

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

DOCKET NO. 07-05-351-0085

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.

136
137 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.¹ The

¹ 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
149 would serve as a check against unconstitutional conduct
150 by executive and legislative officers and as fair and
151 impartial fora for all litigants.² Thus, they designed
152 the Constitution's clauses to give federal judges
153 maximum freedom from possible coercion or influence by
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.³ In explaining that Act, which governs these
160 proceedings, the House of Representatives Committee on
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.⁴
170

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

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

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

171 Accordingly, Congress provided in the Act⁵ that a judicial
173 council must certify a complaint against a judge to the
174 Judicial Conference for consideration of impeachment only
175 when there is a possibility that a judge has committed
176 one of the impeachable crimes named by Article II,
177 section 4, of the Constitution.⁶ In the Act, Congress
178 anticipated that the vast majority of complaints would be
179 dismissed by Chief Circuit Judges as frivolous,
180 irrelevant, or as collateral attacks on final court
181 decisions;⁷ that a relatively fewer number of complaints
182 would be referred by the Chief Circuit Judge to a special
183 committee of the circuit judicial council; and that only
184 the rare and most egregious case would be certified by
185 judicial councils to the Judicial Conference for referral
and consideration of possible impeachment.⁸

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

⁵ 28 U.S.C. §§ 354 (b)(2).

⁶ "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).

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

⁸ 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.

197
198 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."⁹ 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.¹⁰

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

⁹U.S. Const. art. II, § 4.

¹⁰See 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.¹¹
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.¹² 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.¹³

225 In contravention of these principles, this council

¹¹ 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.

¹² 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).

¹³ 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.¹⁴

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.¹⁵ 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

¹⁴ See *id.*

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

251 other commentators.¹⁶

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A.

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

¹⁶ 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").

¹⁷ 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.

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

¹⁹ Pollitt, *supra* note 16, at 265.

270 crimes and misdemeanors agst. the State."²⁰ The
271 ratification debates confirm that "other high Crimes and
272 Misdemeanors" include only "great offenses" against the
273 federal government.²¹ 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."²²

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
done immediately to the society itself.²³

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

²⁰ *Id.*

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

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

²³ *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.

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

²⁴ 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.").

²⁵ 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.²⁶

318 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.²⁷ 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.²⁸

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.²⁹ 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.³⁰

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

²⁶ See Bowman & Sepinuck, *supra* note 10, at 1566-98.

²⁷ *Id.* at 1567-68.

²⁸ *Id.*; Pollitt, *supra* note 16, at 270.

²⁹ Bowman & Sepinuck, *supra* note 10, at 1571-72.

³⁰ *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.³¹ 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.³² 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.³³

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.³⁴ 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.³⁵

358 Judge Harry Claiborne was impeached and convicted by

³¹ Bowman & Sepinuck, *supra* note 10, at 1581-84.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1588.

³⁵ *Id.*; Pollitt, *supra* note 16, at 274-75.

359 the Senate for tax evasion in 1986.³⁶ 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.³⁷ He was sent to prison
364 but refused to resign, so he continued to draw his
365 federal salary while serving jail time.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹

378 Finally, Judge Walter L. Nixon was impeached and

³⁶ Bowman & Sepinuck, *supra* note 10, at 1590-91.

³⁷ Pollitt, *supra* note 16, at 275.

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

³⁹ Bowman & Sepinuck, *supra* note 10, at 1591.

⁴⁰ *Id.*

⁴¹ *Id.*

379 convicted by the Senate for perjury in 1989.⁴² Prior to
381 his impeachment, Nixon had been judicially convicted on
382 federal criminal charges of perjury and was serving a
383 five-year sentence.⁴³ Nixon's perjury conviction arose
384 out of statements he made to a grand jury, which was
385 investigating bribery charges alleging that Nixon
386 accepted a gratuity in exchange for attempting to
387 influence a state's drug prosecution against a business
388 partner's son.⁴⁴ Like Judge Claiborne, Nixon was
389 sentenced to imprisonment and refused to resign, so that
390 he continued to receive federal judicial compensation
391 while in prison, prompting Congress to institute
392 impeachment proceedings.⁴⁵

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.⁴⁶ 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

⁴² *Id.* at 1595.

⁴³ *Id.*

⁴⁴ *Id.*; Pollitt, *supra* note 16, at 276.

⁴⁵ Pollitt, *supra* note 16, at 276.

⁴⁶ Bowman & Sepinuck, *supra* note 10, at 1569-71.

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

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.⁴⁸ 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.⁴⁹ 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."⁵⁰

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.⁵¹ 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

⁴⁷ *Id.*

⁴⁸ *Id.* at 1571.

⁴⁹ *Id.*

⁵⁰ Pollitt, *supra* note 16, at 271-72.

⁵¹ Bowman & Sepinuck, *supra* note 10, at 1578-79.

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

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.⁵⁵ 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.⁵⁶
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.⁵⁷

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

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Pollitt, *supra* note 16, at 273.

⁵⁵ Bowman & Sepinuck, *supra* note 10, at 1585-86.

⁵⁶ *Id.*

⁵⁷ *Id.*

444 receivers.⁵⁸ 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."⁵⁹

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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

⁵⁸ *Id.* at 1586-87.

⁵⁹ *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.

486
487 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.

497
498 3.

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.⁶⁰ In fact, the special committee expressly
520 concedes that there is no allegation of bribery in the
521 complaint or charge against Judge Porteous.⁶¹ Although

⁶⁰ 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.

⁶¹ 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
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.⁶² 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.⁶³

⁶² 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.

⁶³ 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:
540

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.⁶⁴ 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

⁶⁴Though 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
602 to either recuse himself or disclose to the parties the
603 closeness of his thirty-year friendships with Amato and
604 Levenson, and second the council found that during the
605 pendency of *Liljeberg*, Judge Porteous received financial
606 assistance from Amato and Amato's partner Creely, another
607 long-time friend, to help pay for his son's wedding and
608 also attended his son's bachelor party in Las Vegas with
609 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.⁶⁵ 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

⁶⁵ Judge Porteous, Amato, Gardner, and Creely have been close friends for over 30 years. See Special Committee Hearing Transcript ("SCHAT") at 461. Amato, Creely, and Judge Porteous met as young lawyers practicing together. See SCHAT at 198, 236-37. All four frequently enjoyed such diversions as hunting, fishing, or having lunch together. See SCHAT at 229. Over time their families also became close. See SCHAT at 259. They attend each others' various parties, birthdays, weddings, and other events. See SCHAT at 154. In fact, Judge Porteous is godfather to one of Gardner's daughters. See SCHAT 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 SCHAT 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.⁶⁶

⁶⁶ 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
638 precedents demonstrate that Judge Porteous's *Liljeberg*
639 conduct falls far short of impeachable crimes under the
640 Constitution. The congressional impeachments of Judges
641 Nixon, Hastings, Claiborne, Archbald, and Humphreys, for
642 example, resulted in their removal for treason and
643 bribery. Judge Porteous engaged in no treason or bribery
644 at anytime, either in connection with *Liljeberg* or
645 otherwise.⁶⁷ Also unlike the cases of Judges Ritter,
646 Louderback, and Swayne, no evidence here suggests that
647 the gifts Judge Porteous received during *Liljeberg*
648 constituted a quid pro quo for official action or in any
649 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

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.

⁶⁷ 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,⁶⁸ 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.⁶⁹ 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

⁶⁸ 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.

⁶⁹ In unrebutted testimony, 1) Judge Porteous stated that he has "been fair and impartial in every proceeding [before him]," SCHT 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, SCHT 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, SCHT 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. SCHT at 258-59.

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

⁷⁰ 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.⁷¹ 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

⁷¹ 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.

733

734

4.

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.⁷²
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 401.⁷³

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.⁷⁴ 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

⁷² Complaint at 1.

⁷³ *Id.* at 1-2.

⁷⁴ *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,⁷⁵ 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.⁷⁶ "The requisite intent to defraud is

⁷⁵ 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.

⁷⁶ 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.”⁷⁷ 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 advice⁷⁸ and (2) corrected

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).

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

⁷⁸ 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. Adeb* (*In re*

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

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
concealed this credit from his bankruptcy proceedings.

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); *Beckenstein 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.

⁷⁹ "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).

⁸⁰ 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
836 records involving markers are "very confusing" and
837 "there's certain nuances to each casino,"⁸¹ so good faith
838 disagreement or confusion over the financial definition
839 of a marker seems possible. Judge Porteous testified
840 that he understood casino markers as equivalent to
841 checks, which could be held by a casino for as much as 10
842 to 30 days before being presented for payment, and not
843 "credit" in the sense intended by the bankruptcy court
844 order. Under Louisiana commercial law, markers are
845 considered "checks" as defined by Louisiana statute.⁸²
846 Whether each marker was, under the varying underlying
847 circumstances, an actual extension of credit is
848 debatable; thus, whether Judge Porteous knew or should
849 have known each marker was a forbidden extension of
850 credit within the intention of the court's order is also
851 debatable. Based on the complexity of the marker system,
852 the varying circumstances, and the opportunity for
853 misunderstanding, the evidence may support an inference
854 that Judge Porteous did not knowingly incur credit or
855 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

⁸¹ SCHAT at 296.

⁸² *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
859 demonstrates a lack of intent to defraud. Judge Porteous,
860 in un rebutted testimony, stated that "my understanding
861 was all the cards were torn up. I did not know she had
862 kept that card active until well after the fact."⁸³ It is
863 undisputed that Judge Porteous relied heavily upon Mrs.
864 Porteous, who is now deceased, and his secretary to
865 handle his personal bank accounts, credit cards, and
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
inadvertence, not any intent to hide my finances."⁸⁴ 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.⁸⁵

⁸³ SCHAT at 161.

⁸⁴ 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.

⁸⁵ SCHAT at 84.

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

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.⁸⁸ 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

⁸⁶ SCHAT at 84.

⁸⁷ SCHAT at 438.

⁸⁸ 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
905 were true when he filed the renewal form with the bank,
906 and the record tends to supports this "good-faith"
907 assertion. The loan renewal form was completed "a couple
908 of months before [he filed] bankruptcy,"⁸⁹ during a period
909 when Judge Porteous and his lawyer were actively pursuing
910 a work-out with debtors, so as to avoid bankruptcy.
911 Judge Porteous testified: "I didn't mean [the statement]
912 to be false, because I wasn't in the process of declaring
913 - I was doing everything I could not to file a
914 bankruptcy. That's why I attempted for so long to do a
915 workout."⁹⁰ There is evidence and legal authority
916 establishing Judge Porteous's correct understanding that
917 the work-out is an alternative to avoid bankruptcy.⁹¹

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

⁸⁹ SCHAT at 108.

⁹⁰ SCHAT at 109.

⁹¹ 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
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
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.⁹² 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.⁹³ 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."⁹⁴ 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,⁹⁵ 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

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

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

⁹⁴ *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.

⁹⁵ 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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974 5.

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

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

⁹⁶ The Federal Impeachment Process, *supra* note 17, at 101-02.

⁹⁷ H.R. Rep. No. 96-1313, at 14 (1980).

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

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.¹⁰⁰ 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

⁹⁸ 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).)

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

¹⁰⁰ 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 council¹⁰¹ and cannot be considered by Congress
1038 as grounds for its impeachment decision.¹⁰² Thus, this
1039 evidence did nothing but prejudice the record against
1040 Judge Porteous by raising extraneous allegations.

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¹⁰¹ See Special Committee Response to Reply Memorandum at 4.

¹⁰² See *supra* note 63.

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

¹⁰³ 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

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.