

# THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

**Before:** Edith H. Jones, Chief Judge, U. S. Court of Appeals for the Fifth Circuit; Jerry E. Smith, U. S. Circuit Judge; W. Eugene Davis, U. S. Circuit Judge; Jacques L. Wiener, Jr., U. S. Circuit Judge; Rhesa H. Barksdale, U. S. Circuit Judge; Emilio M. Garza, U. S. Circuit Judge; Fortunato P. Benavides, U. S. Circuit Judge; Carl E. Stewart, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Priscilla R. Owen, U. S. Circuit Judge; Sarah S. Vance, U. S. District Judge; James J. Brady, U. S. District Judge; Tucker L. Melançon, U. S. District Judge; Michael P. Mills, U. S. District Judge; Louis Guirola, Jr., U. S. District Judge; Sam R. Cummings, U. S. District Judge; Hayden Head, U. S. District Judge; Thad Heartfield, U. S. District Judge; Fred Biery, U. S. District Judge

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## CONFIDENTIAL

IN RE: Complaint of Judicial Misconduct against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980

DENNIS, Circuit Judge, joined by MELANÇON, HEARTFIELD, and BRADY, District Judges, concurring in part and dissenting in part:

1 I agree that this judicial council must publicly  
2 reprimand Judge Porteous for legal and ethical misconduct  
3 during his tenure as a federal judge. But I disagree with  
4 the council majority's conclusion that the evidence  
5 demonstrates a possible ground for his impeachment and  
6 removal from office.

7 The Framers of the Constitution provided that federal  
8 judges, both of the supreme and inferior courts, shall

9 hold their offices during good behavior and shall be  
10 removed from office only upon impeachment for, and  
11 conviction of, treason, bribery, or other high crimes and  
12 misdemeanors; that the House of Representatives shall  
13 have the sole power of impeachment; that the Senate shall  
14 have the sole power to try all impeachments; and that no  
15 person shall be convicted without the concurrence of two  
16 thirds of the Senate members present. These requirements  
17 make removal by impeachment a difficult process, reserved  
18 only for the most egregious cases. Thus, the founders  
19 intended for judges to have a high degree of independence  
20 and to be removable only upon constitutionally specified  
21 grounds; they did not intend for judges to serve simply  
22 at the pleasure of a majority of the Congress.

23 Congress has authorized a judicial council to take  
24 the initial step towards invoking the impeachment process  
25 only when there is a possibility that the foregoing  
26 requirements can be met. Accordingly, in fidelity to the  
27 Constitution and in the interest of judicial  
28 independence, as well as fairness to individual judges,  
29 a judicial council should not certify a case for  
30 consideration of impeachment unless it has carefully and  
31 judiciously weighed the evidence and determined that the  
32 judge committed specified acts of possible "Treason,  
33 Bribery, or other high Crimes or Misdemeanors." Because  
34 the Constitution mandates only this one definition of  
35 impeachable conduct, a judicial council may not create  
36 its own definition of impeachable offenses, either by

37 aggregating non-impeachable conduct or otherwise.  
38 "Treason, Bribery, or other high Crimes and Misdemeanors"  
39 are the only grounds.

40 A careful and judicious analysis of the evidence in  
41 the present case fails to demonstrate that Judge Porteous  
42 committed possible treason, bribery, or a high crime or  
43 misdemeanor. As an initial matter, it is undisputed that  
44 the evidence does not support a finding of any  
45 possibility that Judge Porteous committed treason or  
46 bribery. Further, the evidence does not support a  
47 finding that Judge Porteous committed a possible high  
48 crime or high misdemeanor as the terms have been  
49 understood by the Framers and ratifiers of the  
50 Constitution and by the members of Congress. The  
51 constitutional convention proceedings, the ratification  
52 history, and the congressional precedents demonstrate  
53 that finding a high crime or high misdemeanor requires a  
54 showing that the subject judge abused or violated the  
55 constitutional judicial power entrusted to him. The  
56 evidence here does not support a finding that Judge  
57 Porteous possibly abused or violated the federal  
58 constitutional judicial power entrusted to him. Instead,  
59 the evidence shows that in one case he allowed the  
60 appearances of serious improprieties but that he did not  
61 commit an actual abuse or violation of the constitutional  
62 power entrusted to him. The other offenses and  
63 improprieties alleged against Judge Porteous relate to  
64 his actions and omissions as a private citizen and his

65 failure to accurately disclose personal financial data.  
66 None of these alleged improprieties amount to an abuse or  
67 violation of constitutional judicial powers.

68 Moreover, neither the special investigating committee  
69 nor the judicial council majority performed the difficult  
70 tasks of making a careful, judicious analysis of the  
71 evidence, determining the definition of "high Crimes and  
72 [high] Misdemeanors," applying that constitutional  
73 concept to the evidence, and making specific findings  
74 that particular acts or omissions by Judge Porteous  
75 possibly constituted such impeachable offenses.  
76 Consequently, neither the committee nor the council  
77 majority actually made a principled determination that  
78 any particular act or omission by Judge Porteous  
79 constituted a possible high crime or misdemeanor.  
80 Instead, the special investigating committee presented a  
81 report setting forth, in the manner of a charging  
82 document or prosecutorial brief, each ethical and  
83 statutory violation that it thought the evidence possibly  
84 supported and concluded, without making the  
85 constitutional interpretation and analysis called for,  
86 that the record might contain one or more grounds for  
87 possible impeachment. The judicial council majority, in  
88 its Memorandum Order and Certification, simply summarized  
89 the special committee report's allegations and findings,  
90 determined that there was "substantial evidence" to  
91 support them, and determined, without making its own  
92 written analysis of the evidence or applying the

93 constitutional test of high crime or high misdemeanor,  
94 that Judge Porteous engaged in conduct which might  
95 constitute one or more grounds for impeachment under  
96 Article II of the Constitution. Thus, it is evident that  
97 the committee and the council majority approved the  
98 certification of possible impeachment without reaching an  
99 agreement as to what constitutes an impeachable offense  
100 or as to which particular high crime or high misdemeanor,  
101 if any, was adequately supported by the evidence.  
102 Consequently, in my opinion, the council majority fell  
103 into error by certifying the existence of possible  
104 grounds for impeachment without carefully and judiciously  
105 analyzing the evidence, determining the constitutional  
106 meaning or definition of "high Crimes and Misdemeanors,"  
107 applying that definition to a judicious assessment of the  
108 evidence, and making specific findings that particular  
109 and certain conduct met the definition of "high Crimes  
110 and [high] Misdemeanors," *i.e.*, actual abuses and  
111 violations of constitutional judicial powers.

112 Finally, the record in this case does not present a  
113 reliable basis upon which to carefully and judiciously  
114 assess the evidence of whether specific high crimes or  
115 high misdemeanors were possibly committed because Judge  
116 Porteous was not afforded all minimal due process rights  
117 required by law. Because Judge Porteous's attorney  
118 resigned two weeks prior to the special committee hearing  
119 and he was denied a continuance to employ new counsel  
120 with which to prepare for the hearing, he was denied his

121 right to counsel in these proceedings. Further, the  
122 special investigating committee and judicial council  
123 majority determinations were in part based on alleged  
124 misconduct by Judge Porteous as a state judge before he  
125 was commissioned as a federal judicial officer, which  
126 does not constitute grounds for impeachment.

127 Accordingly, I respectfully suggest that the Judicial  
128 Conference should vacate the judicial council majority's  
129 order of certification and enter in its place a public  
130 reprimand with appropriate precautionary conditions, or,  
131 in the alternative, vacate the judicial council's actions  
132 and order it to grant Judge Porteous a rehearing and to  
133 afford him full rights of minimal due process, including  
134 an opportunity to employ an attorney and to adequately  
135 prepare for the rehearing.

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1.

138 The Constitution's founders intended for impeachment  
139 and removal of a federal officer to be difficult and  
140 reserved for the most egregious crimes against the United  
141 States, which they named as "Treason, Bribery, or other  
142 high Crimes and Misdemeanors." They believed that, if our  
143 American system of democracy and justice was to survive,  
144 and respect for the rule of law to flourish, judges must  
145 be free to interpret and apply the law with neither the  
146 fear of retribution nor the influence of favor.<sup>1</sup> The

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<sup>1</sup> See H.R. Rep. No. 96-1313, at 2 (1980) (*citing* The Federalist Nos. 78 and 79 (Hamilton 502, 512 (Mod Lib.); Montesquieu, 1 Spirit of the Laws 152 (Nugent ed. 1823)).

147 founders intended that an independent federal judiciary  
148 would serve as a check against unconstitutional conduct  
149 by executive and legislative officers and as fair and  
150 impartial fora for all litigants.<sup>2</sup> Thus, they designed  
151 the Constitution's clauses to give federal judges  
152 maximum freedom from possible coercion or influence by  
153 factions or the other branches of government.

154 Congress reaffirmed these values in enacting the  
155 Judicial Councils Reform and Judicial Conduct and  
156 Disability Act of 1980, recognizing that the framers  
157 meant for impeachment to be used to rectify only the most  
158 egregious cases, those that cannot be remedied by any  
159 other means.<sup>3</sup> In explaining that Act, which governs these  
160 proceedings, the House of Representatives Committee on  
161 the Judiciary stated:

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163 Impeachment . . . is the heaviest piece of  
164 artillery in the congressional arsenal, but  
165 because it is so heavy it is unfit for ordinary  
166 use. It is like a hundred-ton gun which needs  
167 complex machinery to bring it into position, an  
168 enormous charge of powder to fire it, and a  
169 large mark to aim at.<sup>4</sup>

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<sup>2</sup> See, e.g., The Federalist Nos. 78 and 79 (Alexander Hamilton).

<sup>3</sup> *Id.* (citing House Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, (96<sup>th</sup> Cong. 1<sup>st</sup> and 2<sup>nd</sup> Sess.) at 136 (testimony of Peter W. Rodino, Jr.)).

<sup>4</sup>H.R. Rep. No. 96-1313, at 2 (1980) (*quoting* J. Bryce, 1 American Commonwealth 212 (1920)).

171 Accordingly, Congress provided in the Act<sup>5</sup> that a judicial  
172 council must certify a complaint against a judge to the  
173 Judicial Conference for consideration of impeachment only  
174 when there is a possibility that a judge has committed  
175 one of the impeachable crimes named by Article II,  
176 section 4, of the Constitution.<sup>6</sup> In the Act, Congress  
177 anticipated that the vast majority of complaints would be  
178 dismissed by Chief Circuit Judges as frivolous,  
179 irrelevant, or as collateral attacks on final court  
180 decisions;<sup>7</sup> that a relatively fewer number of complaints  
181 would be referred by the Chief Circuit Judge to a special  
182 committee of the circuit judicial council; and that only  
183 the rare and most egregious case would be certified by  
184 judicial councils to the Judicial Conference for referral  
185 and consideration of possible impeachment.<sup>8</sup>

186 This is not one of those rare and egregious cases  
187 presenting the possibility of an impeachable offense  
188 against the nation. Under a proper application of the  
189 Constitution and the Act, Judge Porteous's misconduct is  
190 serious and clearly warrants his public reprimand, as

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<sup>5</sup> 28 U.S.C. §§ 354 (b)(2).

<sup>6</sup> "It is the view of the Committee that impeachment is a cumbersome and unwieldy process, but this was not unintentional since the framers of the Constitution expressly attempted to provide independence to the federal judiciary." H.R. Rep. No. 96-1313, at 19 (1980).

<sup>7</sup> 28 U.S.C. §§ 354 (a)(2)(A); H.R. Rep. No. 96-1313, at 10 (1980).

<sup>8</sup> See H.R. Rep. No. 96-1313, at 2 (1980) ("Over the past 200 years, articles of impeachment have been voted against nine federal judges, four of whom have been convicted and removed from the bench. An additional 46 federal judges have been investigated by the House of Representatives under accusations of unfitness.")(footnote omitted); see also *id.* at 12 (offering examples of the extreme instances in which certification is proper).

191 well as his willingness to accept and obey strict  
192 precautionary conditions for his continuation in office;  
193 but it does not amount to a case of possible treason,  
194 bribery, or other high crimes or misdemeanors as those  
195 terms have been understood by the founders and Congress  
196 as the exclusive grounds for impeachment and removal.

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2.

199 The Constitution limits Congress when it makes a  
200 choice for or against impeachment to that very particular  
201 class of cases: "Treason, Bribery, or other high Crimes  
202 and Misdemeanors."<sup>9</sup> Similarly, when judges serve as  
203 members of a judicial council in making a choice for or  
204 against possible impeachment, they, by virtue of their  
205 oaths and the enabling statute, have an obligation of  
206 fidelity to the fundamental design of the Constitution to  
207 limit the possible instrument of impeachment to that same  
208 narrow class of cases.<sup>10</sup>

209 Bound by the constitutional impeachment standards, a  
210 judicial council does not have authority to create its  
211 own definition of impeachable offenses or to consider a  
212 cumulation of non-impeachable offenses as grounds for  
213 possible impeachment. As the statutory text and the  
214 legislative history of the act authorizing this council

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<sup>9</sup>U.S. Const. art. II, § 4.

<sup>10</sup>See Frank O. Bowman, III & Stephen L. Sepinuck, "*High Crimes & Misdemeanors*":  
*Defining the Constitutional Limits on Presidential Impeachment*, 72 S. Cal. L. Rev. 1517, 1519-  
20 & n.5 (1999) ("Bowman & Sepinuck").

215 make clear, judicial councils may not alter or interfere  
216 with the constitutionally defined impeachment process.<sup>11</sup>  
217 Rather, the concept underlying the act was to allow the  
218 judicial council to deal with matters falling short of  
219 impeachment but that could affect the administration of  
220 justice.<sup>12</sup> Therefore, Congress did not authorize judicial  
221 councils to create their own definitions of impeachable  
222 offenses or suggest removal for offenses falling short of  
223 the Article II “Treason, Bribery, or other high Crimes  
224 and Misdemeanors” standard.<sup>13</sup>

225 In contravention of these principles, this council

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<sup>11</sup> See 28 U.S.C. § 354(b)(2)(A) (prompting certification of a complaint to the Judicial Conferences when it “might constitute one or more grounds for *impeachment under article II of the Constitution*”) (emphasis added).

The legislative history underlying this act confirms this reading. For example, the Senate report terms the act “a supplement to, but not a substitute for, the seldom used process of impeachment” and states “nor is any effort made to alter or modify the constitutional impeachment process.” S. Rep. No. 96-362, at 3-4 (1979). The Senate Report reiterated this limitation, noting that the primary purpose of the act was to “deal with matters which for the most part fall short of being subject to impeachment. And, where impeachment may be appropriate, traditional constitutional procedures continue to govern.” *Id.* at 4.

<sup>12</sup> The act intended judicial councils “to deal with those matters which do not rise to the level of impeachable offenses . . . . Complaints relating to the conduct of a member of the judiciary which are not connected with the judicial office or which do not affect the administration of justice are without jurisdiction and therefore outside the scope of this legislation.” S. Rep. No. 96-362, at 3 (1979). As the Senate report re-emphasized, the act was intended to “deal with matters which for the most part fall short of being subject to impeachment,” to “fill in the void which currently exists in the law between the impeachable offenses and doing nothing at all.” *Id.* at 4-5. See also *Hastings v. Judicial Conference of U.S.*, 593 F. Supp. 1371, 1382 (D.D.C. 1984).

<sup>13</sup> *Cf. Hastings v. Judicial Conference of U.S.*, 593 F. Supp. 1371, 1382 (D.D.C. 1984) (“[In light of Congress’s expressed intent], this Court holds that 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.”).

226 may have overstepped its constitutional and  
227 congressionally intended bounds by mistakenly proceeding  
228 under the erroneous assumption that it may properly  
229 accumulate non-impeachable offenses to find the  
230 possibility of impeachment for an aggregate of less  
231 serious crimes. Such a practice, though, exceeds the  
232 council's congressional authorization and defies the  
233 Constitution because it essentially creates an anomalous  
234 and eccentric definition of an impeachable offense.<sup>14</sup>

235 To avoid such errors and to evaluate possible  
236 impeachable offenses intelligently and constitutionally,  
237 members of both Congress and judicial councils must  
238 address the difficult problem of ascertaining what  
239 qualifies as treason, bribery, and other high crimes and  
240 misdemeanors for which a judge may constitutionally be  
241 impeached and removed from office.<sup>15</sup> Accordingly, in  
242 determining the limits of the constitutional phrase  
243 "treason, bribery, or other high crimes and  
244 misdemeanors," congressional and judicial council members  
245 should generally conform to the historical practice of  
246 relying on the same sources courts have consulted in  
247 construing other constitutional provisions: the language  
248 of the Constitution; the evident intent of the framers  
249 and ratifiers; the body of precedent created by prior  
250 impeachment proceedings; and the views of scholars and

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<sup>14</sup> *See id.*

<sup>15</sup> *See* U.S. Const. art. II, § 4; 28 U.S.C. § 354(b)(2)(A).

251 other commentators.<sup>16</sup>

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The Framers were influenced by the law and practice of England in deciding that "Treason, Bribery, or other high Crimes and Misdemeanors" would be the only offenses for which a federal judge or other constitutional officer could be impeached. In the preceding English experience, impeachable offenses were political crimes, impeachment was a political proceeding, and "high crimes and misdemeanors" was a category of political crimes against the state.<sup>17</sup> Initially in the constitutional convention, Mason proposed to expand the Constitution's definition of impeachable offense by adding the word "maladministration" to follow the words "treason and bribery."<sup>18</sup> Madison objected to this proposal, arguing that "[s]o vague a term [would] be equivalent to a tenure during the pleasure of the Senate."<sup>19</sup> Mason then withdrew "maladministration," substituting instead "other high

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<sup>16</sup> See Bowman & Sepinuck, *supra* note 10, at 1521. See also Daniel H. Pollitt, *Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. Rev. 259, 262 (1998) ("Pollitt"); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 9, 41 (1989) ("Constitutional Limits to Impeachment").

<sup>17</sup> See Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*, 103 (2d ed. 2000) ("The Federal Impeachment Process"); Bowman & Sepinuck, *supra* note 10, at 1529; Pollitt, *supra* note 16, at 265.

<sup>18</sup> See Bowman & Sepinuck, *supra* note 10, at 1524; Pollitt, *supra* note 16, at 265.

<sup>19</sup> Pollitt, *supra* note 16, at 265.

270 crimes and misdemeanors agst. the State."<sup>20</sup> The  
271 ratification debates confirm that "other high Crimes and  
272 Misdemeanors" include only "great offenses" against the  
273 federal government.<sup>21</sup> Thus, delegates to state  
274 ratification conventions often referred to impeachable  
275 offenses as "great" offenses and said impeachment should  
276 apply if the official "deviates from his duty" or if he  
277 "dare to abuse the powers vested in him by the people."<sup>22</sup>

278 Alexander Hamilton similarly observed that:

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280 The subject [of the Senate's] jurisdiction [in  
281 an impeachment trial] are those offenses which  
282 proceed from the misconduct of public men, or,  
283 in other words, from the *abuse or violation of*  
284 *some public trust*. They are of a nature which  
285 may with peculiar propriety be denominated  
286 POLITICAL, as they relate chiefly to injuries  
287 done immediately to the society itself.<sup>23</sup>

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289 In sum, although the framers and ratifiers of the  
290 Constitution saw the need, in extraordinary cases, for  
291 a vehicle to remove a president, judge, or other  
292 constitutional civil officer, they sought to ensure that  
293 those officers would retain a high degree of independence

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<sup>20</sup> *Id.*

<sup>21</sup> The Federal Impeachment Process, *supra* note 17, at 104-05; Bowman & Sepinuck, *supra* note 10, at 1530.

<sup>22</sup> See Constitutional Limits to Impeachment, *supra* note 16, at 65 & n.378-79 (emphasis added).

<sup>23</sup> *Id.* at 85-86 (*citing* THE FEDERALIST NO. 65, at 396 (A. Hamilton) (C. Rossiter ed. 1961)).

294 and not be subjected to removal simply at the pleasure of  
295 Congress. Accordingly, they provided for removal of  
296 judges and other officers only upon impeachment by the  
297 House and conviction by a super-majority of the Senate  
298 for a specific class of offenses, "Treason, Bribery, or  
299 other high Crimes or Misdemeanors," that include only  
300 those political or public crimes which constitute an  
301 abuse or violation of the constitutional powers entrusted  
302 to the officer.

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B.

305 Congress, when dealing with federal judges, has  
306 faithfully restricted its use of the impeachment power to  
307 the core of the constitutional impeachable offenses as  
308 intended by the framers and ratifiers.<sup>24</sup> Accordingly,  
309 throughout United States history, a total of twelve  
310 federal judges have been impeached, and an analysis of  
311 their cases shows that Congress has only voted to impeach  
312 in instances of judges abusing their official,  
313 constitutional powers.<sup>25</sup> Of the twelve judges impeached,  
314 only seven have been convicted and removed from office by

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<sup>24</sup> See Pollitt, *supra* note 16, at 277; The Federal Impeachment Process, *supra* note 17, at xii ("The seven federal officials whom the Senate has convicted and removed — all judges— shared misconduct that caused serious injury to the republic and had a nexus with the official's formal duties."); *see also id.* at 194 ("[I]n over two hundred years Congress has impeached only sixteen officials (including two presidents) but removed only seven judges. Close cases do not produce removals; only compelling ones do."); Pollitt, *supra* note 16, at 267 ("Since 1796, although some sixty or more impeachment proceedings have been filed, the House has voted to impeach only fifteen persons.").

<sup>25</sup> See generally, Bowman & Sepinuck, *supra* note 10, at 1566-98; Pollitt, *supra* note 16, at 268-77.

315 the Senate. Four have been acquitted in Senate hearings,  
316 and one resigned before the Senate could act.<sup>26</sup>

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i.

319 Judge John Pickering was impeached in 1803 and  
320 convicted by the Senate in 1804 for improper rulings,  
321 drunkenness on the bench, and blasphemy.<sup>27</sup> Pickering  
322 allegedly rendered judgment on the merits of a case while  
323 refusing to hear relevant testimony offered by the  
324 attorney general, disregarded and attempted to evade  
325 federal law, and refused to permit an appeal; further, he  
326 appeared on the bench while intoxicated and apparently  
327 suffered from insanity.<sup>28</sup>

328 Judge West H. Humphreys was impeached and convicted  
329 by the Senate in 1862 for actions most akin to treason,  
330 *i.e.*, incitement to revolt and rebellion.<sup>29</sup> Humphreys  
331 joined the Tennessee secession and served as a District  
332 Court Judge in the Confederate States of America without  
333 retiring from the federal bench; during his impeachment  
334 he made no appearance and offered no defense.<sup>30</sup>

335 Judge Robert W. Archbald was impeached in 1912 and  
336 convicted by the Senate in 1913 for bribery, using his

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<sup>26</sup> See Bowman & Sepinuck, *supra* note 10, at 1566-98.

<sup>27</sup> *Id.* at 1567-68.

<sup>28</sup> *Id.*; Pollitt, *supra* note 16, at 270.

<sup>29</sup> Bowman & Sepinuck, *supra* note 10, at 1571-72.

<sup>30</sup> *Id.*; Pollitt, *supra* note 16, at 272.

337 position as a judge to induce numerous litigants to allow  
338 him profitable financial deals, and hearing cases in  
339 which he had a financial interest.<sup>31</sup> In a number of  
340 instances, Archbald coerced a railroad company, which had  
341 several cases pending before him, and a series of other  
342 litigants to sell or lease him and a partner certain  
343 profitable property.<sup>32</sup> Archbald also received a \$500  
344 bribe in exchange for attempting to induce other  
345 litigants to lease profitable property to Archbald's  
346 associate.<sup>33</sup>

347 Judge Halstead L. Ritter was impeached and convicted  
348 by the Senate in 1936 for creating kickback schemes,  
349 continuing to work on a case as a lawyer while already a  
350 judge, evading federal income tax, bartering his judicial  
351 authority for a vote of confidence, and bringing his  
352 court into scandal and disrepute.<sup>34</sup> Among his articles of  
353 impeachment were findings that he awarded a receivership  
354 to a former partner and increased the receivership fees  
355 by \$75,000 in return for a \$4,500 kickback, which led to  
356 the income-tax evasion because he failed to report the  
357 sum.<sup>35</sup>

358 Judge Harry Claiborne was impeached and convicted by

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<sup>31</sup> Bowman & Sepinuck, *supra* note 10, at 1581-84.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1588.

<sup>35</sup> *Id.*; Pollitt, *supra* note 16, at 274-75.

359 the Senate for tax evasion in 1986.<sup>36</sup> Prior to his  
360 impeachment, Claiborne had been judicially convicted of  
361 criminal tax evasion for substantially under-reporting  
362 his income in 1979 and 1980; the income he failed to  
363 report was profit from bribes.<sup>37</sup> He was sent to prison  
364 but refused to resign, so he continued to draw his  
365 federal salary while serving jail time.<sup>38</sup> This apparently  
366 prompted his impeachment proceedings.

367 Judge Alcee L. Hastings was impeached in 1988 and  
368 convicted by the Senate in 1989 for conspiracy to solicit  
369 a bribe and perjury after having been criminally indicted  
370 and acquitted for bribery and conspiracy.<sup>39</sup> Hastings  
371 allegedly attempted to obtain \$150,000 from a defendant  
372 in a case before him in exchange for a sentence not  
373 requiring jail time and then allegedly lied to a grand  
374 jury about the matter.<sup>40</sup> Though Hastings was acquitted in  
375 his criminal trial for bribery and conspiracy, Hastings'  
376 alleged co-conspirator was convicted in a separate  
377 trial.<sup>41</sup>

378 Finally, Judge Walter L. Nixon was impeached and

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<sup>36</sup> Bowman & Sepinuck, *supra* note 10, at 1590-91.

<sup>37</sup> Pollitt, *supra* note 16, at 275.

<sup>38</sup> *Id.*; Bowman & Sepinuck, *supra* note 10, at 1590-91.

<sup>39</sup> Bowman & Sepinuck, *supra* note 10, at 1591.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

379 convicted by the Senate for perjury in 1989.<sup>42</sup> Prior to  
380 his impeachment, Nixon had been judicially convicted on  
381 federal criminal charges of perjury and was serving a  
382 five-year sentence.<sup>43</sup> Nixon's perjury conviction arose  
383 out of statements he made to a grand jury, which was  
384 investigating bribery charges alleging that Nixon  
385 accepted a gratuity in exchange for attempting to  
386 influence a state's drug prosecution against a business  
387 partner's son.<sup>44</sup> Like Judge Claiborne, Nixon was  
388 sentenced to imprisonment and refused to resign, so that  
389 he continued to receive federal judicial compensation  
390 while in prison, prompting Congress to institute  
391 impeachment proceedings.<sup>45</sup>

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393 ii.

394 Supreme Court Justice Samuel Chase was impeached but  
395 acquitted by the Senate in 1804 for bias in charging a  
396 grand jury and other action from the bench.<sup>46</sup> The  
397 articles of impeachment against Chase state that he  
398 attempted to prejudice juries before defense counsel  
399 could be heard, prohibited defense counsel from  
400 addressing the jury on the law, seated a juror who had

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<sup>42</sup> *Id.* at 1595.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; Pollitt, *supra* note 16, at 276.

<sup>45</sup> Pollitt, *supra* note 16, at 276.

<sup>46</sup> Bowman & Sepinuck, *supra* note 10, at 1569-71.

401 already decided that a defendant was guilty, and  
402 delivered political speeches from the bench.<sup>47</sup>

403 Judge James H. Peck was impeached 1830 but acquitted  
404 by the Senate in 1831 for holding a lawyer who criticized  
405 his rulings in contempt.<sup>48</sup> When a local newspaper printed  
406 a letter, written by a lawyer, criticizing one of Peck's  
407 rulings, Peck had the lawyer arrested, held him in  
408 contempt, ordered him imprisoned for 24 hours, and  
409 suspended him from practicing before the court for  
410 eighteen months.<sup>49</sup> The impeachment was based on "[Peck's]  
411 unjust, oppressive, and arbitrary contempt order and his  
412 general gross abuse of power as a judge," but "the Senate  
413 voted not to convict because criminal intent had neither  
414 been charged nor proved."<sup>50</sup>

415 Judge Charles H. Swayne was impeached in 1904 but  
416 acquitted by the Senate in 1905 for falsifying expense  
417 accounts and using property held in receivership.<sup>51</sup> The  
418 articles of impeachment alleged three instances of Swayne  
419 falsely inflating his travel expenses in an attempt to  
420 defraud the federal government into over-paying him; in  
421 two separate instances, Swayne also appropriated the use  
422 of a railroad car, which was held under receivership, to

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1571.

<sup>49</sup> *Id.*

<sup>50</sup> Pollitt, *supra* note 16, at 271-72.

<sup>51</sup> Bowman & Sepinuck, *supra* note 10, at 1578-79.

423 transport himself, his family, and friends from Delaware  
424 to Florida and from Florida to California.<sup>52</sup> Swayne then  
425 allowed the receiver to claim these expenses as necessary  
426 costs of operating the railroad.<sup>53</sup> The Senate ultimately  
427 acquitted Swayne, whose "defense was that even if the  
428 charges against him were accepted as true, those acts did  
429 not satisfy the constitutional definition of high crimes  
430 and misdemeanors."<sup>54</sup>

431 Judge George English was impeached in 1926 for  
432 favoritism, improper conduct, and improper use of  
433 bankruptcy funds in his court; he resigned before the  
434 Senate could take action on the matter.<sup>55</sup> Among English's  
435 articles of impeachment were allegations that he  
436 disbarred two lawyers without giving notice, proffering  
437 charges, or allowing them to speak in their own defense.<sup>56</sup>  
438 He also allegedly threatened to incarcerate jurors if  
439 they did not return guilty verdicts and constructed a  
440 fake trial for the purpose of summoning and berating  
441 local officials.<sup>57</sup>

442 Judge Harold Louderback was impeached but acquitted  
443 by the Senate in 1933 for using favoritism in appointing

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Pollitt, *supra* note 16, at 273.

<sup>55</sup> Bowman & Sepinuck, *supra* note 10, at 1585-86.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

444 receivers.<sup>58</sup> The articles of impeachment against  
445 Louderback alleged four separate instances of Louderback  
446 creating kickback schemes to enrich his friends at  
447 litigants' expense; "lacking evidence that Louderback had  
448 received any direct personal financial gain from these  
449 appointments, however, the Senate voted to acquit him."<sup>59</sup>

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As the examples above demonstrate, 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. Among the judges convicted by the Senate, for example, Judges Nixon's and Claiborne's convictions for perjury to cover up bribery before a grand jury and tax evasion, respectively, demonstrate their abuse of their judicial power. Both also allegedly engaged in bribery, a specifically identified impeachable offense. Similarly, Judge Hastings was alleged to have accepted bribes, and Judge Ritter's kickback schemes and Archbald's financial manipulations, both of which arguably involved bribery, also hinged on their abuse of official judicial power. The allegations that Judge Pickering took the bench while intoxicated, improperly denied an appeal, refused to allow the attorney general to present witnesses' testimony, and arbitrarily entered judgment without

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<sup>58</sup> *Id.* at 1586-87.

<sup>59</sup> *Id.*; Pollitt, *supra* note 16, at 274.

470 conducting trial or hearing witnesses similarly implicate  
471 abuse of his official judicial duty and power. Finally,  
472 Judge Humphreys' actions essentially constituted treason,  
473 another specifically identified impeachable offense.

474 Even for those judges impeached but not convicted by  
475 the Senate, the impeachment grounds hinged on abuses of  
476 official constitutional powers. Judges Louderback and  
477 Swayne, acting in their official federal capacities,  
478 allegedly abused the receivership process and, in  
479 Swayne's case, attempted to defraud the federal  
480 government into over-paying judicial expenses. Judge  
481 Peck acted in his official capacity by ordering arrest  
482 and contempt charges; and all of the allegations against  
483 Justice Chase and Judge English similarly implicate  
484 abusive conduct from the bench toward litigants and  
485 jurors.

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### C.

488 According to the constitutional text, the evident  
489 intent of the framers and ratifiers, the body of  
490 precedent created by prior judicial impeachment  
491 proceedings, and the views of scholars and other  
492 commentators, impeachable high crimes and misdemeanors  
493 are limited to abuses or violations of constitutional  
494 judicial power. Thus, any conduct short of an abuse or  
495 violation of constitutionally entrusted power cannot  
496 constitute a possible impeachable offense.

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499           The special investigating committee and the judicial  
500 council majority neither alleged nor found that Judge  
501 Porteous had committed treason, bribery, or other high  
502 crimes or misdemeanors, or that he had engaged in  
503 misconduct which constituted an abuse or violation of  
504 constitutional judicial power. The only violations of  
505 law or canons of judicial conduct that the committee or  
506 the council majority alleged or found Judge Porteous to  
507 have committed do not amount to impeachable offenses  
508 because they do not amount to an abuse or violation of  
509 the constitutional judicial powers entrusted to him.  
510 Accordingly, although the misconduct which the committee  
511 and council majority attributed to Judge Porteous  
512 warrants a public reprimand, it does not constitute any  
513 of the constitutional grounds for impeachment, and the  
514 council majority therefore erroneously certified this  
515 case for possible impeachment.

516           The DOJ as complainant, the special investigatory  
517 committee, and the judicial council majority have never  
518 alleged that Judge Porteous committed treason or  
519 bribery.<sup>60</sup> In fact, the special committee expressly  
520 concedes that there is no allegation of bribery in the  
521 complaint or charge against Judge Porteous.<sup>61</sup> Although

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<sup>60</sup> See U.S. Department of Justice Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr. (“Complaint”); The Special Committee for the Fifth Circuit Judicial Council Charges of Judicial Misconduct; Special Committee Response to Reply Memorandum at 9.

<sup>61</sup> Special Committee Response to Reply Memorandum at 9 (“no specific allegations of bribery appear in the Complaint or in the Charge”).

522 the committee introduced evidence of alleged misconduct  
523 by Judge Porteous while he was a state judge, the  
524 committee admitted that it has no authority over such  
525 non-federal judicial conduct.<sup>62</sup> Furthermore, because the  
526 only constitutional grounds for impeachment of a federal  
527 judge are his commission, while on the federal bench, of  
528 treason, bribery and other high crimes and misdemeanors  
529 against the United States, the Congress lacks  
530 jurisdiction to impeach, and the judicial council lacks  
531 authority to certify for possible impeachment, Judge  
532 Porteous for any misconduct prior to his appointment as  
533 a federal judge.<sup>63</sup>

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<sup>62</sup> The Special Committee concedes that it has “never taken the position that it has authority over Judge Porteous's judicial misconduct as a state judge.” Special Committee Response to Reply Memorandum at 4.

<sup>63</sup> See The Federal Impeachment Process, *supra* note 17, at 108-09. See also Special Committee Response to Reply Memorandum at 4 (conceding that the committee has “never taken the position that it has authority over Judge Porteous's judicial misconduct as a state judge.”).

Records of past impeachment proceedings also demonstrate that evidence relating to state-level judicial misconduct falls outside the proper scope of an impeachment inquiry into misconduct as a federal judge. During the Senate conviction proceedings for Judge Archbald in 1913, the Judge's counsel presented an extensive brief arguing why the last six articles of impeachment should not stand. Counsel argued that because those articles related to Judge Archbald's tenure as a district court judge and the impeachment concerned his position as a judge on the Commerce Court, the evidence of conduct occurring during Archbald's district court tenure, *i.e.*, prior to his then-current federal office, was irrelevant and outside the scope of a proper impeachment inquiry. In response, the senate found Archbald “not guilty” for all six articles wholly concerned with his actions during his district court tenure though they convicted Archbald on the other articles.

The argument in Judge Archbald's case, equally applicable here, revolved around Article I, section 3, of the Constitution, which states “Judgment in the Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.” As primary legal authority, Judge Archbald's counsel cited to Justice Story's Commentaries on the Constitution of the United States, which interprets the relevant clause as follows:

534           Thus, the special committee and council majority  
535 erred in certifying this matter, having found only  
536 non-impeachable offenses but mistakenly averring that  
537 there might be an impeachable offense among them. The  
538 council majority's Memorandum Order and Certification  
539 describes the offenses it found as follows:  
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As it is declared in one clause of the Constitution, that ‘judgment, in cases of impeachment, shall not extend further, than a removal from office, and disqualification to hold any office of honour, trust, or profit, under the United States;’ and in another clause, that “the president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanours;” it would seem to follow, that the Senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification. *If, then, there must be a judgment of removal from office, it would seem to follow, that the Constitution contemplated, that the party was still in office at the time of the impeachment. If he was not, his offence was still liable to be tried and punished in the ordinary tribunals of justice.* And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object, for which the remedy was given, was no longer necessary, or attainable. And although a judgment of disqualification might still be pronounced, the language of the Constitution may create some doubt, whether it can be pronounced without being coupled with a removal from office. There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests of his political capacity.

Story, Commentaries on the Constitution § 801 (1833) (emphasis added).

Since Judge Porteous is no longer a state court judge, it is up to the “tribunals of justice” to hold Judge Porteous liable for his actions in that capacity-- which they have not. The scope of the current impeachment inquiry only pertains to Judge Porteous’s actions consonant to the remedy at issue-- removal of Judge Porteous from his current federal judicial capacity for abuse of constitutional power related to his current position-- not to actions taken while in state-level positions he no longer holds.

541 (a) Porteous filed numerous false statements  
542 under oath during his and his wife's Chapter 13  
543 bankruptcy, including filing the petition under  
544 a false name; concealing assets of the  
545 bankruptcy estate; failing to identify gambling  
546 losses; and failing to list all creditors.  
547 Porteous additionally violated bankruptcy court  
548 orders forbidding him from incurring debt during  
549 the course of the Chapter 13 case without  
550 approval of the trustee or bankruptcy judge, in  
551 that he continued regularly to incur short-term  
552 extensions of credit from various casinos.  
553 Porteous additionally made unauthorized and  
554 undisclosed payments to preferred creditors  
555 after the commencement of the bankruptcy case.

556  
557 (b) Porteous engaged in fraudulent and deceptive  
558 conduct concerning the debt he owed to Regions  
559 Bank prior to bankruptcy.

560  
561 (c) Porteous received gifts and things of value  
562 from attorneys who had cases pending before him.  
563 During one particular case (*Liljeberg*), Porteous  
564 was requested to recuse from the case but  
565 instead ruled against the movant without  
566 disclosing to any party his history of financial  
567 relationships with at least one counsel in the  
568 case.

569  
570 (d) Porteous's financial disclosure statements  
571 for the years 1994-2000 are inaccurate and  
572 misleading insofar as they fail to report the  
573 gifts and things of value he received from  
574 attorneys, and in the year 2000 failed to report  
575 accurately significant amounts of reportable  
576 indebtedness owed by Judge Porteous.

577  
578 None of these offenses or ethical violations constitutes  
579 a high crime or other impeachable offense because none  
580 represents an abuse or violation of constitutional  
581 judicial power.

582 A. Appearances of Improprieties in Connection with the  
583 *Liljeberg* Case

584 In essence, the judicial council majority finds that  
585 Judge Porteous committed several serious appearances of  
586 improprieties under the Code of Conduct. I agree with  
587 that finding and think that Judge Porteous should be  
588 given the most severe sanction at the council's disposal  
589 for these infractions, a public reprimand. I emphatically  
590 disagree with the council majority, however, if, without  
591 specifically finding or saying so, it believes that these  
592 appearances of improprieties are high crimes or  
593 misdemeanors.

594 Judge Porteous presided over the *Liljeberg* case, in  
595 which Judge Porteous's long-time friends Amato, Levenson,  
596 and Gardner represented opposing parties.<sup>64</sup> Arising out  
597 of these circumstances, the judicial council found  
598 several appearance-of-impropriety violations of the Code  
599 of Conduct: first the council found that, before Gardner

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<sup>64</sup>Though the special committee report mentions Levenson, he is not the primary focus of the allegations because his role in the appearances of improprieties during the *Liljeberg* case is less significant than those of Amato, Creely, or Gardner. The special committee report notes that Levenson paid for some expenses related to one of Judge Porteous's son's externships in Washington, D.C. prior to the *Liljeberg* case and also often took Judge Porteous out to lunch and paid for the meals. Special Committee Report at 60. Such conduct appears fitting with Judge Porteous's and Levenson's relationship because, like Amato, Creely, and Gardner, Levenson is also a long-time friend of Judge Porteous's. Levenson Grand Jury Testimony at 6-8.

At the outset of their relationship, Levenson treated Judge Porteous to lunch, which Levenson testified was often the case in social relationships between judges and lawyers, and this practice continued when Judge Porteous became a federal judge. *Id.* at 11-12. Levenson testified that though he paid for lunches during the pendency of the *Liljeberg* case, he never did so during the actual trial. *Id.* at 44. Furthermore, Levenson testified that his payment of expenses for Judge Porteous's son was a "long time ago," hence before, and unrelated to, the *Liljeberg* case, and amounted to "a couple of hundred dollars." *Id.* at 65-6.

600 entered the case as an attorney, Judge Porteous declined  
601 to either recuse himself or disclose to the parties the  
602 closeness of his thirty-year friendships with Amato and  
603 Levenson, and second the council found that during the  
604 pendency of *Liljeberg*, Judge Porteous received financial  
605 assistance from Amato and Amato's partner Creely, another  
606 long-time friend, to help pay for his son's wedding and  
607 also attended his son's bachelor party in Las Vegas with  
608 Gardner and Creely, among a score of other guests, where  
609 Creely paid for his hotel room.

610 In the absence of Judge Porteous's and his lawyer  
611 friends' involvement in the *Liljeberg* case, of course,  
612 there would have been nothing wrong with his receiving  
613 gifts from them in connection with his son's wedding.  
614 This would have been the natural result of their 30 year  
615 relationship during which their families regularly  
616 celebrated such occasions together.<sup>65</sup> But because of the  
617 serious appearance of impropriety that these gifts  
618 presented in light of *Liljeberg*, Judge Porteous should  
619 have avoided the situation entirely by recusal or  
620 disclosure.

621 Thus, because of the intersection between the close

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<sup>65</sup> Judge Porteous, Amato, Gardner, and Creely have been close friends for over 30 years. *See* Special Committee Hearing Transcript ("SCHT") at 461. Amato, Creely, and Judge Porteous met as young lawyers practicing together. *See* SCHT at 198, 236-37. All four frequently enjoyed such diversions as hunting, fishing, or having lunch together. *See* SCHT at 229. Over time their families also became close. *See* SCHT at 259. They attend each others' various parties, birthdays, weddings, and other events. *See* SCHT at 154. In fact, Judge Porteous is godfather to one of Gardner's daughters. *See* SCHT at 154. In connection with this social interchange, they engaged in the customary mutual benevolence of reciprocal gift-giving and funding of costs of celebrations and social events. *See* SCHT at 461-62.

622 friendships, the *Liljeberg* case, and Judge Porteous's  
623 son's wedding, Judge Porteous's failure to take  
624 corrective action resulted in serious appearance-of-  
625 impropriety ethical violations. However, because all of  
626 the sworn testimony indicates without dispute that Judge  
627 Porteous did not commit bribery, *i.e.*, he did not solicit  
628 or accept any private favor or benefit in exchange for  
629 official action, Judge Porteous's ethical infractions  
630 during the *Liljeberg* case did not amount to a high crime  
631 or high misdemeanor because he did not abuse or violate  
632 the constitutional judicial power entrusted to him.  
633 Further, because Judge Porteous created only appearances  
634 of improprieties, his misconduct was not as serious as  
635 actual ethical improprieties under the Code.<sup>66</sup>

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<sup>66</sup> The creation of an appearance of impropriety is distinguishable from an actual impropriety or actual misconduct under the Code of Conduct for United States Judges. As the Commentary to Canon 2A notes, "actual improprieties . . . include violations of law, court rules, or other specific provisions of this code," whereas "the test for appearance of impropriety is whether the conduct would create in reasonable minds . . . a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

Here, there is no evidence, allegation, or finding that Judge Porteous violated a law or court rule through his actions during the *Liljeberg* case because there is no evidence or allegation that Judge Porteous's relationship with lawyers on either side of the case influenced his impartial judgment or disposition in the matter. Further, in light of this lack of evidence of bribery or other actual bias during *Liljeberg*, the only canonical violations alleged against Judge Porteous, violations of Canons 1, 2, 3, 5, and 6, are necessarily limited to his creating only an appearance of partiality. Thus, his failure to recuse or disclose his relationship constitutes a mere appearance of impropriety rather than actual impropriety under the canons.

As evidenced by the remedies often awarded to litigants, a Judge's appearance of impropriety is less serious than an actual impropriety. For example, a finding that a judge failed to recuse for an actual impropriety generally requires the remedy of vacatur, whereas a finding of failure to recuse for appearance of impropriety often calls only for prospective recusal. *See In re Cargill, Inc.*, 66 F.3d 1256, 1264 (1st Cir. 1995) (holding that an appearance of impropriety does not require immediate relief whereas actual impropriety would); *In re Allied-Signal Inc.* 891 F.2d 967, 973 (1st Cir. 1989) (reasoning that because no actual impropriety was alleged, retroactive relief was unnecessary in a case of appearance of impropriety); *U.S. v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985) ("Disqualification for the appearance of impropriety runs

636 Equally important here, Congress's impeachment  
637 precedents demonstrate that Judge Porteous's *Liljeberg*  
638 conduct falls far short of impeachable crimes under the  
639 Constitution. The congressional impeachments of Judges  
640 Nixon, Hastings, Claiborne, Archbald, and Humphreys, for  
641 example, resulted in their removal for treason and  
642 bribery. Judge Porteous engaged in no treason or bribery  
643 at anytime, either in connection with *Liljeberg* or  
644 otherwise.<sup>67</sup> Also unlike the cases of Judges Ritter,  
645 Louderback, and Swayne, no evidence here suggests that  
646 the gifts Judge Porteous received during *Liljeberg*  
647 constituted a quid pro quo for official action or in any  
648 way connected to his official powers.

649 During the pendency of *Liljeberg*, Judge Porteous  
650 accepted gifts from Creely and Amato to defray his adult  
651 son's wedding expenses and attended his son's bachelor  
652 party with Creely and Gardner, and both of these  
653 instances fit within the context of their extensive  
654 social relationships and had nothing to do with the  
655 *Liljeburg* case. Thus, the difference between Judge  
656 Porteous's conduct during *Liljeberg* and the impeachable  
657 conduct of Ritter, Archbald, Louderback, and Swayne, is  
658 that all the impeached judges' conduct involved abuses of

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prospectively only; even a successful motion does not vitiate acts taken before the motion was filed . . . . Disqualification under . . . for an actual impropriety would indeed require a new hearing") (internal citation omitted).

As such, the appearance of an impropriety is deserving of a lesser sanction, if any, than an actual impropriety or actual misconduct.

<sup>67</sup> See Special Committee Response to Reply Memorandum at 9 ("no specific allegations of bribery appear in the Complaint or in the Charge").

659 official power, viz., awarding receiverships, using  
660 property in receivership, accepting bribes, influencing  
661 litigants' financial decisions, and falsifying expense  
662 accounts,<sup>68</sup> whereas it is undisputed that Judge Porteous  
663 never acted out of fear or favor of any litigant or  
664 attorney and never abused or violated the constitutional  
665 power entrusted to him.<sup>69</sup> Finally, the violations alleged  
666 against the impeached judges spanned multiple cases,  
667 whereas the committee and council's allegations against  
668 Judge Porteous center on only the *Liljeberg* case.

669 Furthermore, the special committee and council  
670 majority do not dispute, but, in effect, concede that  
671 Judge Porteous's conduct amounted only to a non-  
672 impeachable appearance of impropriety. They never find  
673 that Judge Porteous's conduct constituted an actual  
674 impropriety, much less an abuse or violation of official  
675 constitutional judicial power. The special investigating  
676 committee's report finds that none of Judge Porteous's  
677 ethical violations was more egregious than his conduct

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<sup>68</sup> Judges Ritter and Louderback allegedly concocted numerous kickback schemes across many cases, Judge Archbald wielded his office for financial advantage against a number of litigants throughout his docket, and Judge Swayne attempted to swindle the federal government on at least three different occasions and commandeered a railroad car in receivership for two different trips.

<sup>69</sup> In un rebutted testimony, 1) Judge Porteous stated that he has "been fair and impartial in every proceeding [before him]," SCHAT at 157; 2) Creely stated that he never thought that his gifts to Judge Porteous would influence his decision in *Liljeberg* or any other case and that he did not believe Judge Porteous's rulings to rely "one way or the other" on these gifts, SCHAT at 229, 231; and 3) Amato testified that there was no quid pro quo or expectation of judgment tied to his gifts to Judge Porteous, SCHAT at 256, and that any money given to Judge Porteous was "because we're friends and we've been friends for 35 years," rather than because Judge Porteous is a judge or to influence his decisions. SCHAT at 258-59.

678 during the *Liljeberg* case but concludes 1) that Judge  
679 Porteous should have advised the parties of his financial  
680 relationship with Amato and the Creely & Amato law firm  
681 as soon as the recusal motion was filed; and 2) that  
682 Judge Porteous should have granted the motion to recuse  
683 or given the parties the choice of keeping him as a trial  
684 judge. The committee further found that Judge Porteous's  
685 asking for and receiving Amato's and Creely's financial  
686 assistance with his son's wedding and allowing Creely to  
687 pay for his hotel room in connection with his son's  
688 bachelor party compounded the appearances of  
689 improprieties. But the committee correctly did not find  
690 that anything other than appearances of improprieties,  
691 rather than actual improprieties,<sup>70</sup> resulted from this  
692 conduct under the Code. Thus, the committee found that  
693 the failure to recuse, Judge Porteous's worst ethical  
694 offense, was not an irremediable actual impropriety under  
695 the Code but rather an appearance of impropriety, which,  
696 if disclosed, the parties could have cured by agreement.  
697 The appearances of serious improprieties allowed by Judge  
698 Porteous warrant the most severe sanction that the  
699 judicial council can impose, a public reprimand, but  
700 because Judge Porteous did not commit an actual abuse or  
701 violation of the constitutional judicial power entrusted  
702 to him, he did not commit a high crime or high  
703 misdemeanor for which he may be impeached and removed  
704 from office.

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<sup>70</sup> See *supra* note 66.

705 B. Offenses Related to Personal Bankruptcy, Personal  
706 Bank Loan, and Personal Financial Disclosure

707 The committee's and council majority's findings that  
708 Judge Porteous violated criminal statutes relating to his  
709 bankruptcy, bank loan, and financial disclosure  
710 statements do not constitute findings of possible  
711 impeachable offenses, because, rather than constituting  
712 the exercise of the constitutional judicial power  
713 entrusted to Judge Porteous, his misconduct in these  
714 respects was restricted to private conduct and reporting  
715 of private financial affairs.<sup>71</sup> These alleged crimes  
716 implicate no bribery or treason on Judge Porteous's part.  
717 Moreover, they involve neither Judge Porteous's actions  
718 from the bench nor any litigants or lawyers involved in  
719 cases before Judge Porteous. So, unlike the conduct  
720 underlying the charges against every federal judge ever  
721 impeached, Judge Porteous's conduct in his bankruptcy,  
722 bank loan, and financial disclosure statements neither  
723 depended upon nor utilized his constitutionally entrusted  
724 powers. In sum, these offenses involve only Judge  
725 Porteous the private citizen and disclosure of his

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<sup>71</sup> In *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), the Fifth Circuit examined the statutory financial disclosure obligations that Judge Porteous allegedly violated. The disclosure obligation entails filing a "personal financial report," *id.* at 659 and its statutory intent was to require judges to report for public disclosure judges' *private* financial interests, *id.* at 668 n.30. In *Duplantier*, The Fifth Circuit concluded: "Judges should not be harassed in the legitimate exercise of their duties, and we should tread softly before imposing publicity on their *private financial affairs* which may be a serious threat to judicial independence and may erode that independence so necessary to the proper functioning of the judiciary. Federal judges may properly inquire what necessity brought about the provisions of the Act of Congress which will cause many of their intimate personal and confidential financial affairs to be open to public inspection." *Id.* at 672.

726 private wealth and financial affairs, not Judge  
727 Porteous's use or abuse of constitutional judicial power.  
728 As such, because these allegations entail no abuse of  
729 official constitutional power, these alleged offenses  
730 involving personal, private conduct generically and  
731 categorically fall outside the scope of impeachable  
732 offenses.

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735 For the foregoing reasons, a detailed examination of  
736 the evidence may be unnecessary to a determination that  
737 this case does not present a possible treason, bribery,  
738 high crime or misdemeanor, or an abuse or violation of  
739 constitutional judicial power. Nevertheless, every judge  
740 participating in deciding whether to refer this or any  
741 case to the House of Representatives for consideration of  
742 possible impeachment will wish to have a good  
743 understanding of the evidence and record in the case.  
744 Accordingly, in the interest of aiding other judges in  
745 reviewing and evaluating the evidence, I respectfully  
746 suggest that a fair and impartial assessment of the  
747 evidence reveals that the case against Judge Porteous,  
748 while still warranting a public reprimand, is not as  
749 formidable as the committee report represents for many of  
750 the same reasons that the DOJ or the grand jury, or both,  
751 decided that a criminal prosecution of Judge Porteous was  
752 not warranted.

753 The Federal Bureau of Investigation ("FBI") and a  
754 grand jury empaneled in the Eastern District of Louisiana

755 spent nearly five years investigating Judge Porteous in  
756 connection with a number of potential criminal charges.<sup>72</sup>  
757 Specifically, the FBI investigated Judge Porteous for  
758 conspiracy to bribe a public official in violation of 18  
759 U.S.C. §§ 201 and 371, commission or conspiracy to commit  
760 honest services mail- or wire-fraud in violation of 18  
761 U.S.C. §§ 371, 1341, 1343, and 1346, submission of false  
762 statements to federal agencies and banks in violation of  
763 18 U.S.C. §§ 1001 and 1014, and filing false  
764 declarations, concealing assets, and acting in criminal  
765 contempt of court during his personal bankruptcy action  
766 in violation of 18 U.S.C. §§ 152 and 401.<sup>73</sup>

767 After this extensive investigation, the DOJ decided  
768 to press no criminal charges against Judge Porteous based  
769 both on statute of limitations bars to certain charges  
770 and on determination that the government could not meet  
771 its burden of proof for the non-barred charges.<sup>74</sup> It is  
772 unclear whether the DOJ decided not to continue or the  
773 grand jury returned submitted charges without an  
774 indictment. The DOJ specifically said "the government's  
775 heavy burden of proof in a criminal trial, and the  
776 obligation to carry that burden to a unanimous jury;  
777 concerns about the materiality of some of Judge  
778 Porteous's provably false statements; the special  
779 difficulties in proving mens rea and intent to deceive

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<sup>72</sup> Complaint at 1.

<sup>73</sup> *Id.* at 1-2.

<sup>74</sup> *Id.*

780 beyond a reasonable doubt in a case of this nature" led  
781 to a decision not to prosecute.

782 The same evidence presented to the grand jury was  
783 before the judicial council, and considered under any  
784 reasonable standard of proof,<sup>75</sup> it still arguably cannot  
785 support a conclusion that Judge Porteous should be held  
786 responsible for the alleged criminal offenses to the  
787 extent claimed by the committee because the record cannot  
788 support an essential element of the criminal allegations,  
789 viz., intent to deceive or defraud, save for the least  
790 serious offense which does not require proof of this  
791 element. The Complaint alleges, and the Special Committee  
792 agreed, that the pertinent allegations of criminal  
793 offenses are violations of 18 U.S.C. § 1621, perjury; §  
794 152, bankruptcy fraud; § 1001, false statements to  
795 federal agencies; § 1014, false statements to a financial  
796 institution; § 1344, bank fraud; and § 371, conspiracy.

797 To prove a violation of 18 U.S.C. §§ 1621, 152, or  
798 1344 requires proof of a specific intent to defraud; and  
799 18 U.S.C. § 1014 requires proof of a specific intent to  
800 influence the bank.<sup>76</sup> "The requisite intent to defraud is

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<sup>75</sup> Another problem in the Special Committee's treatment of the allegations is the failure to identify the standard of proof required to substantiate these allegations. As noted earlier, the DOJ concedes these allegations probably can not be proved beyond a reasonable doubt.

<sup>76</sup> For perjury under § 1621(2), "in order to constitute perjury, a false statement must be made with criminal intent, that is, with intent to deceive, and must be wilfully, deliberately, knowingly and corruptly false." *Beckanstin v. United States*, 232 F.2d 1, 4 (5th Cir. 1956). For bankruptcy fraud under § 152, according to the Fifth Circuit pattern jury instructions, to convict under Section 152(1), the Government must prove: (1) "That there existed a proceeding in bankruptcy"; (2) "That certain property or assets belonged to the bankrupt estate"; (3) "That defendant concealed such property from the creditors [custodian] [trustee] [marshal] [some person] charged with control or custody of such property"; and (4) "That the defendant *did so*

801 established if the defendant acted knowingly and with the  
802 specific intent to deceive, ordinarily for the purpose of  
803 causing some financial loss to another or bringing about  
804 some financial gain to himself.”<sup>77</sup> As I discuss in the  
805 balance of this section, the record evidence forms an  
806 arguably insufficient foundation for the conclusion that  
807 Judge Porteous harbored the requisite specific intent for  
808 the aforementioned alleged criminal offenses.

809 The Special Committee finds a violation of 18 U.S.C.  
810 § 1621(2), the general perjury statute, because Judge  
811 Porteous submitted a bankruptcy petition using an alias  
812 (“Orteous”) as suggested by his attorney to avoid  
813 negative publicity. However, the record shows that Judge  
814 Porteous and his attorney intended to correct the name  
815 soon after the petition was filed and, in fact, did  
816 correct it just twenty days later. Since (1) Judge  
817 Porteous relied on his lawyer’s advice<sup>78</sup> and (2) corrected

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*knowingly and fraudulently.*” (emphasis added); see *United States v. Maturin*, 488 F.3d 657, 662 n.3 (5th Cir. 2007). For bank fraud under 18 U.S.C. § 1344, the prosecution must show beyond a reasonable doubt that the defendant (1) engaged in a scheme or artifice to defraud, or made false statements or misrepresentations to obtain money from; (2) a federally insured financial institution; and (3) *did so knowingly*. *United States v. Brandon*, 17 F.3d 409, 424 (1st Cir. 1994). For § 1014, “the only specific intent that matters for purposes of § 1014 is the intent to influence the bank’s actions.” *United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995).

The last alleged infraction, § 1001, false statement to a federal agency, does not require an “intent to defraud.” While Section 1001 proscribes only deliberate, knowing, willful false statements,” it “does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit.” *United States v. Lichenstein*, 610 F.2d 1272, 1276-77 (5th Cir. 1980).

<sup>77</sup> *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999).

<sup>78</sup> Generally, a debtor is entitled to rely on the advice of his bankruptcy counsel where the reliance is reasonable and in good faith. See *Hibernia Nat’l Bank v. Perez*, 124 B.R. 704, 710-11 (E.D. La. 1991), *aff’d* 954 F.2d 1026 (5th Cir. 1992); see also *First Beverly Bank v. Adeeb (In re*

818 the name within twenty days,<sup>79</sup> arguably a neutral finder  
819 of fact could follow our criminal law precedents and  
820 infer a lack of bad faith or no intent to defraud.<sup>80</sup>

821 Judge Porteous's assertion of a good-faith belief in  
822 his conduct, and thus a lack of intent to defraud, also  
823 tends to weaken the evidentiary basis for the other  
824 allegations of fraud relating to his bankruptcy. In  
825 fact, no direct evidence of intent to defraud, a  
826 necessary element for the bankruptcy fraud allegation  
827 under 18 U.S.C. § 152, rebuts the testimony about Judge  
828 Porteous's "good-faith."

829 For example, the record arguably contravenes a  
830 finding of intent to defraud for the allegation that  
831 Judge Porteous improperly obtained credit during his  
832 bankruptcy by using gambling markers and intentionally  
833 concealed this credit from his bankruptcy proceedings.

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*Adeeb*), 787 F.2d 1339, 1343 (9th Cir. 1986) (noting that reasonable and good faith reliance on advice of counsel sufficient to show debtor lacked requisite fraudulent intent to revoke or deny discharge); *Beckanstein v. United States*, 232 F.2d 1, 4 (5th Cir. 1956) ("The advice of counsel is also important in determining whether appellant made the statement with a corrupt motive.").

The Special Committee attempts to strip Judge Porteous of this defense by declaring "a federal judge cannot reasonably avail himself of such a defense," Special Committee Report at 18, but this statement appears contrary to the Code of Conduct for United States Judges. According to the Commentary to Canon 5C of the Code of Conduct for United States Judges, "[a] judge has the rights of an ordinary citizen with respect to financial affairs," which arguably includes the right to rely on bankruptcy counsel when such reliance is reasonable and in good faith.

<sup>79</sup> "Recantation may have a bearing on whether an accused perjurer intended to commit the crime." *United States v. McAfee*, 8 F.3d 1010, 1017 (5th Cir. 1993) (internal citations omitted).

<sup>80</sup> Further evidence of a lack of bad faith may be inferred from the facts that Judge Porteous's bankruptcy was completed, all creditors were paid a percentage of their claims, and no creditor opposed Judge Porteous's discharge from bankruptcy. See Porteous Hearing Exhibit 1 part 1, Bates No. SC00009-10, SC00015.

834 The FBI agents noted in their testimony that the casino  
835 records involving markers are "very confusing" and  
836 "there's certain nuances to each casino,"<sup>81</sup> so good faith  
837 disagreement or confusion over the financial definition  
838 of a marker seems possible. Judge Porteous testified  
839 that he understood casino markers as equivalent to  
840 checks, which could be held by a casino for as much as 10  
841 to 30 days before being presented for payment, and not  
842 "credit" in the sense intended by the bankruptcy court  
843 order. Under Louisiana commercial law, markers are  
844 considered "checks" as defined by Louisiana statute.<sup>82</sup>  
845 Whether each marker was, under the varying underlying  
846 circumstances, an actual extension of credit is  
847 debatable; thus, whether Judge Porteous knew or should  
848 have known each marker was a forbidden extension of  
849 credit within the intention of the court's order is also  
850 debatable. Based on the complexity of the marker system,  
851 the varying circumstances, and the opportunity for  
852 misunderstanding, the evidence may support an inference  
853 that Judge Porteous did not knowingly incur credit or  
854 intend to deceive the bankruptcy court.

855 As for Mrs. Porteous's use of the Fleet credit card  
856 to charge around \$1,100 during bankruptcy, Judge

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<sup>81</sup> SCHAT at 296.

<sup>82</sup> *TeleRecovery of Louisiana, Inc. v. Gaulon*, 738 So.2d 662, 667 (La. Ct. App. 1999). I do not suggest that "markers" are necessarily treated as checks and not loans in the bankruptcy context, see *In re Armstrong*, 291 F.3d 517, 523 (8th Cir. 2002), however legal authority for the position that markers should be considered "checks" (even if not in the bankruptcy context) is some support for a good-faith understanding that "markers" would be treated as checks and not credit in the bankruptcy context within Louisiana and the Fifth Circuit.

857 Porteous's testimony of his ignorance arguably  
858 demonstrates a lack of intent to defraud. Judge Porteous,  
859 in unrebutted testimony, stated that "my understanding  
860 was all the cards were torn up. I did not know she had  
861 kept that card active until well after the fact."<sup>83</sup> It is  
862 undisputed that Judge Porteous relied heavily upon Mrs.  
863 Porteous, who is now deceased, and his secretary to  
864 handle his personal bank accounts, credit cards, and  
865 personal financial affairs.

866 Similarly, regarding the failure to disclose assets,  
867 Judge Porteous repeatedly noted that he did not fully  
868 understand his financial status, and therefore never  
869 knowingly misrepresented his bank accounts. First,  
870 explaining his non-disclosure of less than \$900 total in  
871 various accounts, Judge Porteous stated, "[i]t was just  
872 inadvertence, not any intent to hide my finances."<sup>84</sup> Other  
873 factors corroborate that Judge Porteous was not fully  
874 aware of his financial situation; his wife handled their  
875 bank accounts and his secretary often paid his bills from  
876 her personal account before seeking reimbursement from  
877 him. Second, Judge Porteous testified that his failure  
878 to report a tax refund of \$4143.72, like his use of an  
879 alias, was in reliance on the advice of his attorney.<sup>85</sup>

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<sup>83</sup> SCHAT at 161.

<sup>84</sup> SCHAT at 158. Judge Porteous's non-disclosure of \$900 in assets arises out of his representation that a bank account was valued at \$100 when it actually contained \$559.07, Special Committee Report at 25, and his failure to disclose a Fidelity money market account containing a balance somewhere between \$283.42 and \$320.29. Special Committee Report at 25.

<sup>85</sup> SCHAT at 84.

880 Judge Porteous testified that this omission, done on the  
881 advice of his attorney, was "no intentional act to try  
882 and defraud somebody. It just got omitted. I don't know  
883 why."<sup>86</sup> His attorney could not recall giving advice on  
884 this subject, but his testimony indirectly supports Judge  
885 Porteous's contentions. His attorney, in response to a  
886 question about his standard practice under these  
887 circumstances, stated that "at the time [of Judge  
888 Porteous's bankruptcy] . . . [as part of my standard  
889 practice,] it was not included in the confirmation order  
890 that the debtor turn over either tax returns or tax  
891 refunds from year to year as the plan progresses."<sup>87</sup>

892 The same lack of evidence regarding specific intent  
893 also applies to allegations of submitting false  
894 statements to Regions bank and bank fraud regarding the  
895 renewal of a \$5,000 signature loan.<sup>88</sup> Judge Porteous made  
896 two statements: (1) that he was not "in the process of  
897 filing bankruptcy" and (2) that there had been no  
898 "material adverse change in [his] financial condition as  
899 disclosed in [his] most recent financial statement to  
900 lender" (emphasis added). In both of these statements,  
901 Judge Porteous arguably did not intend to defraud or  
902 influence the bank because, in unrebutted testimony, he

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<sup>86</sup> SCHT at 84.

<sup>87</sup> SCHT at 438.

<sup>88</sup> Alleged against Judge Porteous are violations of both 18 U.S.C. § 1014, false statements to a financial institution, and 18 U.S.C. § 1344, bank fraud; the evidence is insufficient to support these charges' respective specific intent requirements, *i.e.*, the evidence does not support a finding of specific intent to influence the bank or specific intent to defraud.

903 testified that he actually believed the two statements  
904 were true when he filed the renewal form with the bank,  
905 and the record tends to supports this "good-faith"  
906 assertion. The loan renewal form was completed "a couple  
907 of months before [he filed] bankruptcy,"<sup>89</sup> during a period  
908 when Judge Porteous and his lawyer were actively pursuing  
909 a work-out with debtors, *so as to avoid bankruptcy*.  
910 Judge Porteous testified: "I didn't mean [the statement]  
911 to be false, because I wasn't in the process of declaring  
912 - I was doing everything I could not to file a  
913 bankruptcy. That's why I attempted for so long to do a  
914 workout."<sup>90</sup> There is evidence and legal authority  
915 establishing Judge Porteous's correct understanding that  
916 the work-out is an alternative to avoid bankruptcy.<sup>91</sup>

917 Similarly, Judge Porteous's statement to Regions Bank  
918 that there was "no material adverse change" to his  
919 financial status as disclosed by financial statements  
920 also appears to have been true; though his finances were

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<sup>89</sup> SCHAT at 108.

<sup>90</sup> SCHAT at 109.

<sup>91</sup> In fact, the very "workout" letter that the Special Committee points to as evidence of Judge Porteous's intent to file bankruptcy specifically stated that it was an attempt to "workout of the debts . . . by settlement and release *as opposed to the filing of bankruptcy*." SCHAT at 280 (emphasis added). The very purpose of a "work-out" agreement is for use outside bankruptcy. *See In re Colonial Ford, Inc.*, 24 B.R. 1014 (Bankr. Utah 1982) ("Congress designed the Code, in large measure, to encourage workouts in the first instance, with refuge in bankruptcy as a last resort."); *see also In re Pengo Indus., Inc.*, 962 F.2d 543, 549 (5th Cir. 1992) ("We strongly disfavor a judicial interpretation of the Bankruptcy Code that contravenes the substantial congressional policy favoring out-of-court consensual workouts."). The testimony of Judge Porteous's bankruptcy attorney, Lightfoot, corroborates Judge Porteous's: "we first started on a workout proposal . . . hoping to avoid bankruptcy" by looking into leveraging home equity and other possible strategies. SCHAT at 433-34.

921 in poor shape at the time he renewed the loan, the same  
922 was true at the time he initially sought the loan.  
923 Therefore, he may not have believed his financial  
924 condition was any worse in respect to his ability to  
925 repay a \$5000 bank loan than it was a year before when  
926 the loan was first made. Moreover, his statement appears  
927 to have been literally true; the financial statement  
928 forms were never filled out in the initial loan  
929 application or in the renewal application. He was only  
930 obliged to provide financial statements "as Lender may  
931 reasonably request," and there is no evidence showing the  
932 Lender so requested. Thus, no material change was  
933 technically reflected in the financial condition  
934 information *as disclosed* to the Lender, since both  
935 initial and renewal applications contained identical  
936 blank financial statement forms.

937 In respect to each of these criminal allegations  
938 above, the evidence permits and supports the argument  
939 that the record lacks evidence to support these  
940 allegations on a critical element: evidence of an intent  
941 to defraud or intent to influence the bank.

942 Further, the record demonstrates several mitigating  
943 considerations in respect to the remaining allegation and  
944 finding that Judge Porteous failed to carefully update  
945 his financial disclosure statements to provide an  
946 accurate picture of his debt and gifts from friends in  
947 the required financial disclosures under 5 U.S.C. App. 4  
948 § 101, or the "Ethics in Government Act," in violation of  
949 18 U.S.C. § 1001. This statute does not require an intent

950 to deceive for its violation. Without an intent to  
951 deceive element, violations of this statute do not entail  
952 the moral culpability associated with the previous  
953 alleged criminal violations.<sup>92</sup> Moreover, Judge Porteous's  
954 violation of this provision arguably does not arise to a  
955 level of seriousness that would trigger a criminal  
956 investigation and/or indictment.<sup>93</sup> The Department of  
957 Justice Manual restricts discretion to prosecute to  
958 violations of 18 U.S.C. § 1001 when nondisclosures  
959 "conceal significant underlying wrongdoing."<sup>94</sup> It is not  
960 alleged that any impropriety was concealed other than a  
961 possible appearance of impropriety (not actual  
962 impropriety) created by the unreported gifts and the  
963 level of his already-substantial reported private debt.

964 As I have discussed above, the evidentiary support  
965 for the specific intent element is weak in these criminal  
966 allegations,<sup>95</sup> save the least serious alleged violation.  
967 As for the least serious infraction, it arguably does not  
968 even warrant criminal investigation. Moreover, the DOJ  
969 and a grand jury investigated similar charges involving

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<sup>92</sup> *McBride v. United States*, 225 F.2d 249, 254-55 (5th Cir. 1955) (noting that § 1001 does not require proof of an "evil" intent).

<sup>93</sup> That Judge Porteous's actions did not, in fact, trigger an investigation further supports this conclusion.

<sup>94</sup> *United States v. Blackley*, 986 F. Supp. 607, 613 (D.D.C. 1997). While the probable lack of criminal prosecution for the violation in this case does not excuse a finding of a violation, a violation that fails to trigger criminal prosecution under DOJ internal policy is persuasive evidence that such a violation is not an impeachable high crime or misdemeanor.

<sup>95</sup> The final allegation of conspiracy is subject to the same analysis as the independent charges.

970 the same evidence for nearly five years and did not find  
971 sufficient evidence to submit or obtain an indictment on  
972 any of the charges.

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There is reason to conclude that due process concerns render the entire record compiled by the special committee, and considered by the judicial council majority, an unreliable basis for a certification of possible impeachment.

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Each judicial council must demonstrate that it has fully protected the values of judicial independence and integrity in every disciplinary proceeding; otherwise, the prospect of judges evaluating each other's integrity risks chilling to an extreme degree individual judges' exercise of independent judgment as a matter of fairness to litigants.<sup>96</sup> In recognition of this, Congress drafted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to control "potential excesses" of a circuit council by "requir[ing] that minimal due process rights be accorded any judicial officer whose actions or state of health are being investigated by a circuit council."<sup>97</sup> Accordingly, each judicial council must adopt rules requiring that adequate prior notice of any investigation be given to the judge complained against and that the judge be afforded an opportunity to

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<sup>96</sup> The Federal Impeachment Process, *supra* note 17, at 101-02.

<sup>97</sup> H.R. Rep. No. 96-1313, at 14 (1980).

996 appear in person or by counsel at investigating panel  
997 proceedings, to present oral and documentary evidence, to  
998 compel the attendance of witnesses or the production of  
999 documents, to cross-examine witnesses, and to present  
1000 argument orally or in writing.<sup>98</sup> Additionally, this  
1001 judicial council, prior to this case, adopted other rules  
1002 designed to lend fairness and due process to the judicial  
1003 disciplinary proceedings.<sup>99</sup>

1004 Judge Porteous was afforded most of these rights, but  
1005 he was not provided with all that would appear to be  
1006 required for minimal due process and fairness. First,  
1007 Judge Porteous was not represented by an attorney at  
1008 either the Special Committee hearing or the Judicial  
1009 Council hearing.<sup>100</sup> Judge Porteous's former attorney  
1010 resigned two weeks before the Special Committee hearings  
1011 in which all of the evidence was taken; the judge's  
1012 motion for continuance and for time to obtain new counsel  
1013 was denied; and he was forced to appear without the  
1014 assistance of counsel before the committee, which  
1015 retained two former United States Attorneys to present  
1016 the case for Judge Porteous's sanctioning and possible

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<sup>98</sup> 28 U.S.C. § 358(a)&(b); H.R. Rep. No. 96-1313, at 14 (1980) ("The net effect is . . . that the possibility of one group of federal judges arbitrarily 'ganging up' or 'hazing' another is prevented." (citing *Chandler v. Judicial Council*, *supra* 398 U.S. at 140 (Douglas, dissenting).)

<sup>99</sup> See Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 11.

<sup>100</sup> See *id.* at 11(e); see also Judicial Conference Draft Rules Governing Judicial Conduct and Disability Proceedings, Rule 15(e) ("Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any of the rights enumerated in this Rule. The costs of such representation may be borne by the United States as provided in Rule 20(e).")

1017 impeachment. Before the Special Committee, the attorneys  
1018 compiled a voluminous record in an effort to prove  
1019 violations of the Code of Judicial Conduct canons and  
1020 several complex federal criminal statutes. Judge  
1021 Porteous, representing himself, presented very little  
1022 evidence and failed to cross examine vigorously the  
1023 witnesses called by the committee.

1024 Second, at the beginning of the Special Committee  
1025 hearing, Judge Porteous moved to exclude from the  
1026 proceedings any evidence of his alleged misconduct that  
1027 occurred prior to his appointment and confirmation as a  
1028 federal district court judge in 1994. The Chief Judge,  
1029 for the Special Committee, denied his motion, and as a  
1030 result the record, upon which the Special Committee's  
1031 recommendations are made and the Judicial Council's  
1032 determinations are based, improperly contains evidence of  
1033 his alleged misconduct between 1984 and 1994, when he was  
1034 a state judge and before he took office as an Article III  
1035 judge. As discussed above and conceded by the special  
1036 committee, this conduct is beyond the authority of the  
1037 judicial council<sup>101</sup> and cannot be considered by Congress  
1038 as grounds for its impeachment decision.<sup>102</sup> Thus, this  
1039 evidence did nothing but prejudice the record against  
1040 Judge Porteous by raising extraneous allegations.

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<sup>101</sup> See Special Committee Response to Reply Memorandum at 4.

<sup>102</sup> See *supra* note 63.

1043 For these reasons, I respectfully dissent from the  
1044 Judicial Council majority's certification of possible  
1045 grounds for impeachment and instead would issue a public  
1046 reprimand subject to strict precautionary conditions.<sup>103</sup>

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<sup>103</sup> For these same reasons, I had, prior to the certification of this issue, respectfully recommended to the Judicial Council that Judge Porteous's conduct warrants a public reprimand but not certification to the Judicial Conference as possible grounds for impeachment. Accordingly, I recommend 1) that Judge Porteous be reprimanded by means of public announcement; 2) that on a temporary basis for a period of two years no criminal matters in which the United States is a party be assigned to him; 3) that he be required to enter a contract with the Lawyer Assistance Program of the Louisiana State Bar Association for counseling, monitoring, and such programs as it may require for recovery and rehabilitation from alcohol abuse and gambling addiction for a period of not less than five (5) years; 4) that, if such restrictions are not already imposed by the Lawyer Assistance Program, he be required to undergo alcohol testing and treatment and be prohibited from entering any gambling establishment, and 5) that he be required to make such written and personal reports to a monitor to be appointed by the Chief Circuit Judge in respect to his recovery, rehabilitation and financial condition, upon terms and conditions to be specified by the monitor during his tenure in office. This resolution was ultimately rejected, though Judge Porteous was amenable to such measures, *See* Judge Porteous's Reply Memorandum at 13.

It is unfortunate that the Judicial Council did not reach such a collegial settlement on this basis because a Judicial Council should strive to resolve these matters collegially when it can. *See Hastings*, 593 F. Supp. at 1383. Moreover, a resolution by reprimand is consonant with the circumstances surrounding Judge Porteous's transgressions, his contrition for those transgressions, and his strong commitment to turning his life around. Judge Porteous admits he committed non-impeachable transgressions; he "sincerely apologizes" for that conduct, and acknowledges he is "ultimately responsible for [his] actions and lapses." Judge Porteous's Reply Memorandum at 13. However, a number of undiscussed tragic mitigating factors surround Judge Porteous's actions. His transgressions occurred at a time when he was beset by undiagnosed depression, alcoholism, and gambling addiction. *Id.* at 2. These problems were exacerbated by the worsening state of his finances, his loss of his home to Hurricane Katrina, and his wife's sudden death soon thereafter. *Id.* at 12.

In reaction to this string of misfortune, though, Judge Porteous's conduct in the two years after his wife's death in 2005 displays Judge Porteous' strong commitment to change his life and eliminate the causes of his past indiscretions. *Id.* at 2. He has not gambled for over two years and has been free from alcohol for at least twenty months. *Id.* at 2; *see also* SCHAT at 481. He also is continuing his over two-year treatment for his depression. Judge Porteous's Reply Memorandum at 2. At the time of he filed his Reply Memorandum, Judge Porteous was in the process of signing a five-year contract with the Louisiana Bar's Lawyers Assistance Program, which involves weekly Alcoholics Anonymous meetings, meetings with support groups, meetings with a monitor, and random alcohol testing. *Id.* at 2. The Chief Judge and other judges of the Eastern District of Louisiana have expressed their belief that Judge Porteous has always performed his judicial duty with integrity and their confidence in his ability to carry out his

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judicial responsibilities with fairness, impartiality and competence. They also note Judge Porteous's commitment to turning his life around. For these reasons, I believe that a public reprimand subject to strict precautionary conditions is the appropriate sanction in this case.