source that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (*Id*.) 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 10.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

- 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 6.) This information was passed on to the Senate prior to Judge Porteous's confirmation.

Appointed Creely as a Curator in Hundreds of Cases

- These appointment of curatorships were public documents. Creely represented these individuals in public proceedings.

Assuming that Article IV must be given its plain meaning, then it is not the basis for an impeachment because the Senate was aware of these allegations or facts at the time of Judge Porteous's confirmation vote. This is precisely the element discussed by the House's own expert witnesses in describing the rare and narrow basis under which pre-federal conduct could be used to remove a judge. Professor Michael Gerhardt testified that "there's not been a 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." (Dec. 15th Hearing at 51-52.) He specifically said that pre-federal conduct could be used as a basis for impeachment only if the conduct is "egregious but not known at the time of the judge's confirmation proceedings." He noted that if the Senate had knowledge of allegations before confirmation "the Senate . . . effectively ratifies the misconduct at the time it decides to confirm the judge." (*Id*. at 30.) In the case of Article IV, while there is a question whether the conduct alleged is egregious, but there can be no doubt that it was known before confirmation.

CONCLUSION

Article IV would effectively gut the impeachment standard to allow removal of a federal judge for his subjective view on what was material in responding to generally worded questions during the confirmation process. It is a back-door effort to do what the Senate has historically declined to do: remove a federal judge for pre-federal conduct. In this case, the alleged non-disclosure is virtually identical not only to non-disclosure by a long list of prior nominees (all of whom were confirmed and none of whom were impeached) but also to similarly ambiguous questions found by federal courts to be unconstitutionally vague. The consequences of adopting such a potentially mischievous standard could be extraordinary in terms of future office holders and impeachments. It makes little sense to cross that Rubicon for a judge who will be leaving the bench in roughly a year anyway. The Senate has traditionally maintained the line of a clear impeachment standard, often rejecting Articles that are vague or based on pre-federal conduct. Article IV is one such article that should be dismissed in its entirety.

WHEREFORE, Judge Porteous respectfully requests that the Senate dismiss Article IV 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
P.J. Meitl
Daniel T. O'Connor
Ian Barlow
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