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EXAMINING THE STATE OF JUDICIAL RECUSALS AFTER CAPERTON v. A.T. MASSEY

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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EXAMINING THE STATE OF JUDICIAL RECUSALS AFTER CAPERTON v. A.T. MASSEY

THURSDAY, DECEMBER 10, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:05 p.m., in room 2237, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Conyers, Quigley, Jackson Lee, Coble, and Chaffetz.

Staff Present: (Majority) Christal Sheppard, Subcommittee Chief Counsel; Elisabeth Stein, Counsel; Rosalind Jackson, Professional Staff Member; and (Minority) Blaine Merritt, Counsel.

Mr. JOHNSON. We are officially starting this Subcommittee hearing.

Without objection, the Chair will be authorized to declare a recess of the hearing, and I will now recognize myself for a short statement.

I would like to welcome everyone to the hearing today and offer my thanks to the panel members for being here with us.

I am holding this hearing because the issue of judicial recusal is extremely important to me. As a former magistrate judge and as Chair of this Subcommittee, I firmly believe that we must maintain the integrity of our judiciary. Judicial misconduct, particularly in the form of a judge to recuse him or herself when there is a conflict of interest, must be taken seriously. Our Federal judges go through an extensive process in the Senate to make sure that they are fit to hold a lifetime judicial appointment, and I believe that most judges genuinely do their best to be fair and impartial in every case and appropriately recuse themselves when there exists an actual bias or the appearance of bias. As such, Congress should take care not to impose unnecessary or overly burdensome procedural or substantive burdens on our already overworked judicial system.

However, the limited instances where judges do not recuse themselves when there is an appearance of bias creates a tension between the need for an independent judiciary and the need for some Federal oversight to ensure that cases are decided fairly.

There have been three recent cases which highlight the problem with judicial recusal. The first is the Siegelman case. Siegelman's codefendant, Scrushy, claimed that he was entitled to a new trial

because the district court judge should have disclosed his extrajudicial income from business contacts with the United States Government. The court denied Scrushy's motion. The 11th circuit on appeal held that Scrushy's claim held no merit. However, the court did not explain why the motion was denied.

This was a highly political case and it raises one of the concerns that I hope our witnesses will address today, and that is: Should the court be required to specifically explain why a motion for recusal was denied?

In another case, Georgia State senator Charles Walker, a highly respected former newspaper publisher and entrepreneur, as well as the first African American chosen as Senate majority leader in Georgia, was charged with mail fraud, tax fraud and conspiracy regarding his prior publishing business. The indictment filed against Mr. Walker may have been based on politics instead of actual wrongdoing. Mr. Walker was also assigned a judge who had close ties to the principal competitor of Mr. Walker's newspaper business. Mr. Walker did not submit a request that the judge recuse himself. However, after his trial he maintained that his defense counsel should have moved to disqualify.

The final recusal issue I want to talk about today is Judge G. Thomas Porteous, a district court judge who is currently under consideration by the Impeachment Task Force of the House Judiciary Committee on which I sit.

Judge Porteous failed to recuse himself from cases where he had financial relationships with several attorneys who appeared before him. Now, the issue of whether Judge Porteous behaved improperly is still something the Task Force is considering. However, if the task force finds that Judge Porteous should have recused himself in those cases, it certainly highlights the legitimate concerns held by many that judges might not be the best people to determine whether they should recuse themselves from a case.

So what should Congress do? Clearly a balance must be maintained between the need for transparency in judicial recusals, and the need for a judge's private life to be protected. However, the failure of a judge to recuse himself or herself when the outcome leads to a miscarriage of justice, is one that must be taken very seriously. There have been some suggested procedural reforms for judicial recusal laws. One would be to allow appeals. Another would require judges to explain their disqualification decision. And yet another would be to allow disqualification motions to be decided by other judges.

Some States have already acted to amend their judicial recusal laws to allow for more transparency. However, the Federal recusal laws continue to lag behind. I look forward to the testimony from today's witnesses that will address whether reform to judicial recusal laws is ripe for review; and if it is, what steps Congress can and should take to enact substantive and procedural reforms to judicial recusal laws.

I now recognize my colleague, Mr. Coble, the Ranking Member of this Subcommittee, for his opening remarks.

Mr. COBLE. Thank you, Mr. Chairman. I appreciate you having called this hearing. It appears we have a formidable panel from whom we will hear subsequently.

There has always been inherent tension among the three branches of our Federal Government. The founders intended that no one branch would dominate the other two and that each branch would guard its own constitutional territory from the other two. This system of checks and balances has done a wonderful job of defending civil liberties, promoting national security, and expressing the popular will through a deliberative legislative process.

The inevitable by-product of this construct is institutional tension, especially when one branch "checks" the other. But it is natural. And, in fact, it is a sign of civic health.

This hearing wasn't convened to create more tension than already exists. We are not here to poke a coequal branch of government in the eye. All Members of the Courts Subcommittee respect the work of the judiciary, even if we don't always agree with their work product in every instance. Following the founder's example, we appreciate the importance of judicial independence. Article 3 judges should be insulated from political pressure to render unbiased opinions, and that is why they enjoy life tenure. However, this doesn't mean that Federal judges are entitled to a free pass in life.

We have a constitutional obligation to conduct oversight on judicial operations, just as the judiciary is charged with reviewing our statutory handiwork for legal defects. But short of impeachment, a congressional prerogative rarely exercised, there is little we can do to discipline judges for ethical lapses. Still, we need to work with the judiciary to identify areas of concern, if they exist, and to develop corrective responses when appropriate. As a former court Subcommittee Chairman and a long-time Member of this House Judiciary Committee, I have participated in previous oversight efforts to review the state of judicial ethics and behavior. Much of this work culminated in a rewriting of the Judicial Conduct and Disability Act of 1980, the statutory mechanism by which individuals may file complaints against Federal judges.

While I am sometimes plagued by senior moments, Mr. Chairman, I do recall that this matter peripherally touched on the matter of recusals, with some arguing that recusal statutes were dead law. In other words, judges weren't likely to recuse themselves from cases, and lawyers were too frightened or uneasy to ask them to do so.

And if memory further serves, part of this Subcommittee's impeachment investigation of District Judge Manny Real during the 109th Congress involved a recusal issue.

No open-minded litigant, in my opinion, believes that he or she is entitled to win in Federal Court; but, every litigant expects and deserves to be treated fairly. At minimum, this means the presiding judge must be free of bias or prejudice toward any litigant. If this isn't the case, the judge, I believe, should step aside.

We have a balanced panel of witnesses who can speak to this issue in great detail, and we are eager to hear from them.

I emphasize that I am not out to get the judiciary. I don't know if the complaints about the state of recusal jurisprudence are anecdotal or genuine. That is why we are having this hearing, and I look forward to participating.

Mr. Chairman, at this time I would like to make a unanimous consent request that we enter into the record a statement and

other information submitted by Michigan Supreme Court Justice Robert Young about his State's experience with their recusal laws.

Mr. JOHNSON. Without objection.

Mr. COBLE. I yield back the balance of my time.

Mr. JOHNSON. I thank Ranking Member Coble.

Next I will recognize Mr. John Conyers, a distinguished Member of this Subcommittee and also the Chairman of the full Judiciary Committee.

Mr. CONYERS. Thank you, Chairman Johnson.

Welcome judges, panelists. This is almost like a bright line. There are two schools of legal thought here; brilliance all over the place, but still a bright line. I don't want to reduce this to simplistic terms, old school versus new school or retrograde versus progress. But goodness, gracious, here is a problem begging for consideration. We have distinguished members of the court and teachers of law saying nothing wrong; accidents will happen. You don't have to be so perfect about all this.

A judge in Alabama, not a citizen in Alabama, a judge in Alabama, that goes up to the 11th circuit and for no reason, denies the disqualification order.

Why?

We don't choose to give you any reasons why. You don't need to know why. Well, it may be some of your business, but it is none of your concern.

This is the Governor.

And, so in instance after instance—this is what has brought me to love and revere the Committee on the Judiciary. In the Congress—we get this opportunity that very few others do. Yes, inside of the bar associations there will be brilliant discussion back and forth about it; but here in this country, the democratic society that is held up, the constitutional democracy that is written and spoken about and emulated and practiced and sought after, locks up more people than any other place in the world.

What causes that? Well, don't get over-excited about that, Chairman, it is just the way that the cookie crumbles. You uphold law and order.

What about transparency?

We, Federal jurists, don't have to tell you why we have ruled thus and so. Do you know how much clogging of the courts and how much backing up if judges had to explain everything they did? Go read the precedents. Go back and take a refresher course, but don't bother us with having to explain why a Governor of one of the several States can be denied relief without any explanation whatsoever.

That offends me. And it is only a small part of the problem that brings us here today. There are so many areas that we need to reexamine, not to help somebody or put your thumb on the scale, but just to bring this thing of simple justice home.

Do you know how many—and I conclude on this—do you know how many people in this country feel that they got really taken going through a court process? That the thing was against them from the beginning? I know enough to feel disturbed about this question of recusal that Chairman Johnson has put on the table this afternoon. I thank him for his efforts.

Mr. JOHNSON. You are quite welcome, Mr. Chairman. Thank you for your statement.

Without objection, other Members' opening statements will be included in the record.

Now I am pleased to introduce the witnesses for today's hearing.

Our first witness is the Honorable M. Margaret McKeown from the United States Court of Appeals for the ninth circuit where she has served since 1998. Judge McKeown has published and spoken extensively on the topic of judicial ethics. She is also the chair of the Judicial Conference of the United States Code of Conduct Committee, and we welcome her to this hearing.

Our second witness is Charles Geyh who is the Associate Dean of Research, John F. Kimberling Professor of Law, Indiana University, Maurer School of Law. Professor Geyh also serves as a director and consultant of the American Bar Association Judicial Disqualification Project. He is widely known for his scholarship in addressing the Federal courts and judicial recusal laws. Welcome, sir.

Our third witness is Richard Flamm. Mr. Flamm is an attorney specializing in judicial ethics and judicial recusal. He is an expert in that area. He wrote the leading treatise in this area called "Judicial Disqualification: Recusal and Disqualification of Judges." Welcome, Mr. Flamm.

Our fourth witness is Eugene Volokh. Professor Volokh teaches constitutional law, criminal law, and tort law at the UCLA School of Law. Before going to UCLA, he clerked for Justice Sandra Day O'Conner on the U.S. Supreme Court and for Alex Kozinski for the U.S. Court of Appeals for the 9th Circuit. Professor Volokh was one of the attorneys for A.T. Massey Coal Company in *Caperton v. A.T. Massey Coal Company.* We welcome him here today.

Our fifth witness is Norman L. Reimer. Mr. Reimer is the executive director of the National Association of Criminal Defense Lawyers, which is an organization dedicated to ensuring justice and due process for all. Prior to serving in that position, Mr. Reimer practiced law for 28 years, most recently at Gould, Reimer, Walsh, Goffin, Cohn, LLP. Mr. Reimer is active in judicial recusal issues and assisted in writing the amicus brief in *Caperton v. Massey.* Welcome, Mr. Reimer.

Last is our sixth witness, Mr. Arthur D. Hellman, who is a professor of law at the University of Pittsburgh School of Law. Mr. Hellman is a dedicated scholar in the field of judicial ethics and has written several articles on the point. He has testified before both the House and the Senate Judiciary Committees on Federal court issues, and assisted with the Judicial Improvements Act of 2002. Welcome, Professor.

Thank you all for your willingness to come and participate in today's hearing. Without objection, your written statements will be placed into the record. We ask that you limit your oral remarks to 5 minutes. You will note that we have a lighting system that starts with a green light, and after 4 minutes it turns yellow, and then red at 5 minutes. After each witness has presented his or her testimony, the Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

Mr. JOHNSON. Judge McKeown, will you now proceed with your testimony.

TESTIMONY OF THE HONORABLE M. MARGARET McKEOWN, JUDGE, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT DISTRICT, SAN DIEGO, CA

Judge MCKEOWN. Thank you, Chairman Johnson, Mr. Coble and Members of the Committee. I appreciate being invited to testify here today. I am the chair of the Judicial Conference Committee on Codes of Conduct, which is the Federal judges ethics committee and I appear here on behalf of the Judicial Conference. There are three points I would like to touch on in my testimony this afternoon: first, the recusal standards applicable to Federal judges; second, the extensive framework by which the judiciary endeavors to abide by these standards; and, finally, the role that our committee plays in advising and educating judges.

Ethics is a critical part of the fabric of the Federal judiciary, and impartiality lies at the heart of our work.

Judicial recusal is formally governed by two key statutes, 28 USC section 144 and section 455(a). In addition, Federal judges abide by the Ethics in Government Act, gift regulations, and other statutes, and the Judicial Conference imposes further constraints through the judicial Code of Conduct. The language in your Federal statute 455 is also mirrored in our Code of Conduct.

There are five specific situations in which recusal is mandatory and may not be waived. Those are detailed in my written testimony.

Let me just add one key note here concerning disqualifying financial interests. In the Federal system, unlike in some State systems, there is no de minimis exception for recusal based on a financial interest. Even owning a single share of stock in a party mandates recusal, and Federal judges are not permitted to put their assets into a blind trust.

In addition to the mandatory recusal situations, there is one important other mandatory recusal, and that is whenever a judge's impartiality might reasonably be questioned.

These statutes and the Code are actually part of a much broader framework that the judiciary has developed both to promote transparency and to provide multiple checkpoints in the recusal process. Several institutional safeguards operate together to ensure that judges have the tools they need to follow the recusal statutes and that judges who have real conflicts not hear those cases.

They begin with a system that randomly assigns cases to judges within a particular court. And at the outset and throughout the entire proceeding, the judge has an obligation to assess whether disqualification is required. Guarding against conflict of interest is of paramount importance to us.

Besides random assignment, the Judicial Conference requires all judges to use an electronic conflict screening system. This ensures that judges do not inadvertently fail to recuse based on financial interest in a party. In addition, all judges file detailed annual disclosure reports, which I know Members of Congress are also familiar with in their roles, and we also disclose our attendance at publicly funded educational seminars, and these reports are publicly available.

The safeguards are intended to minimize conflicts before they occur and to avoid the possible need for recusal motions. Beyond

these systemic safeguards, there is, of course, the litigation process which permits any party to file a recusal motion, and appellate review provides a further avenue of recourse.

Finally, the Judicial Conduct and Disability Act, which I believe was referenced here by Congressman Coble, and the procedures under that act may be available to provide a check on flagrant violations of the recusal law. The Judicial Conference, through the Breyer Commission, has recently strengthened the procedures under that act for addressing complaints against judges.

Finally, let me turn to the role of our committee. Basically we are an advisory body, an ethics service center, and a sounding board to help judges try to comply with this wide array of ethical principles. We are actually often called the "Dear Abby Committee," and we give confidential advice to judges. Our goal is to make sure that ethics guidelines for judges protect the fairness and impartiality of the judiciary while striking the right balance with judicial independence. We have more than 80 publicly available advisory opinions, many of them on the points of recusal, and our recusal advice goes well beyond the Code and the statute.

Also, a judge who needs ethics advice, in addition to doing his or her own research, can come to the committee for informal advice; and if informal advice doesn't suffice, we provide written opinions, confidential letters of advice. We respond to more than a thousand informal inquiries every year. We issue over a hundred formal opinions, and much more informal advice is offered through our education program.

A key function of our committee is education for judges, law clerks and staff, and in the last few years we have greatly increased that education outreach. We offer a number of printed publications for the judges, Internet Training, and also in-person training.

In conclusion, both the judges and the public have a broad array of tools and a transparent environment to ensure the fair and impartial adjudication of cases, while maintaining the independence of the judiciary needed to uphold our laws. We regard ethics as a very serious matter.

I appreciate appearing here today. I welcome your questions.

Mr. JOHNSON. Thank you, Judge McKeown.

[The prepared statement of Judge McKeown follows:]

PREPARED STATEMENT OF THE HONORABLE M. MARGAREET MCKEOWN

Written Testimony of The Honorable M. Margaret McKeown
on behalf of the
Judicial Conference of the United States

before the House Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Hearing on:
Examining the State of Judicial Recusals After *Caperton v. A.T. Massey*

December 10, 2009

Good afternoon and thank you for inviting me to testify. I am Margaret McKeown. I serve as a judge on the United States Court of Appeals for the Ninth Circuit, and I chair the Committee on Codes of Conduct of the Judicial Conference of the United States. I am here on behalf of the Judicial Conference to provide a brief overview of the recusal standards that apply to federal judges, to discuss the extensive framework by which the judiciary seeks to abide by the recusal rules to accord each case a fair and impartial forum, and to explain the role that the Codes of Conduct Committee plays in advising judges on ethics issues, including recusal.

Recusal Standards for Federal Judges

Judicial recusal (often also referred to as "disqualification") is formally governed by two statutes: 28 U.S.C. § 144 and 28 U.S.C. § 455(a). Section 144 narrowly permits a party to file an affidavit to attempt to establish personal bias or

prejudice of a district court judge. Section 455(a) is broader, addressing both the appearance of impartiality and other categories for disqualification, and it therefore functions as the primary recusal statute. In addition to following these recusal statutes, as well as additional ethics statutes that apply to the judiciary specifically and other ethics statutes that apply to public servants generally, the Judicial Conference imposes further ethical constraints through the Code of Conduct for United States Judges. The Code of Conduct both parallels and expands upon the recusal statutes.

The language of Section 455 is mirrored in Canon 3C of the Code of Conduct. Section 455 and Canon 3C provide five specific situations in which recusal is mandatory; the judge must disqualify himself or herself from the case and the parties may not waive recusal in any of those situations. The five mandatory recusal situations, which are paraphrased here, are:

1) the judge has a personal bias about a party or has personal knowledge of disputed facts in the case;

2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter;

3) the judge, judge's spouse, or minor child has any financial interest in the

subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding;

4) the judge, judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or

5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.

Let me add several notes on those five mandatory recusal obligations. First, concerning financial interests, in the federal system—unlike in some state judicial codes—there is no "de minimis" exception for recusal based on a financial interest. Even owning a single share of stock in a party requires recusal. This bright line rule avoids any ambiguity about recusal as a result of equity holdings.

Second, a judge cannot avoid recusal by placing assets in a blind trust, or by avoiding knowledge of the judge's financial holdings. The Code and the recusal statute require a judge to be informed about the judge's and the judge's family members' financial interests.

Finally, with respect to disqualification due to a financial interest, recusal is not required if the judge (or spouse or minor child) divests the financial interest. Divestiture is not permitted if the judge has an interest that could be substantially affected by the outcome of the proceeding.

In addition to the five specific mandatory recusal situations, Section 455 and Canon 3C also include a mandatory general disqualification requirement whenever the judge's impartiality might reasonably be questioned. The standard for determining disqualification under this principle is based on an objective determination. Thus the question is not whether the judge believes there is an issue of impartiality but rather whether an objective observer, or "reasonable person," might reasonably question the judge's impartiality.

A judge who is disqualified under this impartiality section has the option to use the "remittal" procedure and obtain waivers to remain on the case. The process is transparent and is designed to avoid placing any pressure on parties to waive a judge's decision to disqualify. The judge is required to disclose on the record the basis for disqualification; then the parties and their lawyers must be given the opportunity to confer outside the presence of the judge, and if all parties and counsel agree in writing or on the record that disqualification is not in order, then the judge may proceed with the case. This procedure is not available for

recusal based on the five specific mandatory grounds for disqualification.

Transparency and the Recusal Framework

The recusal statutes and the Code of Conduct lie at the heart of a much broader framework that the judiciary has developed so that the recusal process contributes to a fair and impartial forum for each case. The judiciary has implemented efforts to promote transparency and provide multiple checkpoints in the recusal process itself, and has adopted a number of mechanisms that supplement the recusal requirements of the Code and the statutes.

Several institutional safeguards operate together to ensure that judges have the tools they need to follow the recusal statutes and the Code, and that judges who have real conflicts do not hear those cases. These safeguards begin with systems that randomly assign cases to the judges within a particular court. At the outset, the judge has an obligation to assess whether disqualification is required.

As an overlay to the random assignment process, the Judicial Conference requires all judges to use an electronic conflicts screening system to ensure that judges do not inadvertently fail to recuse based on financial interests in a party. Under this mandatory policy, each judge must develop a list of financial interests that would trigger recusal. Special conflicts-screening software is used to compare a judge's recusal lists with information filed in each case. The system

flags potential conflicts, which enables the judge to decline an assignment or, if the case has been assigned, to recuse if necessary.

Once a case is assigned, a judge has a further continuing obligation to evaluate and monitor the case for potential recusal triggers. If any such issue arises, the judge must re-evaluate recusal—a move that is also contemplated by the statute.

In addition, all judges must file detailed annual financial disclosure reports under the Ethics in Government Act. These reports include extensive detail concerning all financial holdings, dates of acquisition and disposition, even of partial interests, board memberships, gifts and reimbursements. In addition, judges are required to disclose their attendance at privately-funded educational seminars and the seminar providers must disclose their sources of funding. These reports are publicly available so that litigants may check on financial and other interests that might require a judge to recuse from a case.

The institutional safeguards are designed to minimize conflicts before the possible need for a recusal motion arises. Beyond these systemic safeguards, the litigation process itself is designed to provide ample opportunity for any party to challenge a judge's qualification to hear the case. If a party believes that a judge should be disqualified, a recusal motion may be filed under either Section 144 or

Section 455. Judges typically explain their recusal decisions in orders that grant or deny a recusal motion. Appellate review provides a further avenue of recourse to the objecting party.

Buttressing this framework is the ability of judges at any point in the process to obtain recusal or other ethics advice from the Codes of Conduct Committee of the Judicial Conference, as discussed in greater detail below.

Finally, the statutory judicial discipline process, under the Judicial Conduct and Disability Act, may be available to provide a check on flagrant violations of the recusal rules. For example, a judge who openly decides to hear a case in which he or she holds a financial interest could be the subject of a judicial conduct complaint initiated by a litigant, a member of the public, or the chief judge of the circuit. The Judicial Conference, through the Breyer Commission, recently revised and strengthened the procedures under the Judicial Conduct and Disability Act by adopting all the Commission's recommendations for addressing complaints against judges.

Role of the Judicial Conference Committee on Codes of Conduct

To help judges comply with the wide array of recusal standards and safeguards, the judiciary turns to the Judicial Conference Committee on Codes of Conduct. The Committee's jurisdiction — which is set by the Judicial Conference

of the United States — broadly encompasses ethics policy for the judiciary. We serve as an advisory body — an ethics service center and sounding board for judges — on ethics issues including recusal. Our job is developing ethics codes and regulations, advising judges and employees on ethics matters, and developing ethics education programs. We also oversee the mandatory conflicts screening system and the approval process for Certificates of Divestiture, which authorize judges to divest and roll over holdings for tax purposes in order to avoid unnecessary recusals. Our goal is to make sure that the ethics guidelines for judges effectively protect the fairness and impartiality of the judiciary, while striking the right balance with judicial independence.

The Committee has 15 members, including a representative from each judicial circuit, a bankruptcy judge, and a magistrate judge. All Committee members participate in providing ethics advice for judges and judicial employees. Because we serve as an ethics advisory body, we do not monitor judicial conduct. We do not have the authority to investigate, adjudicate or resolve factual matters, and we are not involved in any way in disciplinary policy or activities. A separate committee on Judicial Conduct and Disability handles those matters. This separation of functions encourages judges to come to us for confidential advice. In my view, judges want to do the right thing. They wouldn't call on us otherwise.

Judges can obtain ethics guidance in several ways. As a starting point, judges can, of course, do their own research. The statutes and the related case law, the Code of Conduct for United States Judges, the associated Commentary, and the ethics regulations adopted by the Judicial Conference are the basic resource documents.

Beyond the Codes and regulations, the Committee has issued about eighty Advisory Opinions addressing topics that frequently arise. These published Advisory Opinions provide guidance that goes well beyond the bare terms of the recusal statutes and Code of Conduct, in order to assist judges in complying with their recusal obligations. The Committee has published a wide range of guidance on recusal issues, for example:

- Advisory Opinion No. 20: Disqualification Based on Stockholdings by Household Family Member
- Advisory Opinion No. 24: Financial Settlement and Disqualification on Resignation From Law Firm
- Advisory Opinion No. 38: Disqualification When Relative Is an Assistant United States Attorney
- Advisory Opinion No. 66: Disqualification Following Conduct Complaint Against Attorney or Judge

- Advisory Opinion No. 70: Disqualification When Former Judge Appears as Counsel
- Advisory Opinion No. 100: Identifying Parties in Bankruptcy Cases for Purposes of Disqualification
- Advisory Opinion No. 101: Disqualification Due to Debt Interests
- Advisory Opinion No. 106: Disqualification Based on Ownership of Mutual or Common Investment Funds
- Advisory Opinion No. 107: Disqualification Based on Spouse's Business Relationships

The published advisory opinions are available to judges and the public through the Judiciary's website, www.uscourts.gov.

A judge who needs ethics advice can also come directly to the Codes of Conduct Committee. The Committee is dedicated to providing timely and thoughtful ethics advice to any judge who contacts us. Our recusal advice is given under Canon 3 of the Code of Conduct, which parallels Section 455, the recusal statute. Although we do not have the jurisdiction to interpret this recusal statute directly, our advice is provided with an eye toward section 455 and the case law that has developed under it. We also routinely remind judges to consult recusal case law in their circuits before reaching final conclusions concerning recusal

questions.

The Committee provides informal ethics guidance on a broad range of issues. Judges can contact me or any committee member for an informal ethics opinion. We usually provide an informal response on the spot or with some minimal additional research on subjects where we have prior advice or precedent. I personally field several hundred calls a year from judges, while our committee counsel responds to many more. We receive about 1000 informal requests for ethics guidance in an average year.

In cases where an informal opinion doesn't suffice or the judge raises a novel issue, the judge may seek what we call "formal" ethics guidance. The Committee issues a confidential letter of advice, usually within three weeks or less. If a judge needs an expedited letter, the Committee is on call to respond. We regularly consult with judges who are in trial, in emergency situations or under time constraints. The Committee issues about 100 advice letters each year. All of the letters are confidential, as is all of the Committee's advice to individual judges.

Another key Committee function is developing and delivering ethics education for judges. In the last few years we have greatly increased our participation in formal training at judicial meetings, particularly through programs with the Federal Judicial Center. In training we cover ethics scenarios drawn from

the confidential inquiries we receive, as well as hypothetical ethics problems, to encourage discussion among the judges. At national and regional meetings of appellate, district judges, magistrate judges, and bankruptcy judges, our committee members routinely offer interactive ethics presentations. We tailor our education programs to the audience; our programs have ranged from video vignettes to teaching ethics through popular music. We provide Internet-based training, such as ethics quizzes to gauge what we call a judge's EQ, or "Ethics Quotient," on a variety of topics including recusal. We also send out periodic ethics updates to all judges. We regard ethics as a very serious matter and look upon these opportunities as an excellent way of working with our judicial colleagues on ethics issues.

Through the Federal Judicial Center, we provide ethics education for new judges and provide ethics training for law clerks, staff attorneys, clerks and judicial assistants. We offer an introductory video on ethics, coupled with explanatory booklets for judges, law clerks, and employees.

We participate in ethics education events that include both judges and attorneys. Lawyers are often very interested in knowing about judicial ethics, such as recusal procedures and what a judge is permitted to do within the bar and the community. We have highlighted ethics issues in joint bench/bar meetings, and in

meetings with the media. Our extensive training effort underscores the value and the importance the federal judiciary places on ethical conduct.

Conclusion

In summary, both judges and the public have a broad array of tools and a transparent environment to ensure the fair and impartial adjudication of cases, while maintaining the independence of the judiciary needed to uphold our laws. That toolbox includes statutes and case law on recusal, the judiciary's strict ethics requirements and enforcement mechanisms, and the overall framework for ensuring that recusal obligations are met, combined with the advisory services provided by the Codes of Conduct Committee.

I will be happy to respond to any questions.

Mr. JOHNSON. Professor Geyh.

TESTIMONY OF CHARLES G. GEYH, ASSOCIATE DEAN OF RESEARCH, JOHN F. KIMBERLING PROFESSOR OF LAW, INDIANA UNIVERSITY, MAURER SCHOOL OF LAW, BLOOMINGTON, IN

Mr. GEYH. Thank you, Mr. Chairman, for the opportunity to be here today. It is not just a privilege but a pleasure to appear before the Committee. I served as counsel many years ago under Robert Kastenmeier. And as former counsel, I would be remiss not to thank Kirsten Zewers for helping out and organizing me for this event.

I am testifying on my own behalf here and not on behalf of the American Bar Association and other organizations with whom I have worked on this matter.

The Supreme Court's decision in *Caperton*, which really is part of the title of this hearing, does not apply to the Federal courts directly. It was a case that concerned a State judge, and it was decided under circumstances unique to States that elect their judges. The thing about *Caperton*, though, is it does underscore the importance of impartial justice and the role disqualification plays in preserving it, and in that sense is a good launching point for this hearing.

My starting point is to say, on the whole, I do think that we have an excellent Federal judiciary, and that it is committed to promoting impartial justice. And I do think that on the whole, section 455, which has been 200 years in the making, has served the judiciary pretty well. That doesn't mean, though, that there aren't problems. And in my testimony I allude to several of them. A couple of them I will reserve for my written testimony, and focus on one here which has to do with the judicial disqualification procedure and the issue of judges deciding their own disqualification motions.

Section 455, as Judge McKeown testified, indicates first that a judge must disqualify himself whenever his impartiality might reasonably be questioned, and then goes on to enumerate a series of rather specific instances when judicial disqualification is necessary.

It is extremely rare in my review for a judge to willfully refuse to disqualify himself under circumstances in which the judge knows he must. On the whole, I think our judges are too committed to impartial justice for any but the isolated bad apple to do that; and you refer to Judge Porteous, and he may be among them. Ironically, however, I think it is precisely, or at least partly, because our judges are so committed to impartial justice that we have a problem.

Let me explain. Judges take an oath to be impartial. Judges ascribe to a code of conduct in which they are directed to act at all times in a manner that promotes, that preserves impartial justice. They are asked also to follow a code that says you should avoid even the appearance of impropriety, which means even the appearance, frankly, of partiality.

Now that being said, when a judge is called upon in the context of a disqualification proceeding to disqualify herself because she is biased, or because she is perceived to be biased, she is being asked

to admit that she is not impartial, that she has created a perception problem that her oath and the code tell her she shouldn't be creating. In other words, she is being accused implicitly of performing in a way that is suboptimal.

For that reason I think, understandably, judges who are deeply committed to impartial justice are predisposed to think that they can be impartial and they cannot reasonably be perceived otherwise. And it is not at all uncommon for lawyers in the field to say that the judges take umbrage when the judge stands accused of being less than impartial, precisely because I think judges try very hard to be.

Now, when a judge is called upon in the circumstances, against this backdrop, it is troubling to me that the standard operating procedure in disqualification proceedings is for the judge whose disqualification is being challenged to be the judge who decides her own fitness to sit.

First, it strikes me as unfair to the judge in question to ask her to second-guess her own impartiality and her own commitment to preserving the appearance of impartial justice.

Second, it is unrealistic, it seems to me, to expect anyone to be able to candidly assess the extent of their own bias. Research in the psychology field underscores this, the complexity of that. It is also hard to expect someone to understand how they would reasonably be perceived by another, which is equally complicated.

Third and finally, when a party is concerned that a judge appears to be too biased to be fair, which is really what is going on in disqualification proceedings, it is odd in the extreme to have that issue resolved by the very judge who is allegedly too biased to be fair. Having a judge grade their own paper in this way is bound to create a perception problem, which strikes me as being uniquely problematic for a judiciary which is committed to the appearance of impartial justice.

To me, the solution is one that many States have adopted, which is to adopt what I would suggest to be a two-part process that could be embedded in a procedural section of section 455. Part one says; let the judge receive the motion initially and make an initial determination as to whether disqualification is in order. Oftentimes, that will come very quickly. The judge will be unaware that one of the many defendants is a party with respect to whom a relative is on the board of directors and will quickly step aside.

If, however, the judge concludes that disqualification is unwarranted, then the simple solution, it seems to me, is to send the matter to another judge. And I would contend that many of the situations in which you second-guess this qualification determinations, could be resolved by returning the matter to a different judge that is not going to be subject to these suspicions.

Thank you.

Mr. JOHNSON. Thank you, Professor Geyh.

[The prepared statement of Mr. Geyh follows:]

PREPARED STATEMENT OF CHARLES G. GEYH

Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*
Before the House Judiciary Committee's Subcommittee on Courts and Competition
Testimony of Charles G. Geyh*
October 20, 2009

My name is Charles G. Geyh (pronounced "Jay"). I am the Associate Dean of Research and the John F. Kimberling Chair in Law at the Indiana University Maurer School of Law at Bloomington. I am the author of a forthcoming monograph on judicial disqualification in the federal courts, to be published by the Federal Judicial Center, and am currently serving as director of the American Bar Association's Judicial Disqualification Project. In addition, I am the author *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), and am coauthor (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 4th ed. 2007). In addition, I recently served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and prior to entering academia in 1991, was counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Administration of Justice, under Chairman Robert W. Kastenmeier.

The title of this hearing implies that its catalyst was the United States Supreme Court's recent decision in *Caperton v. A.T.* Massey. Narrowly read, *Caperton* is irrelevant to the federal courts and the United States Congress. *Caperton* featured a justice of the West Virginia Supreme Court who declined to disqualify himself under his state's disqualification rule, which gave rise to the question before the Court: whether a state supreme court justice who refused to disqualify himself under the circumstances of that case, violated the due process clause of the Fourteenth Amendment. In the federal courts disqualification begins and ends with an analysis of the applicable disqualification statutes (28 U.S.C §§144 and 455). A judge's erroneous failure to disqualify himself under the relevant statute may lead to judicial review on appeal or in a mandamus proceeding, but that review will be confined to an interpretation of the applicable statute. The due process implications of non-recusal (under the Fifth Amendment) will not arise, because the case will be decided on the basis of the more stringent statutory disqualification standards—the Constitutional question need never be decided.

More broadly construed, however, *Caperton* is relevant to the federal courts and this Subcommittee. *Caperton* serves as a wake-up call to state and federal courts to take judicial disqualification more seriously. It creates an opportunity that this subcommittee is taking, to reexamine the law of disqualification, assess how the disqualification statutes are working, and ascertain whether reform is needed. In my testimony today, I will assess the general state of federal judicial disqualification. To that end, I will first review the history of judicial disqualification in the United States. Second, I will discuss what I refer to as the "judicial disqualification paradox," which history reveals to have operated as an obstacle to the implementation of disqualification rules. Third, I will identify

*I would like to thank Evelyn Gentry and Andrew Williams for their research assistance in preparing this testimony.

several problems with the federal disqualification regime that the disqualification paradox has created, and propose reforms to address those problems. Fourth and finally, I will offer some preliminary thoughts on the issue of whether Judge Mark Fuller should have disqualified himself from United States v. Siegelman and Scrushy, which Subcommittee counsel has asked me to address.

Although I conclude that there are aspects of the current disqualification regime that could benefit from reform, I want to put my critique in perspective. The problem inherent in judicial disqualification is that judges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge, in the context of specific cases, that despite their best efforts to preserve their impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges. My objective here is to propose reforms that will make that difficult task easier.

I. The History of Judicial Disqualification in the United States

The history of disqualification in the United States reveals a more or less steady march in the direction of imposing ever-more exacting disqualification standards Under English common law, the only accepted basis for judicial disqualification was financial interest—disqualification for bias was not recognized. In 1792, Congress enacted legislation that was the precursor to 28 U.S.C. §455. This legislation codified the common law by calling for disqualification of a district judge who was "concerned in interest," but added that a judge could also be disqualified if he "has been of counsel for either party."[1] The statute was expanded in 1821 to require disqualification when relatives of the judge appeared as parties.[2]

In 1891, Congress enacted legislation, later codified at 28 U.S.C. §47, forbidding a judge from hearing the appeal of a case that the judge tried.[3] In 1911, the precursor to §455 was further amended to require disqualification when the judge was a material witness in the case.[4] That same year, Congress enacted new legislation (later codified as 28 U.S.C. §144) entitling a party to secure the disqualification of a judge by submitting an affidavit that the judge has "a personal bias or prejudice" against the affiant or for the opposing party. A decade later, in *Berger v. United States*, the Supreme Court interpreted this statute to prohibit a judge from ruling on the truth of matters asserted in the party's affidavit, and to require automatic disqualification if the affidavit was facially sufficient.[5]

In 1927, the Supreme Court added a constitutional dimension to the law of disqualification. In *Tumey v. State of Ohio*, the Court invalidated, on due process grounds, an Ohio statute that authorized a judge to preside over cases in which the judge would receive court costs assessed against convicted (but not acquitted) defendants.[6]

By the mid-twentieth century, common law aversion to judicial bias as grounds for disqualification continued to exert considerable influence. Section 455 remained silent as to bias. Section 144, while ostensibly enabling a party to disqualify a district judge simply by submitting an affidavit alleging personal bias, had been given an extremely exacting construction by the circuit courts, as Professor John Frank explained at the time:

[1] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178-79 (1792).
[2] Act of March 3, 1821, ch. 51, 3 Stat. 643 (1821).
[3] Act of March 3, 1891, ch. 23, § 21, 36 Stat. 1090 (1891).
[4] Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090 (1911).
[5] Berger v. United States, 255 U.S. 22 (1921).
[6] Tumey v. State of Ohio, 273 U.S. 510 (1927).

> Frequent escape from the statute has been effected through narrow construction of the phrase "bias and prejudice." Affidavits are found not "legally sufficient" on the ground that the specific acts mentioned do not in fact indicate "bias and prejudice," a reasoning which emasculates the *Berger* decision by transferring the point of conflict.[7]

Frank warned that "[u]nless and until the Supreme Court gives new force and effect to the *Berger* decision, the disqualification practice of the federal district courts will remain sharply limited."[8]

In 1948, §455 was further amended to disqualify judges who were related to a party's lawyer (not just the party, as had been the case since 1821). As amended, the statute then provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has, been a material witness, or is so related to or connected with a party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[9]

In 1964, the United States Court of Appeals for the Fifth Circuit articulated a so-called "duty to sit."[10] "It is a judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason for recusation."[11] By 1972, Justice William Rehnquist reported in *Laird v. Tatum* that the duty to sit had been accepted by all circuit courts.[12]

In 1972, the American Bar Association published the Model Code of Judicial Conduct to replace the Canons of Judicial Ethics it had promulgated fifty years earlier. The Model Code sought to encapsulate the ethics of disqualification into a unified rule.[13] Under the new rule, a judge was subject to disqualification "in a proceeding in which his impartiality might reasonably be questioned, including but not limited to" cases in which the judge had an actual bias concerning a party, had served as a lawyer in the matter (or was still with his former firm when the matter was being handled by another firm lawyer), had an interest in the case, or was related to the parties or their lawyers. In 1974, Congress adopted, with some variations, the 1972 Model Code's disqualification rule in an amendment to §455, which, by virtue of its requirement that judges disqualify themselves whenever their impartiality might reasonably be questioned, was generally seen as qualifying, if not ending, the "duty to sit."[14]

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[7] John Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 629 (1947).
[8] *Id.* at 630.
[9] Comment, *Disqualification for Interest of Lower Federal Court Judges*, 71 Mich. L. Rev., 538, 540 (1973).
[10] United States v. Edwards, 334 F.2d 360 (5th Cir. 1964).
[11] *Id.* at 362.
[12] Laird v. Tatum, 409 U.S. 824, 837 (1972).
[13] Model Code of Judicial Conduct, Canon 3C (1972) (current version at Model Code of Judicial Conduct, R. 2.11 (2007)).
[14] James Alfini, Jeffrey Shaman, Steven Lubet, & Charles Gardner Geyh, Judicial Conduct and Ethics §4. (2007).

II. The Judicial Disqualification Paradox

The history of judicial disqualification has a marked trajectory in which Congress has imposed ever more rigorous disqualification standards on judges. Implicit in this history of escalating regulation is a pattern of behavior in which judges recurrently preside over cases that members of Congress (and those they represent) think they should not. Underlying this pattern is an inherent tension between traditional conceptions of the judicial role and disqualification for bias that has bothered judges and scholars for centuries.

At the core of the judicial role is the notion of impartiality. As early as the 17th century, Sir Matthew Hale's personal code of judicial conduct included several principles focused on impartiality, e.g. "That in the administration of justice I carefully lay aside my own passions."[15] Over three hundred years later, the Model Code of Judicial Conduct continues to strike a very similar tone, with rules directing that a judge "shall perform all duties of judicial office fairly and impartially,"[16] and "shall act at all times in a manner that promotes the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"[17] The principle that a "good" judge is an impartial judge is thus thoroughly engrained in Anglo-American law and legal culture. Indeed, lawyers and judges who ascend to the federal bench take an oath to "faithfully and impartially discharge and perform all the duties" of judicial office.[18]

The judge who disqualifies herself for bias in a given case effectively concedes inability to be the impartial arbiter she has sworn to be. This is a concession the common law did not tolerate, as Blackstone explained when he wrote that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[19] Professor John Frank, writing in the mid-twentieth century, put the point bluntly: "Disqualification for bias represents a complete departure from common law principles."[20] Disqualification for bias thus implies a judge's failure to live up to the centuries old expectation that he be able to "set aside [his] own passions,"[21] which judges are understandably hesitant to admit even to themselves, let alone others.

Disqualification for *apparent* bias (the standard embodied in §455(a), which calls upon judges to disqualify themselves when their impartiality "might reasonably be questioned") poses similar problems. When a judge acknowledges that she has said or done things that could lead the public to question her impartiality, such a concession is in tension with the ethical directive that "a judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."[22] The point is not that judges who disqualify themselves for apparent bias fear discipline for failing to avoid an appearance

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[15] Quoted in J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 208 (1873).

[16] 2007 MODEL CODE, Rule 2.2.

[17] *Id.*, Rule 1.2.

[18] 28 U.S.C. § 453 (2000).

[19] WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

[20] Frank, *supra* note 7 at 618-19.

[21] Matthew Hale, *quoted in* CAMPBELL, *supra* note 15.

[22] 2007 Model Code, Rule 1.2.

of impropriety. Rather, the point is that ethics codes define a good judge as someone who avoids the appearance of partiality, which by negative implication means that a judge who has created an appearance of partiality (and must disqualify herself on that basis) has behaved less than optimally. And so many judges have an understandable reluctance to disqualify themselves for appearing biased, given the adverse implications of such a concession.

In contrast to the culture of impartiality that pervades the judiciary, the public has been steeping in a culture of legal realism since the middle of the twentieth century. The legal realism movement of the early twentieth century cultivated an appreciation for the complexity of judicial decision-making that has, in the years since, been widely internalized, not only by scholars and pundits but by the public as well. Judges are not automatons who apply the law mechanically, in a political vacuum. They are people too, whose thinking is influenced by education, background, experience, ideology and personal values, and who are subject to the same prejudices that afflict the rest of us. As with the rest of us, it is only natural that a judge's personal prejudices will sometimes get the best of her, or at least appear to do so. When that happens in a case she has been called upon to decide, the judge should step aside, to protect judicial impartiality and promote public confidence in the courts. Animated by these realist sentiments, rule-makers of the past century have imposed ever more rigorous disqualification standards in an effort to encourage disqualification for bias and apparent bias. Judges, however, given the history and tradition of the roles they are sworn to play—often remain reluctant to embrace the spirit of these rules. That has given rise to what I have characterized as the judicial disqualification paradox, which as one scholar explains creates a "vicious circle" of litigants moving for disqualification; of seemingly biased judges resisting; of Congress responding with more stringent disqualification rules, which are then subjected to judicial interpretation that contort the rules again.[23]

III. Current Problems with the Federal Judicial Disqualification Regime

A. Problem: Under §455, Judges decide motions requesting their own disqualification.

In the federal system, the norm is that disqualification motions are decided by the judge whose disqualification is sought.[24] While it may be a bit awkward to initiate the disqualification process by calling upon the party who seeks a judge's disqualification to raise the matter with that judge, it is a defensible approach. The target judge will be the most familiar with the facts giving rise to the motion, and can step aside without delay when circumstances warrant.

When, however, the judge is disinclined to step aside, asking that judge to resolve a contested disqualification motion becomes much more problematic. In effect, such an approach calls upon the judge to "grade his own paper"—to ask the judge who is accused of being too biased to decide the case, to decide whether he is too biased to decide the

[23] John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. Rev. 237, 245 (1987).

[24] Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); *In re* United States, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord* United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

case. Unsurprisingly, two recent commentators observe that "the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of of U.S. disqualification law, and for good reason."[25] Another commentator adds:

> The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.[26]

And yet another echoes that "[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case."[27]

In a recent survey, over 80% of the public polled thought that disqualification motions should be decided by a different judge.[28] The assumption underlying the majority's view—that a judge is ill-positioned to assess the extent of her own bias (real or perceived)—is corroborated by empirical research. Recent empirical studies in cognitive psychology have demonstrated that judges, like lay people, are susceptible to cognitive biases in their decision-making.[29] Considerable research has been conducted in the field of "heuristics"--rules of thumb or mental shortcuts people use to aid their decision-making that may enable efficient judgments in some settings but which are a form of bias may also lead to systematic, erroneous judgments in other settings.[30] This research suggests that when an individual employs "heuristics" in his decision-making, he is unaware of those underlying biases.[31]

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[25] James Sample, David Pozen, *Making Judicial Recusal More Rigorous,* 46 Judges' J. 17, 21 (2007).

[26] Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 Val. U. L. Rev. 543, 561 (1994).

[27] Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 571 (2005).

[28] Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between. Judges, Election Backers (Feb. 22, 2009), *available at* http://www.justiceatstake.org/node/125.

[29] Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in Heuristics and Biases: The Psychology of Intuitive Judgment 49, 49-50 (Thomas Gilovich et al., eds., 2002); Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).

[30] Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in Heuristics and Biases: The Psychology of Intuitive Judgment 49, 49-50 (Thomas Gilovich et al., eds., 2002).

[31] Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 Personality and Soc. Psychol. Bull. 1 (2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781 (2004); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 Personality and Soc. Psychol. Bull. 369 (2002); Richard E. Nisbett et al., *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychol. Rev. 231 (1977).

More generally, people typically rely on introspection to assess their own biases;[32] however, "because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty."[33] The individual thus takes his unfruitful search as proof that bias is not present and fails to correct for those biases.[34]

The peril of asking a person to assess the extent of her own bias is further exacerbated for judges by the judicial disqualification paradox, because the judge is being asked to assess whether she harbors a real or perceived bias that she has sworn to avoid. In short, the tradition of calling upon judges to be the final arbiters of challenges to their own impartiality should be abandoned.

Reform proposal: .Amend §455 to require that contested disqualification motions be heard by a different judge.

A simple solution to the problem of calling upon a judge to evaluate her own qualification to sit is to assign the matter to a different judge. Such a procedure could be limited to courts of original jurisdiction (district judges, magistrates, bankruptcy judges), or extended to appellate courts. Illinois employs such a procedure with language that could be borrowed, with appropriate modifications to accommodate the vocabulary of §455:

> Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition."[35]

The Illinois statute adds that the judge whose disqualification is sought "need not testify but may submit an affidavit if the judge wishes" to assist the judge evaluating the disqualification petition.[36]

B. Problem: 28 U.S.C. §144 has become a virtual dead-letter

Section 144 of Title 28 states in its entirety:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in

[32] Emily Pronin et al., Valuing *Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. of Experimental Soc. Psychol. 565, 565-67 (2007).

[33] Ehrlinger, *supra* note 31, at 10.

[34] Pronin, *supra* note 32, at 565-67.

[35] 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

[36] *Id.*

> any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.37

A literal reading of §144 suggests that a party can force disqualification automatically, simply by filing an affidavit alleging that the judge is biased against the affiant or in favor of the affiant's opponent. Such an interpretation would render §144 akin to peremptory disqualification procedures adopted by judicial systems in a number of western states—and the legislative history of §144 lends some support for this interpretation of the section.[38]

The federal courts have indeed held that under §144 a judge must step aside upon the filing of a facially sufficient affidavit, but they have been exacting in their interpretations, not only of what a facially sufficient affidavit requires, but of the procedural prerequisites to application of the statute as well. Thus, motions have been dismissed because the motion was untimely, because the movant failed to submit an affidavit, because the movant submitted more than one affidavit, because the attorney rather than a party submitted the affidavit, because the movant's affidavit was unaccompanied by a certificate of counsel, because the affidavit failed to make allegations with particularity, and because the certificate of counsel certified only to the affiant's good faith, not counsel's.[39]

This is not accidental. As the First Circuit explained, "courts have responded to the draconian procedure—automatic transfer based solely on one side's affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice to a party."[40] In a similar vein, the the Seventh Circuit has stated:

> [T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient. . . . Because the statute 'is heavily weighed in favor of recusal,' its requirements are to be strictly construed to prevent abuse.[41]

As a consequence, §144 has been rendered a much more cumbersome tool to obtain disqualification than §455, even though §455 calls upon judges to evaluate the merits of a movant's allegations and not simply the facial sufficiency of those allegations. Judges who are loath to tolerate strategic manipulation of disqualification rules and (given the disqualification paradox) are disinclined to second guess their own impartiality have

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[37] 28 U.S.C. § 144 (1949). Originally enacted as § 21 of the Judicial Code of 1911, the statute was recodified as § 144 in 1948 without significant change.

[38] 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

[39] *See, e.g.*, United States v. Barnes, 909 F.2d 1059, 1072 (7th Cir. 1990) (counsel did not present certificate of good faith, "another requirement of section 144 with which Barnes failed to comply"); *In re* Cooper & Lynn, 821 F.2d 833, 838 (1st Cir. 1987) ("[N]o *party* filed an affidavit. . . . Rather the affidavit was filed by an attorney."); United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 1986) ("Elder's affidavit violates the one-affidavit rule . . . and need not be considered."); United States v. Balistrieri, 779 F.2d 1191, 1200 (7th Cir. 1985) ("Because of the statutory limitation that a party may file only one affidavit in a case, we need consider only the affidavit filed with Balistrieri's first motion."); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (motion rejected because counsel, not plaintiff, signed and filed affidavit); United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973) (same); Morrison v. United States, 432 F.2d 1227, 1229 (5th Cir. 1970) (motion rejected because there was no certificate of good faith by counsel); United States v. Hoffa, 382 F.2d 856, 860 (6th Cir. 1967) (same).

[40] *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997).

[41] United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (citation omitted).

imposed what many commentators have long regarded as an unduly stingy construction of §144.[42] An additional reason that §144 has fallen into relative disuse is that it requires the more difficult showing of actual bias, whereas §455(a) requires a mere appearance of bias. Section 455 thus subsumes §144—As the Supreme Court has observed of §144, it "seems to be properly invocable only when §455(a) can be invoked anyway."[43] Moreover, many of the circumstances that might qualify as actual bias under §144 are specifically enumerated in §455(b), which explicitly addresses various conflicts of interest, in addition to actual bias.[44] In short, while parties still file motions under §144, they usually do so in tandem with §455, with the latter section typically monopolizing the court's attention.

Reform Proposal: Eliminate §144 or replace it with a procedure for judicial substitution.

Section 144 has been rendered a problematic and cumbersome tool for disqualification, leaving §455 as the one workable mechanism for disqualification in the federal system. One simple solution is to decommission §144 after nearly a century of service.

A second possibility, however, is to return to the roots of §144 and explore alternative means to achieve its objective. That objective was to provide a party with a relatively simple means to request a different judge without putting the original judge in a position to second guess the merits of the party's request. The pitfall of §144 was its requirement that the moving party submit a "timely and sufficient affidavit" charging the judge with personal bias. By hinging disqualification on a facially sufficient allegation of bias, the underlying truth of which could not be challenged, the statute simultaneously encouraged litigants to exaggerate their assertions of bias to meet the threshold of facial sufficiency, and angered judges targeted with exaggerated claims, who responded by making the threshold requirements more exacting.

The problems of §144 could be avoided if the statute were amended to offer parties a limited opportunity to request a simple substitution of judges, much in the nature of the preemptory challenge in jury selection. Nineteen states currently employ a procedure of this kind. Typically it is limited to trial judges, it may be invoked by each party one time only, and it must be invoked early in the proceedings. I have included, as an appendix to this statement, examples of substitution of judge provisions from the codes of Alaska and Montana.

The primary objection to substitution of judge procedures is that a party may use them strategically to avoid judges who, while impartial, are likely to be unsympathetic to the party's claims on the merits. The short answer to this concern is that a party is entitled only to one substitution per case, which limits the harm—a harm more than offset by the benefit of avoiding the aggravation and expenditure of resources associated with litigating traditional disqualification claims. A secondary objection relates to the administrative burdens associated with implementing judicial substitution procedures—a legitimate concern, to be sure, but one that has not proved insurmountable in the nearly

[42] John Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 629 (1947).
[43] Liteky v. United States, 510 U.S. 540, 548 (1994).
[44] *See id.* ("section 455 is the more modern and complete recusal statute").

twenty jurisdictions that employ them (including rural jurisdictions like Alaska and Montana).

C. Problem: §455 Requires Disqualification for Trivial Financial Interest "Conflicts"

Under 28 USC §455(b)(4), a federal judge must disqualify himself if he has "a financial interest in the subject matter in controversy or in a party to the proceeding." "Financial interest" is defined in 455(d)(4) as "ownership of a legal or equitable interest, however small." Under the federal statute, then, federal judges must disqualify themselves when they own utterly trivial amounts of stock in a corporate party—as little as a single share. The net effect is to force disqualification even when there is no realistic possibility that the judge's impartiality might reasonably be questioned.

Professor Geoffrey Miller has written critically of this provision and the problems that flow from its over-inclusiveness:

> Recusal and disqualification . . . can operate rigidly and thus exclude judges whose interest in a case cannot plausibly result in prejudice against a party. To the extent recusal and disqualification are overinclusive they can impose unnecessary costs and delay on the administration of justice and can be used by parties for strategic purposes rather than to protect a bona fide interest in avoiding biased results.[45]

A different manifestation of the disqualification paradox is at work here: In response to worries that judges will be reluctant to disqualify themselves if given the discretion to do otherwise, Congress has eliminated all discretion and forced disqualification categorically. Every other specific ground for disqualification under §455(b) is effectively limited to circumstances in which the disqualifying event might reasonably call the judge's impartiality into question. Making a special case of financial interests has proved to be more trouble than it is worth.

Reform Proposal: Amend §455(b)(4) to limit disqualification for financial interest to cases in which a judge's impartiality might reasonably be questioned

A simple and straightforward solution here would be to borrow language from the American Bar Association's Model Code of Judicial Conduct. Model Code Rule 2.11(A)(3) requires disqualification if the judge has an "economic interest in the subject matter in controversy or in a party to the proceeding", but defines economic interest as "ownership of more than a *de minimis* legal or equitable interest." "De minimis," in turn, is defined as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." Under the Model Code, then, judges are subject to disqualification for financial interest only when that interest is significant enough to call a judge's impartiality into question.

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[45] Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 460-61 (2004).

IV. Observations on United States v. Siegelman and Scrushy

Subcommittee counsel has asked me to comment on whether Judge Mark Fuller should have disqualified himself in *United States v. Siegelman and Scrushy*, 561 F.3d 1215 (11th Cir. 2009). The entirety of the Eleventh Circuit's analysis of the disqualification issue in that case is as follows:

> Scrushy contends that he is entitled to a new trial because Chief Judge Fuller should have disclosed his "extraordinary extrajudicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)." This claim is predicated upon Chief Judge Fuller's ownership interest in two aviation companies that engage in business with agencies of the United States government. This claim was raised over nine months after trial and incorporated information learned from the internet and from Chief Judge Fuller's Financial Disclosure Reports.
>
> A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986). The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d Cir.1978). The purpose of the rule is to "conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir.1997).
>
> Scrushy's recusal motion was untimely, based upon information readily available to him prior to trial, and has all the earmarks of an eleventh-hour ploy based upon his dissatisfaction with the jury's verdict and the judge's post-trial rulings. It has no merit.

The court's analysis strikes me as sound, as far as it goes. Under §455, however, a judge must disqualify himself if his impartiality might reasonably be questioned, regardless of whether a party has filed a motion seeking the judge's disqualification. Thus, even if the Eleventh Circuit was correct in rejecting the defendants' disqualification motion as untimely, the question remains whether Judge Fuller should have disqualified himself in the first place, on his own initiative.

Subcommittee counsel has furnished me with several articles published by Scott Horton in Harper's Magazine, including one featuring an interview with Professor David Luban.[46] Professor Luban reviewed the defendant's recusal motion and the government's response, and on the basis of that review concluded that Judge Fuller should have disqualified himself. Professor Luban is an accomplished legal ethicist, and I hold him in high regard. That said, I have not had access to the underlying documents that formed the basis for Professor Luban's assessment and so am not in a position to reach an independent judgment.

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[46] Scott Horton, *An Interview With Legal Ethicist David Luban Regarding Judge Mark Fuller*, HARPER'S MAGAZINE, August, 2007.

As best I can tell, Professor Luban is most troubled by two features of the case. First is the presence of preexisting, antagonistic, partisan entanglements between the judge and defendants, which could lead a reasonable person to doubt the judge's impartiality. Second is that the judge owned businesses with government contracts, and that because this case was of acute interest to political leaders in Washington, a reasonable person might doubt the capacity of the judge to bracket out the impact of his decision on his business's prospects for future contracts. Professor Luban's observations strike me as cogent, but I nonetheless find myself puzzled as to why defendants did not raise the disqualification issue earlier. The first feature of concern to Luban is one with which defendants would be familiar from the outset of the case, while the second, as the Eleventh Circuit notes, was a matter of public record.

It is possible that Judge Fuller did not disqualify himself on his own initiative because he did not think that disqualification was warranted. Given the ethos of judging, judges are predisposed to think that they can lay aside their passions and be fair. Even so, Judge Fuller might have avoided the subsequent cloud of suspicion (created by the Harper's articles) by erring on the side of disclosure. Comment 5 to Rule 2.11 in the ABA's Model Code of Judicial Conduct offers judges the following advice: "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." In a case with an obviously high political profile such as this, disclosing more, rather than less would seem to have obvious advantages. As noted above, it is unclear whether such disclosures would have revealed any information to the parties of which they were previously unaware or which they could not otherwise have obtained with a simple internet search. Disclosure would, however, have served the salutary purpose of reassuring the public that the judge had no hidden bias or agenda.

Appendix: Judicial Substitution Procedures

Alaska:

AS 22.20.022. Peremptory Disqualification of a Judge.

(a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit must contain a statement that it is made in good faith and not for the purpose of delay.
(b) A judge or court may not punish a person for contempt for making, filing, or presenting the affidavit provided for in this section, or a motion founded on the affidavit.
(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time.
(d) A party or a party's attorney may not file more than one affidavit under this section in an action and no more than two affidavits in an action.

Montana:

MONT CODE ANN § 3-1-804: Montana Code - Section 3-1-804: SUBSTITUTION OF DISTRICT JUDGES

SUBSTITUTION OF DISTRICT JUDGES

This section is limited in its application to district courts and judges presiding therein; it does not include district court judges or other judges sitting as a water court judge, nor a Workers' Compensation Court judge.
1. A motion for substitution of a district judge may be made by any party to a proceeding only in the manner set forth herein. In a civil or criminal case, each adverse party, including the state, is entitled to one substitution of a district judge.
(a) A motion for substitution of a district judge shall be made by filing a written motion with the clerk, as follows:
"The undersigned hereby moves for substitution of District Judge _____ in this case."
A copy of the motion shall be served upon all parties to the proceeding and the clerk shall immediately notify the judge and the first judge in jurisdiction, if there has already been a substitution. After a timely motion has been filed, the substituted judge shall have no

power to act on the merits of the cause or to decide legal issues therein, and shall call in another judge. However, a resident district judge who has previously been substituted from the case may agree to set the calendar, draw a jury, conduct all routine matters including arraignments, preliminary pretrial conferences in civil cases, and other matters which do not go to the merits of the case, if the judge in jurisdiction authorizes the same.
(b) The first district judge who has been substituted or disqualified for cause shall have the duty of calling in all subsequent district judges. In a multi-judge court all other judges in that court shall be called, in accordance with that court's internal operating rules, before a judge from another district court is called in. It shall be the duty of the clerk of court to stamp the name of the judge to whom the case is assigned on the face of the initial pleading, complaint, order to show cause, or information, and all copies thereof.
(c) When a judge is assigned to a cause for 30 consecutive days after service of a summons, or 10 consecutive days after service of an order to show cause, information or other initiating document, and no motion for substitution of judge has been filed within said time period, the plaintiff or the party filing the order, information or other initiating document, and the party upon whom service has been made shall no longer have a right of substitution. Any party named in a summons who is subsequently served shall have 30 consecutive days after such service in which to move for a substitution of judge. Any person subsequently served in connection with an order to show cause, information or other initiating document, shall have 10 consecutive days after such service in which to move for a substitution of judge. If the presiding judge removes himself or herself, or a new judge assumes jurisdiction of the cause by virtue of the internal operating rules of a multi-judge court, the right to move for substitution of a judge is reinstated, unless having been previously used in the cause by the moving party, and the time periods shall run anew. After the time period shall have run as to the original parties to the proceeding, no party who is joined or intervenes thereafter shall have any right of substitution, except that one third party defendant who is not an original party in any pending case may have a right of one substitution within 30 consecutive days after the service upon the third party defendant of a third party complaint.
(d) The motion for substitution shall not be effective for any purpose unless a filing fee is paid to the clerk of the district court in the amount set by law. No filing fee is required by law in criminal cases.
(e) Any motion for substitution which is not timely filed is void for all purposes. The judge for whom substitution is sought shall have jurisdiction to determine timeliness, and if the motion for substitution is untimely, shall make an order declaring the motion void.
(f) When a new judge has accepted jurisdiction, the clerk of court shall mail a copy of the assumption of jurisdiction to the original judge and to each attorney or party of record. The certificate of service shall be attached to the assumption of jurisdiction form in the court file.
(g) When a new trial is ordered by the district court, each adverse party shall thereupon be entitled to one motion for substitution of judge in the manner provided herein. When on appeal the judgment or order appealed from is reversed or modified and the cause is remanded to the district court for a new trial, or when a summary judgment or judgment of dismissal is reversed and the cause remanded, each adverse party shall thereupon be entitled to one motion for substitution of judge in the manner provided herein. Such motion must be filed, with the required filing fee in civil cases, within twenty (20) days

after a new trial has been ordered by the district court or after the remittitur from the Supreme Court has been filed with the district court. No other right of further substitution shall arise in cases remanded by the supreme court. In criminal cases, no further right of substitution shall arise when the cause is remanded for resentencing.

Mr. JOHNSON. Now we will hear from Mr. Flamm.

TESTIMONY OF RICHARD E. FLAMM, AUTHOR OF "JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES;" CONFLICTS OF INTEREST AND LAW FIRM DISQUALIFICATION, BERKELEY, CA

Mr. FLAMM. Thank you very much, Chairman Johnson.

Chairman Johnson, Ranking Member Coble, other Committee Members, I am very honored and pleased to be here to talk about a subject that is very interesting to me. My interest in this field is twofold. I have the academic interest that you mentioned. I wrote the book. In the process of writing that book, for better or worse, I probably had occasion to review more judicial disqualification precedents than probably anybody else on the planet.

But I also have a practical interest in this field as well. I have acted as a consultant or expert witness in dozens of disqualification proceedings, and in that capacity I had occasion to experience some of the concerns that Chairman Conyers alluded to, which is that not all litigants are very happy with the way that the system works. And in fact, a great many litigants don't believe that they are getting justice when they go before American courts.

But I didn't come with an ox to gore or with any kind of agenda. I was asked to testify, and I said I would, because I thought with my background I might be able to provide a valuable resource to the Committee. My first step in that process was to provide you with some written testimony in which I basically tried to outline what the status of Federal recusal law is at this point and how it got to be that way.

I don't know if you have had a chance to look at it yet, but Chairman Conyers characterized this panel as brilliant scholars who think there is nothing wrong with the law. I don't know if the first half of that statement applies to me, but I know the second one doesn't. I seriously believe there is a good deal that is wrong with Federal judicial disqualification law as it exists today.

I talked about a few problems in my testimony. I didn't go into great depth. The main thing I alluded to was one of the two statutes that Judge McKeown referred to, 28 USC section 144 which is on the books today, along with section 455. So currently, the Federal Government has two different Federal disqualification statutes.

Nobody, including the courts, seem to understand how they are supposed to interact between each other, and the 3problem is only partly mooted by the fact that the Supreme Court decided in 1921 not to enforce section 144 in the manner that Congress had intended.

I was told that one of the issues that might be up for discussion by this Committee is the possibility of enacting what is known in jurisdictions that have a preemptory challenge or preemptory disqualification statute; 28 USC section 144, as enacted by Congress in 1911, was intended to be exactly that, but the Supreme Court refused to enforce it in that manner. And as I think Professor Geyh has said, it has now come to be thought of as dead law by a lot of scholars.

I had several other things to say that I won't have time to say, so instead of doing that, I would like to address a couple of the other issues that Chairman Johnson and Chairman Conyers brought up.

First, should a court explain its reasons for why or why not it has chosen to recuse itself? I think the answer to that is obvious; but one of the problems that is caused by not doing it may not be so obvious.

I have a very lengthy book on judicial disqualification; 95 percent or more of all of the precedents in there are cases in which disqualification motions were denied. The reason that is, is because judges do recuse themselves in a great many circumstances. A lot of judges are very conscientious about doing so. But very few judges who recuse themselves take the time to write an opinion explaining why they did so. In contrast, many judges who don't disqualify themselves write lengthy opinions explaining why they are not disqualifying themselves.

As a result, another problem we have with the law is people who are trying to figure out what the law on disqualification is may get a skewed idea of what they should expect when they go into court.

Let me say one last thing in the small amount of time allotted.

Ranking Member Coble alluded to Robert Young's submission, and I haven't seen it, obviously, on the Michigan experience with judicial disqualification.

The Michigan experience has indeed been very interesting. In 2003, a new justice on the court, Justice Weaver, was asked to recuse herself in a case, but was told that judges aren't supposed to explain. It is an unwritten tradition of the Michigan Supreme Court that judges don't explain the reasons why.

She researched it and came to the conclusion that that was false, and what ensued has been a donnybrook in the Michigan courts that has lasted for years about whether judges do have the requirement. And that is something we can talk about if you have further questions.

Thank you.

Mr. JOHNSON. Thank you, sir.

[The prepared statement of Richard E. Flamm follows:]

PREPARED STATEMENT OF RICHARD E. FLAMM

WRITTEN TESTIMONY OF RICHARD E. FLAMM, ESQ.

FOR THE UNITED STATES HOUSE OF REPRESENTATIVES

HOUSE COMMITTEE ON THE JUDICIARY,

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

HEARING ON "EXAMINING THE STATE OF JUDICIAL RECUSALS AFTER *CAPERTON v. A.T. MASSEY*"

HEARING DATE: DECEMBER 10, 2009

HEARING TIME: 1:00 p.m.

ROOM 2141

RAYBURN HOUSE OFFICE BUILDING

Good afternoon Chairman Johnson, Ranking Member Coble, honorable Subcommittee members, and invited guests. My name is Richard Flamm. I am a California attorney who specializes in matters of legal and judicial ethics; and, specifically, disqualification motions and appeals. I have written and lectured extensively in this field. Most significantly, for purposes of this Hearing, I am the author of a nationwide treatise on *Judicial Disqualification: Recusal and Disqualification of Judges,* which has been extensively relied on by state and federal judges throughout the nation.

Thank you for the opportunity to address you today regarding the status of the federal recusal laws. I am pleased that Congress has decided to devote attention to this important topic, but I think it should be pointed out that this is not the first time that Congress has chosen to do so. Approximately once every generation the subject – which is frequently before the courts, but seldom in the public eye – comes to the forefront of the American consciousness; and, when it has, Congress has tended to respond by inquiring into the wisdom of the prevailing law, just as this honorable Subcommittee is doing today. On almost every such occasion, Congress has endeavored to facilitate the ability of a litigant who has legitimate concerns about whether a judge will be impartial and unbiased in presiding over her case to have that judge removed; thereby making the American system of justice both be – and to appear to be – fair.

Some of the changes Congress has made, through the years, have undoubtedly been quite helpful in fulfilling this Congressional purpose. As I will discuss, however, not every disqualification provision Congress has enacted has been enforced by the courts in the manner that Congress intended. Therefore, in keeping with poet and philosopher George Santayana's familiar aphorism, to the effect that "those who cannot remember the past are condemned to repeat it," I thought it might be helpful to provide this honorable Subcommittee with a brief overview of prior attempts to fashion a comprehensive federal judicial disqualification framework, in the hopes that any law this Congress elects to adopt will avoid a similar fate.

The notion that judges should stand fair and detached between the parties who appear before them did not originate with Congress; in fact, edicts designed to ensure judicial impartiality have been recorded since ancient times. *See, e.g.,* Babylonian Talmud, Tractate Shabbath 10a

("[e]very judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One...in the work of creation"), quoted in 1 E. Quint & N. Hecht, Jewish Jurisprudence 6 (1980). Likewise, the concept of "peremptory" disqualification is of ancient origin. Pursuant to the Roman Code of Justinian, a party who believed that a judge was "under suspicion" was permitted to "recuse" that judge, so long as he did so prior to the time issue was joined. This expansive power on the part of early litigants to effect a judge's recusal formed the basis for the broad disqualification statutes that generally prevail in civil law countries to this day.

The common law standard was initially put forward by Bracton who, like early Roman scholars, believed that a litigant should be allowed to disqualify a judge on the basis of even a suspicion of bias. But England's parliament ultimately decreed that judges were not subject to disqualification for "suspicion" alone, but only for pecuniary interest in a cause. 3 Blackstone, Commentaries 361. *See also* Liteky v. U.S., 114 S. Ct. 1147, 1151 (1994) ("[r]equired judicial recusal for bias did not exist in England at the time of Blackstone"). Thus, in contrast to the civil law system of "recusation," the common law notion of what constituted good grounds for seeking a judge's disqualification was exceedingly simple: A judge would be disqualified for possessing a direct financial interest in the cause before him, and for absolutely nothing else. In the American Colonies, as in England, only pecuniary interest in a pending cause constituted good cause for seeking the disqualification of a sitting judge; and, when Congress first tackled the subject matter this Subcommittee is currently considering, the initial federal judicial disqualification statute likewise proved to very limited. It called for disqualification only when a judge had a pecuniary interest in a proceeding over which he was to preside, had "acted in" the proceeding, or had been "of counsel for" a party. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

Not long after the original federal disqualification statute was enacted, Congress was reminded that non-financial motives can also impact judges; and the statute was amended, in 1821, to include a judge's relationship to a party as an additional ground for seeking disqualification. *See* Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Other amendments ensued, but the first significant overhaul of the federal disqualification scheme did not take place until 1911, at which time the original federal statute became § 20 of the Judicial Code. Act of Mar. 3, 1911, ch.

23, § 20, 36 Stat. 1090. Like its predecessor statute (and the "primary" judicial disqualification statute that is in effect today, 28 U.S.C. § 455), § 20 was a "for cause" provision. A judge who was the object of a § 20 motion was required to recuse if, and only if, the moving party could demonstrate that he had run afoul of one of the statute's enumerated proscriptions. For litigants, satisfying this requirement proved to be exceedingly difficult. For one thing, the statute provided no mechanism by which a party could seek to disqualify a judge for bias. Congress attempted to rectify this and other perceived shortcomings, not by amending § 20, but by enacting a new statute, § 21 of the Judicial Code. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090.

According to a recent article in the *National Law Journal*, one of the proposals this honorable Subcommittee plans to discuss is one which would make "substitution automatic if any party to a case swears an affidavit alleging prejudice." This may be a good idea, but it is not a new one. Section 21 provided that: "[w]henever a party to any action or proceeding [files an affidavit stating] that the judge before whom the action or proceeding is to be tried or heard has a personal bias...either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated [to hear] such matter." In other words, a judicial challenge statute Congress clearly intended to be peremptory has been the law of the land for almost a century.

Congress recognized that a provision which authorized a party to remove a judge on the strength of an affidavit alleging bias could be susceptible to abuse; and, in an attempt to avert such abuse, it imposed several procedural limitations on the statute. For example, the moving party's allegations of judicial bias were required to be filed in a timely manner, and made in affidavit form. In addition, the moving party's counsel was required to certify that her client's affidavit was made in good faith. These types of checks against the possible abuse of a peremptory challenge provision were not unusual. In fact, following Congress's adoption of § 21 the legislatures of many states enacted similar statutes, and the limitations the various state legislatures placed on their peremptory challenge statutes do not appear to differ materially from those which Congress placed on § 21. However, whereas courts in those states that have adopted peremptory challenge statutes have tended to liberally construe and zealously enforce them, § 21 has not fared very well in the federal courts.

The statute first came before the Supreme Court in *Berger v. United States*, 255 U.S. 22 (1921) – a case in which petitioners had submitted an affidavit alleging that the district judge was biased against them because they were of German descent. The bias manifested by the judge in *Berger* was hardly subtle. He said, among other things, that one must have a "very judicial mind" not to be prejudiced against German-Americans "because their hearts are reeking with disloyalty." In the face of comments like this, the Supreme Court had little trouble finding that, even though actual judicial bias had not been proven, the challenged judge should have stepped down. But *Berger* is remembered not for its outcome, but for what the Court said about how § 21 motions were to be decided. The Court held that, while a judge who had been called upon to decide a § 21 motion must accept the moving party's factual allegations as true, the judge could decide whether the alleged facts, if true, were "legally sufficient" to compel her disqualification. The decision thereby invested federal judges with a significant measure of discretion in deciding whether to grant motions which Congress clearly intended to be peremptory.

Undoubtedly, Congress could have taken steps to impress upon the High Court the peremptory intent behind § 21, but it did not do so; and, when Congress next tinkered with § 21 in 1948, Congress made no attempt to reassert the statute's peremptory intent. The statute was recodified as 28 U.S.C. § 144, but was virtually unchanged. Since then, some federal judges have adverted to the peremptory intent behind the statute, but few judges who did not admit to being biased appear to have recused themselves merely because a party filed a § 144 motion.

At the same time that § 21 was reconstituted as § 144, and began its slow descent into oblivion, § 20 was recodified as 28 U.S.C. § 455, which read: "[a]ny justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit." Act of June 25, 1948, ch. 646, §455, 62 Stat. 908. Under this version of this statute, recusal remained a largely subjective matter. In fact, once a judge satisfied himself that none of the three enumerated grounds for disqualification existed, a presumption against recusal was typically indulged, to the effect that the challenged judge not only could remain on the case if he so chose, but was deemed to have a duty to do so. Thus, by the middle of the Twentieth Century the federal judicial disqualification

scheme consisted of two statutes, one of which, § 455, was intended to be self-enforcing, but was only sporadically enforced; while the other, § 144, was intended to be peremptory, but was rarely if ever construed in such a way as to mandate the automatic disqualification of a federal judge.

These problems were evident in 1948, but the subject of judicial disqualification did not come to the fore again until the late 1960's, when opponents of the United States Supreme Court nomination of Judge Clement Haynsworth seized upon his failure to recuse himself from presiding over a number of cases in which he had a financial interest in a party as the basis for denying him the appointment. Judge Haynsworth's unwillingness to recuse was not unusual for the times. In fact, Justice Blackmun – who was eventually confirmed for the same seat – also participated in cases in which he possessed a financial interest in a party. Still, notoriety arising from this situation, and from a number of highly publicized cases involving other judges' refusal to recuse themselves, began to kindle public sentiment for altering the standards for disqualifying federal judges. In response, Justice Lewis F. Powell Jr., who was then President of the American Bar Association, proposed that a new Code of Judicial Conduct be written. The resulting Code, which the ABA adopted in 1972, called for disqualification, *inter alia*, whenever a judge's impartiality could "reasonably be questioned." In 1973 the Judicial Conference of the United States adopted the Code, with only minor modifications, as the governing standard of conduct for all federal judges except United States Supreme Court Justices.

The ethical imperatives enumerated in the Code were much more stringent than those that had been prescribed in the statutory laws that pre-existed it. Therefore, following the Code's adoption federal judges who were called upon to decide challenges to their ability to preside over cases were obliged to choose between inconsistent legal and ethical imperatives. In 1973, the House Committee on the Judiciary concluded that this situation placed federal judges on the "horns of a dilemma," and Congress set about implementing a plan designed to correct this problem. In 1974, Congress acted to reconcile the Code with the federal statutory scheme, as well as to broaden the grounds for disqualification, by rewriting 28 U.S.C. § 455. The process was completed with the enactment of the 1974 amendments to § 455, which altered that statute to the point of virtual repeal. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609.

In the 1974 version of § 455 Congress adopted the literal language of the ABA Code, with few exceptions. Thus, whereas the pre-amendment version of § 455 had consisted of little more than the 1821 prohibition against a judge presiding over any case in which he held an interest, or was related to a party, the new version of § 455 provided that a federal judge was to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," as well as in a number of specifically enumerated circumstances – including where the judge possessed personal bias toward a party or in favor of its adversary. This statute, together with § 144, pretty much sums up the state of the federal judicial disqualification scheme as it exists today.

There are some who would argue that the existing federal judicial disqualification scheme works just fine, and that no changes need to be made to it. I am not one of them. I am of the opinion that the federal disqualification framework, as presently constituted, is deeply flawed; and, worse, fraught with serious pitfalls both for litigants and unwary counsel. For one thing, while § 144 gives the illusion of being a peremptory challenge provision, and therefore a simple and straightforward means for a party who truly believes that a federal judge is biased to secure the removal of that judge, many of those who have sought to challenge judges in accordance with that statute have learned, the hard way, that things are not always what they seem. Likewise, while § 455 lulls litigants into believing that a judge whose impartiality may reasonably be questioned will be obliged to stand down, because the person who decides what a "reasonable person" would believe is usually the very judge whose ability to be impartial has been questioned, parties who avail themselves of this provision are often in for a rude awakening.

Even for a judge who makes a good faith effort to determine what a reasonable person would believe, deciding a § 455 motion is not necessarily an uncomplicated task. As one federal judge put it, it "is not as easy as the Congress and the Court of Appeal seem to think it is to determine what a 'reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge." Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D. Ohio 1981). This problem is compounded by the fact that judges often take accusations of bias or partiality both personally and very seriously. Of course, judges do sometimes recuse; but, over the years, there have been thousands of reported cases in which federal judges have declined to grant disqualification motions. In this situation, the moving party's fate may be left to

a judge whom that party not only believes may not be impartial, but who may have become biased, subconsciously or otherwise, by the fact of having his impartiality questioned.

Situations in which judicial bias is suspect can also pose a serious dilemma for counsel. As I point out in my treatise, during the first half of the Nineteenth Century one judge tersely noted that, in some districts, lawyers who wanted to try to disqualify a federal judge were "advised to write out their motion to disqualify on the back of their license to practice law." This does not happen today, but what does occur is far from ideal. A litigant is unlikely to expect to appear before a particular judge again; and, therefore, may feel that she has little to lose in seeking that judge's recusal; but an attorney who frequently handles litigation in federal court is likely to be less than eager to make a recusal motion if she perceives that doing so may prejudice her ability to effectively litigate before that judge in later cases. Judges are supposed to be part of the solution to a controversy, not part of the problem, so this reluctance to assert a legislatively prescribed right is unfortunate. The fact is, however, that attorneys who would be more than willing to file almost any other kind of motion are likely to refuse to move to disqualify a judge.

I volunteered to testify before this honorable Committee because I believed that my background in the field might be helpful to your deliberations, and I do not want to belabor the record with gratuitous comments. It may be worth pointing out, however, that while Congress has consistently acted in a way designed to foster public confidence in the integrity and impartiality of federal judges, the federal judicial disqualification framework as it is presently constituted, and as it has been interpreted by the courts, may have engendered a situation where many litigants have come to perceive the judicial system to be less fair than they might have if no federal disqualification statutes were on the books at all.

There are other problems with the current federal judicial disqualification scheme as well. For example, while there is no requirement that a federal judge explain his reasons for deciding a judicial disqualification motion, judges who decline to disqualify themselves often write lengthy opinions explaining their reasoning, while those who recuse seldom say why. As a result, the jurisprudence does not provide much guidance to parties and counsel as to whether disqualification is warranted in a particular case. Instead, as Professor Leubsdorf has ruefully

observed, the case law tends to reflect "an accumulating mound" of reasons for denying disqualification. Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 244 (1987). Another problem is that while, with the passage of the 1974 amendments to § 455, Congress clearly intended to do away with the so-called "duty to sit" concept as a restriction on a judge's proper exercise of discretion when confronted by a disqualification motion, a spate of recent federal court decisions have affirmed the pre-amendment view that a federal judge is as duty-bound not to recuse himself when the facts do not give fair support to a charge of prejudgment, as he is to excuse himself when the facts warrant such action.

But if Congress were to attempt to address only one shortcoming of the existing statutory framework it should, in my opinion, do something about § 144. In making a motion to disqualify a federal judge, some parties invoke only that statute, others invoke only § 455, still others invoke both statutes, and some invoke neither; leaving it to the challenged judge to decide which disqualification statute applies, and how to apply it. This is problematic because the sponsors of the 1974 amendments to § 455 did not specify how they expected §§ 144 and 455 to interact. For example, it has never been firmly resolved whether the procedural requirements set forth in § 144 are also to be applied to motions made under § 455.

On account of lingering confusion as to the intended interplay between the two federal judicial disqualification statutes, a significant investiture of judicial time and energy has been invested in hand-wringing over such matters as whether or not §§ 144 and 455 are to be construed "in pari material." Such a happenstance might be tolerable if a significant benefit were derived from having two disqualification statutes on the books; but § 144, as presently constituted, is of little or no utility. In fact, the United States Supreme Court has pointed out that the statute "seems to be properly invocable only when § 455(a) can be invoked anyway." *See* Liteky, supra at 1154. It would appear clear, therefore, that it is time for § 144, as presently constituted, to go. The question is: should § 144 be amended and improved, in a way that is calculated to insure that it will be enforced in the manner Congress originally intended, or should the statute simply be repealed?

In states that have enacted peremptory challenge statutes, the right to challenge a judge on a peremptory basis is widely considered to be a useful and valuable one, and one that assuages the concerns of a great number of litigants and attorneys. In such jurisdictions, moreover, it does not appear that courts have found that the occasional interposition of the peremptory challenge right has proven to be a major obstacle to the proper administration of justice. It would be my preference, therefore, that § 144 be amended with a clear directive from Congress that the federal peremptory disqualification statute is to be construed liberally in favor of disqualification, and not as a nit to be picked until the peremptory purpose of the statute is eviscerated. Should Congress elect not to go this route, however, I believe it is imperative that Congress make this intent clear by repealing the existing peremptory challenge provision. This would not be the optimal solution, in my view, but it would be far better than the existing situation, in which unwary litigants and their counsel are lulled into making motions that have little chance of success, and may be exceedingly ill-advised.

Thank you, once again, for the opportunity to share these concerns and suggestions with this honorable Subcommittee.

Richard E. Flamm, Esq.

Mr. JOHNSON. I don't know if the panel heard those rings going off. It is a call for us to go do what we are supposed to do, which is to press that button yes, no, or present. We have about 10 minutes left on the votes. I think it would be wise for us to knock off here. We will recess and come back and have the rest of the opening statements.

We have three votes and I would suppose we will be back in about half an hour.

Mr. CONYERS. Mr. Chairman, perhaps with a group as distinguished as this, many of these problems can be resolved by the time we come back from the floor.

Mr. JOHNSON. I am sure that many would fully appreciate promptness, a prompt decision on dealing with such an important area.

[Recess.]

Mr. JOHNSON. Okay, ladies and gentlemen, we are back in session. The next witness that we will hear from is Mr. Volokh.

TESTIMONY OF EUGENE VOLOKH, GARY T. SCHWARTZ PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, LOS ANGELES, CA

Mr. VOLOKH. Thank you very much for inviting me to testify. It is a great honor and privilege to be here. Much of my recent interest in this area stems from my having participated as a lawyer in the *Caperton v. A.T. Massey Coal Company* case, but I am not here as a lawyer for any party. I am expressing solely my own view as an academic. In any event, since the case, after the Supreme Court, has returned to the State court system, nothing that Congress is likely to do in this area will have any bearing on that case.

Mr. JOHNSON. Let me stop you and ask you whether or not your mike is on.

Mr. VOLOKH. The green light is on, but maybe I am not speaking into it. Is this any better or——

Mr. JOHNSON. No, it is not. But that is not your——

Mr. VOLOKH. Is this any better?

Mr. JOHNSON. No, but go ahead. Just try to speak a little louder.

Mr. VOLOKH. My main interest in this area has to do with the constitutional standards having to do with recusal, which, of course, are a very small part of the recusal picture. As a result I also have some thoughts on the substantive rules of recusal.

Obviously the procedural matters as we have heard discussed here are also very important. On those, I would largely defer to my colleagues who are much more knowledgeable on this. Also in a discussion with counsel, I suggest that it might speak more broadly about some of the issues that this raises. So I want to just take a big-picture view of appearance of impropriety standards and the rules having to do with recusal. I hope that this is helpful but perhaps it is too big a picture view.

It is often tempting for discussions of this subject to turn quickly to appearance of impropriety standards or, in fact, to follow the Federal statute standards that focus on when a judge's impartiality might reasonably be questioned and saying that whenever that might happen, when the impartiality might reasonably be questioned, the judge ought to recuse himself.

I want to suggest that the matter is considerably more complex than that. It is complex because judges are people, and are people who come to the court, and who while they are on the court acquire various things. They acquire, for example, political connections. Generally, to be appointed a Federal judge, one needs the backing—obviously one needs to be appointed by a President—one

needs the backing of State senators. One often gets into that position as a result of an extensive career, much of it in with political connections.

One also acquires opinions and past statements often about controversial issues. One acquires friends and former colleagues. So, for example, especially once they are judges, judges have law clerks who often become litigants before them. And of course, many judges in small towns know many—excuse me, I shouldn't say litigants—but lawyers before them. Many judges in small towns know most of the local lawyers because there are only so many lawyers traveling in their circle.

Judges acquire spouses and families, many who have business interests of their own. Judges may acquire assets. Even though of course they don't continue to have side jobs, there are assets they continue to have.

Judges also in addition to acquiring friends, they acquire enemies. People, for example, may harshly criticize them in or out of court, or people may oppose their confirmation by the Senate, may testify against them or, for that matter, in favor.

So as a consequence, decisions by judicial recusal rules have to take into account a bunch of different interests, and not just interest in preventing even the appearance, just reasonable person of possible partiality. To take one example, I would take it that a reasonable person who hasn't really focused on the matter would say that if somebody has called the judge highly pejorative names, if somebody has had a press conference condemning the judge as a Fascist and a crook, for example, that might leave the judge's impartiality to be reasonably questioned. After all, judges are human beings who may take umbrage at that and may end up holding it against the person. But we can't have a system in which that in which that leads to automatic recusal, because then people can just judge-shop simply by insulting enough judges.

Likewise, my guess is that many perfectly reasonable laypeople, when they hear that a case is being argued before a judge by somebody who has clerked for the judge—that is often a very close relationship which leads often to enduring friendship or at least close acquaintanceship—they may say well, there is something potentially improper about the judge knowing one of the lawyers; yet that is certainly not a Federal court practice, to require recusal in such cases. And before the U.S. Supreme Court, many of the top, top lawyers are ones who had clerked for the very justices before whom they are arguing.

Of course we want to make sure that judges are impartial. To the extent possible, we want to preserve the appearance of impartiality, but we have to balance that against a lot of other factors: the fact that we want to have people be able to criticize judges without having that automatically form the basis for recusal; that we don't want judges to be hermits; that we want judges to be able to be judges in the same area where they grew up and acquired many connections and practiced law.

So as a consequence, I just want to caution against broad discussion of an appearance of impartiality as a legal standard. It is in some measure the legal standard, but it has ended up becoming something other than what the words seem to appear. It has ended

up generating a bunch of rules, such as the extrajudicial source rule, that try to clarify it and make it more precise and in some measure lead to absence of recusal, even when quite reasonable people might conclude there is some question about the judge's partiality. I think that that has to be recognized, and before people get upset in particular situations about the possibility of appearance of impartiality, they should recognize that sometimes there are other factors that need to be balanced against it.

Mr. JOHNSON. All right. Thank you, Professor Volokh.

[The prepared statement of Mr. Volokh follows:]

PREPARED STATEMENT OF EUGENE VOLOKH

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Dear Members of the Committee:

I was asked to testify about judicial recusal law following *Caperton v. A.T. Massey Coal Co.* I was one of the lawyers in that case, but I am not testifying here in that capacity; I'm speaking as a legal academic, representing only my own views. Moreover, since the Supreme Court decision, the *Caperton* litigation has been proceeding in state court and not federal court, and is governed by the Supreme Court's constitutional rule, not a federal statute. Nothing I say here would therefore bear on that litigation.

On then to recusal law and federal judges. All agree that judicial impartiality is extremely important. At the same time, judges, like all human beings, have their own histories which have led them to their own attitudes and preconceptions, including towards litigants in their courtrooms.

A judge might have voted for or against a politician who ends up as a litigant before the judge. A politician might have publicly voted for or against the judge. A judge's family member might have been murdered, which might affect a judge's attitude towards people accused of murder, or of a particular kind of murder. *Cf. Strickler v. Pruett*, 1998 WL 340420 (4th Cir. 1998) (Luttig, J.) (responding to a motion for recusal in such a case). A constitutional case may affect the rights of the judge alongside the rights of millions of others, for instance if a female judge is ruling in a case involving the Equal Protection Clause and sex classification—or if a male judge is ruling in the same case. A constitutional case may affect the legal rights or financial standing of a group, such as a religious denomination, that the judge has voluntarily joined.

Moreover, judges usually become judges because they have had a successful career as lawyers, and because they have made political connections as a result of that career. Before ascending the bench, they might have gotten involved in political campaigns, perhaps in campaigns to elect the Senator who later urges the judge's appointment, or the President who ultimately appoints the judge.

Or they might have gotten involved in state politics, perhaps helping elect a state governor who then appoints them to state judgeships, which becomes stepping-stones to federal judgeships. In the process, they would have gotten involved with the state party apparatus, would have been endorsed or opposed by state newspapers and state politicians, would have made friends in the state or federal Administration, and so on. Just to give two examples with which I'm most familiar, both involving highly respected jurists, my former boss Justice Sandra Day O'Connor was an Arizona Senate majority leader before being appointed to state judgeships and then eventually to the U.S. Supreme Court, and my former boss Judge Alex Kozinski (now the Chief Judge of the Ninth Circuit) was involved in President Reagan's election campaign, and was then

a political appointee in the administration before being appointed to the Court of Federal Claims and then to the Court of Appeals.

As a result of their careers as lawyers, and as judges, judges also make many friends and close acquaintances among lawyers—their classmates, coworkers, political allies, law clerks, and the like. In many smaller towns, where the number of lawyers is likewise small, judges may have social relationships with almost all the leading local lawyers.

Even in D.C., no small town, many of the lawyers who practice before the Supreme Court are former law clerks for Supreme Court Justices, friends of the Justices, or both (since many law clerks end up enjoying very close relationships with their former bosses). To give just three extremely well-regarded examples, the former Solicitor General was once a law clerk for Justice Scalia, the current Principal Deputy Solicitor General was once a law clerk for Justice Breyer, and the private lawyer who represented the University of Michigan in the Supreme Court's landmark *Grutter* and *Gratz* affirmative action cases was once a law clerk for Justice Rehnquist, who was then still alive and on the Court.

As a result of their careers as lawyers, judges also acquire assets; and they may have assets through family connections as well. They may be partners in family businesses, or they may have real estate investments, or they may own stocks. Being a federal judge is a full-time job, so judges do not work in outside businesses. But they are not required to sell all their property and put it in a bank account (or even in a blind trust), something that might be financially quite burdensome, and might drive away many excellent candidates for the federal bench.

Judges also acquire spouses and families. For instance, a judge's wife may be a businesswoman, and the judge will end up profiting from her business (and may even be a co-owner of her business, under state community property laws). No-one should ask the businesswoman to retire when her husband is appointed to the bench. Likewise, judges may have children or siblings who are businesspeople or lawyers, and who have friends or enemies of their own, who get into trouble with the law, who run for political office, and so on. Of course those judges will assiduously recuse themselves from cases where a party is a relative or a close friend, or where the judge or the judge's family has a direct business interest in one of the parties. But many cases that come before the judges will inevitably set precedents that foreseeably benefit the judges' family members, and perhaps even the judges' own investments.

And judges acquire enemies and hostilities as well as acquiring friends. Lawyers and businesspeople may spend money trying to get a judge voted out of office, or even impeached or recalled. Newspapers may write editorials that condemn a judge's decisions or ethics, and speak against the judge's election or reelection. Litigants may say nasty things, both in court and out of it, about judges who rule against them or who seem likely to rule against them.

Recusal rules are in large measure aimed at preventing improper influences that stem from all these connections—but the rules are also necessarily limited by the ubiquity of such connections. Thus, for instance, a judge should recuse himself from a case when he owns even a little bit of stock in one of the litigants. But a judge does not have to recuse himself just because the rule of law announced in a case (for instance, federal preemption of some state regulation of a class of businesses) may affect the business fortunes of the companies in which he or his family members own stock.

A judge should recuse himself in a case in which a friend is a party. But a judge does not have to recuse himself just because he is friendly with one of the lawyers in the case. Likewise, a Catholic judge need not recuse himself in a case involving the Catholic Church (such as *City of Boerne v. Flores,* in which the petitioner was an Archbishop), no matter how devoted he might be to his Catholicism and to the Church.

Likewise, the Supreme Court held, in *Caperton v. A.T. Massey Coal Co.*, 521 U.S. 507 (1997), that a state Supreme Court Justice must recuse himself in a case where one party's officer spent a good deal of money advocating for the defeat the judge's election opponent, because that advocacy had "had a significant and disproportionate influence on the electoral outcome" in the judge's favor. There was, the Court held, a "sufficiently substantial" "risk that [this] influence engendered actual bias" on the judge's part in favor of one party. But it's not clear that a U.S. Supreme Court Justice needs to recuse himself in a case where one of the parties is the President who appointed him, or a Senator who backed his appointment.

In fact, in *Clinton v. Jones*, 520 U.S. 681 (1997), two of the Justices who heard the case had been appointed by one of the parties, President Clinton. The President had had an even more "significant and disproportionate influence" in placing the Justices on the Court than the influence involved in *Caperton*: In *Caperton*, A.T. Massey's CEO helped persuade the public to elect someone to a judicial seat, but in *Clinton*, the President personally made the decision to appoint two of the Justices to their seats. Yet that was not seen a reason for the Justices to have to recuse themselves, both in *Clinton* and in other past cases.

Likewise, a judge may well recuse himself if he feels sufficient personal hostility to a particular litigant or lawyer who is appearing before him. Yet if that were a binding rule, parties and lawyers could judge-shop simply by publicly condemning judges whom they don't want deciding their cases, or by prominently opposing the judges in election campaigns or confirmation battles. If all it takes to force the recusal of a judge you dislike is to spend, say, $20,000 running sufficiently harsh ads against him—on the theory that the judge will now be hostile to you—then many litigants might be happy to do that. That's even more so if publicly insulting a judge would suffice to get the judge recused.

Is there a risk that a judge will be biased against people who insult him? Of course; judges are human like the rest of us. But mandating recusal in such situations would be unacceptable, because of the danger of strategic judge-shopping.

If our legal system's only goal were to try to minimize improper influences on judicial decisionmaking, then perhaps it would mandate recusal in all these situations. But this is not our system's only goal. Rather, the recusal standards have to balance a wide range of goals. For instance, we want to be able to get final decisions without recusals that leave a Supreme Court split 4-4, or lacking a quorum. We want to be able to appoint high-quality judges who come from the place in which they are to sit, and who are vetted by elected officials in which they are to sit. We want judges' families not to be unduly handicapped in their own professional lives. We want judges to be free to continue their social lives, and in large measure their financial lives.

We want judges to get even more involved with their communities and the legal profession by participating in various bar events and in community education events, even though this may increase the number of the judges' social and professional contacts that could potentially lead to some possibility of bias. We don't want litigants to be able to judge-shop by saying or doing things that force the judge's recusal.

All this also illustrates the weaknesses of formulating rules based on the "appearance of potential bias," or on whether a judge's "impartiality might reasonably be questioned." (For more on this, see Prof. Ronald Rotunda's excellent article, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337 (2006).) If the rules are attempts to provide an empirical test—would a typical citizen reasonably worry that the judge might be biased?—then they will yield far more recusals that can be justified. A typical reasonable citizen, for instance, might well question the impartiality of a judge in a case where one of the litigants had earlier publicly lambasted the judge, perhaps calling the judge a racist or corrupt or incompetent. But as was discussed above, there are important practical reasons not to require recusals in such cases.

Likewise, a typical reasonable citizen might well worry that a judge would be biased in favor of a lawyer who had once been a law clerk for the judge, or whom the judge knows socially. But applying such a test would mean that judges in small towns would either have to be hermits or outsiders, and the most prominent lawyers in D.C. would be unable to argue before the most prominent courts in D.C.

In fact, what has happened with such "appearance of potential bias" rules—such as the federal recusal statute, which requires recusal whenever a judge's "impartiality might reasonably be questioned"—is that courts have turned this phrase from a mostly empirical question (might a reasonable person reasonably question the judge's impartiality?) into a legal label. *See, e.g., Liteky v. United States*, 510 U.S. 540 (1994) (discussing the "extrajudicial source rule," one such legal gloss on the standard). Things that many reasonable citizens would see as potentially bias-inducing become permissible, because that's what the legal precedents say.

There are good reasons for this result, as the discussion above suggested. But the consequence is that the legal system seems to promise the public one thing and deliver another. The result might therefore be *less* public confidence in the judiciary rather

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than more: People who expect that a judge will recuse himself—not because of actual bias, but because of an appearance of potential bias—may become disappointed or even outraged when it turns out that the "appearance of potential bias" standard, as interpreted by judges, doesn't actually call for recusal.

So what should Congress do in this situation? First, it should recognize that judicial recusal rules must try to reconcile many different public interests, and that no formula such as "appearance of potential bias" can capture them all.

Second, it should tread cautiously, and not act unless there seems to be a serious problem. I haven't heard much evidence that there is indeed a serious problem in the federal judiciary with bias towards or against various parties. Certainly people have made these arguments, whether or not correctly, as to elected state judiciaries. And certainly people have argued that federal judges are unduly biased in favor or against particular legal conclusions (e.g., abortion rights) or interpretive mechanisms (e.g., a living Constitution, or the acceptance of foreign influence on American constitutional law). But neither of those problems, if they are problems, can be dealt with through federal recusal rules.

Third, even if there is a serious problem, the trick is finding a sound solution that does more good than harm. It's hard to evaluate any particular solutions unless they are laid on the table, in specific terms; the devil is in the details in such matters. All I can say is that I haven't seen any particular proposal that seems likely to make a substantial improvement here.

Fourth, and now focusing much more narrowly on the *Caperton* case, it's not clear to me what, if anything, the Congress needs to do to respond to that case. To be sure, the logic of *Caperton* isn't limited to cases where a party or a party's official spent money in a judicial election, which would by definition involve state judges and not federal judges. *Caperton*'s rationale could also apply, as I suggested above, to cases where a party played an important role in placing a federal judge on the bench, or in trying to keep the judge off the bench—for instance if a party was (1) the President, (2) the Senator from the judge's home state, (3) the political party which had backed the judge, (4) an influential newspaper that editorialized for or against the judge when he was nominated, (5) an influential advocacy group that publicly called for or against the judge's confirmation, or even (6) an important witness at the judge's confirmation hearings. As Chief Justice Roberts suggested in his *Caperton* dissent, it's not obvious whether under the majority's logic "a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities [would] also give rise to a constitutionally unacceptable probability of bias." Still, given that the Court's decision is indeed unclear on this, it's probably better for Congress to wait for the courts to elaborate on this question.

I hope that these thoughts have been helpful; please let me know if you'd like me to elaborate them on further, or to answer any questions you might have about them.

Mr. JOHNSON. Now we will have the opening statement of Professor Reimer.

TESTIMONY OF NORMAN L. REIMER, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC

Mr. REIMER. Mr. Chairman, Ranking Member Coble and distinguished Members, thank you for holding the hearing on this important issue, and thank you for inviting the National Association of

Criminal Defense Attorneys to express our concerns and suggestions.

I want to augment just one aspect of my testimony and propose one very concrete step that Congress can take to ameliorate the corrosive impact of electioneering upon the reality and perception of an independent and impartial judiciary. I don't hold myself out as an expert on the law of judicial recusal nor as an expert on the scope of permissible conduct in judicial elections. You have got a great panel of experts that can speak much more eloquently to those issues. Rather, I speak on behalf of the Nation's Criminal Defense Bar and the hundreds of thousands of accused persons each year who are most keenly impacted by judicial campaign rhetoric and the resulting judicial behavior when reelection or retention approaches.

There is no greater risk to fundamental constitutional rights than the risk borne by the accused who appear before judges who must pick their way through the minefield of judicial election. And in this regard I note that this problem is to a large extent a State problem where the Congress' role is obviously limited.

Indeed if you consider the *Caperton* case, which was the genesis or one of the geneses for the Committee holding this hearing, look at what that case was. It was a battle, a civil fight over land rights and ultimately money. It had nothing whatsoever to do with criminal law. The rights of the accused are fundamental constitutional rights. But the means of dislodging the sitting judge was a blistering diversionary attack upon his decision-making in criminal matters.

This tactic is replicated time and time again in virtually every jurisdiction that elects its judges. As a result, the candidate who emerges victorious is often the one that espouses the most anti-defendant, pro-prosecution points of views.

In answer to Ranking Member Coble's question as to whether this is a genuine problem or merely anecdotal, I think it is a genuine problem. I think that the pervasiveness of it, particularly in its impact on the criminal justice system, is one of the reasons, as Chairman Conyers noted, that so many people don't feel, don't feel that they got a fair shake.

Imagine what it is like to be called into court to answer an accusation and know that the judge who will decide the critical issues in the case, including whether or not you perhaps will receive a prison sentence, has promised to "stop suspending sentences" or stop putting criminals on probation or has stated that she doesn't believe in leniency or, worse, pledge to rule a certain way with certain parties and witnesses.

All of these examples are cited in our written testimony. They are real. They are documented. The roadkill here is not just the rights of the accused whose cases are judged by judges who have to worry about how a potential adversary may mischaracterize their decisions. The true victim is the perception of fairness and impartiality of the judiciary that is the moral underpinning of our justice system.

The people's confidence in the system hinges on the perception by the guilty, by the innocent, by all who are touched by the crimi-

nal justice system and the larger community, that judges are not predisposed to decide a case one way or another.

There can be little doubt that a potent solution lies in the adoption of recusal rules with some real bite. Strong recusal requirements may in the first place deter the objectionable rhetoric by giving all judicial candidates cover to avoid it. Now, whether or not a Federal solution is achievable consistent with our fundamental principles of federalism is questionable, but what Congress can do—and I would argue should do—is expose the full extent of the problem. You should shine a light on the practices and consequences that are undermining our system of justice.

There is considerable evidence for the proposition that there is a provable nexus between election campaign rhetoric and judicial outcomes.

Now, I know the Committee for Economic Development has issued a report called Justice for Hire which has some great examples in there, but I will just tell you that in my own practice, which I was a practicing attorney, as you noted Mr. Chairman, before I came to the association, and I will never forget once representing a young man who was a passenger in a car from which a large quantity of drugs had been seized from the trunk. The testimony at the hearing was so preposterous that even the seasoned court officers were giggling at the police account. At the end of the testimony, the judge called the lawyers up to the bench and said, Well, what am I going to do here? I said, Well, Judge, it looks like you are going to have to suppress the evidence; to which the judge responded, Mr. Reimer, I know it is a bad stop, but I can't suppress. I have got to run next year. Will your client take probation?

Now, rather than rely on anecdote, conjecture, and a small array of independent studies, Congress should authorize funding for a research grant to study the relationship between judicial campaign speech and judicial conduct in criminal proceedings. If the research confirms what many of us suspect and believe, and what some of the studies that have already been done show, it will provide an overwhelming impetus for States to act to listen, to some of the suggestions that we have heard here today, and to accept Justice Kennedy's invitation, in his opinion in *Caperton*, to adopt recusal standards that are more rigorous than merely the due process floor that was set in *Caperton*.

This would be a great step forward, and I can tell you that one thing is certain: If the present trajectory is continued, the combustible mix of electoral politics, money, and unchecked rhetorical intimidation will destroy the people's trust in the independence of our judiciary. Thank you.

Mr. JOHNSON. Thank you Mr. Reimer.

[The prepared statement of Mr. Reimer follows:]

PREPARED STATEMENT OF NORMAN L. REIMER

Written Statement of
Norman L. Reimer
Executive Director
National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Re: "Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*"
December 10, 2009

Mr. Chairman, Mr. Coble and distinguished Members of the Subcommittee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and timely issue of judicial recusals. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's over 11,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the fair and proper administration of justice.

Introduction

Consistent with these objectives, NACDL has an interest in preserving both the actuality and the appearance of an independent and impartial judiciary, charged with making crucial decisions that can result in the loss of liberty or even life for a criminal defendant. NACDL has a particular interest in ensuring that a remedy exists to protect the accused from judges who are or appear to be biased against criminal defendants. Under the Due Process Clause, every litigant is entitled to a fair hearing before a fair tribunal. This mandate is particularly crucial to criminal defendants who face the loss of liberty or life and depend on judges to protect their constitutional rights.

There is a tension between an elected judge's accountability to those constituencies who assisted in his or her election and the judge's role as independent and impartial arbiter. This tension is particularly pronounced in criminal cases because elected judges often run on "tough on crime" platforms. Anthony Champaign, *Television Ads in Judicial Campaigns*, 35 Ind. L. Rev. 669, 683 (2002) (documenting the rise of television ads in judicial campaigns and noting that "crime control was clearly the most common theme."). This may be true both when running for initial election or when an incumbent runs in a retention election. Common experience and a plethora of literature have brought to light countless incidents in which candidates have sought judicial election by touting their anti-crime credentials or determination to impose harsh sentences or rebuff the claims of the accused. Worse, incumbent judges who were compelled by their oath of office and the dictates of the law to rule in favor of an accused person in a particular case are often targeted for their ruling and derided as "soft on crime."

Increasingly, a combustible mix of factors has coalesced to seriously jeopardize the public's confidence in the fairness and impartiality of judges who emerge from the electoral process. The availability of large sums of money and the susceptibility of an electorate whipped into a frenzy by media that disproportionately report the most lurid crimes make the temptation to exploit the "crime issue" irresistible. The public, especially the accused and his or her loved ones, can hardly have confidence in the ruling of a judge who has run on an anti-crime, anti-criminal

platform. As Justice John Paul Stevens has noted, "A campaign promise to be 'tough on crime' or to 'enforce the death penalty,' is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases."[1]

Due Process and the Right to a Fair and Impartial Judge

The constitutional mandate that litigants be heard by a judge who appears to be fair, impartial and without bias is vital to safeguarding the constitutional rights of criminal defendants. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955). Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.,* 393 U.S. 145, 150 (1968); *see also In re Murchison,* 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice") (internal quotation omitted).

Criminal defendants are especially dependent on the Due Process Clause of the Fourteenth Amendment to protect them from judges who are or appear to be biased against them. Because their liberty and even their lives hang in the balance, criminal defendants have even more at stake than civil litigants, who at most might be required to pay a monetary judgment if unsuccessful. Because judges must safeguard a criminal defendant's constitutional rights, the due process mandate that judges both be and appear to be impartial is especially important in this context.

Judicial Campaigns and the Politics of Crime

In limited circumstances, judicial electioneering can create the actuality or appearance of bias, violating a litigant's due process rights. An independent and impartial judiciary is the cornerstone of the justice system in the United States. Judges must be "independen[t] of mind and spirit ... to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." *United States* v. *Hatter,* 532 U.S. 557, 568 (2001) (internal quotation omitted). "[I]deally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *Chisom* v. *Roemer,* 501 U.S. 380, 400 (1991).

More than 89 percent of state judges stand for election in order to obtain or retain office. Bert Brandenburg et al., *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns,* 21 Geo. J. Legal Ethics 1229, 1230 (2008). Because elections are an intrinsic part of a democratic process, judicial elections are lauded as a way to make judges, like other public officials in the United States, accountable to the citizenry. *See, e.g.,* David E. Pozen, *The Irony of Judicial Elections,* 108 Colum. L. Rev. 265, 271 (2008). There is, however, a fundamental tension between judicial independence on the one hand and judicial accountability on the other, "'between the ideal character of the judicial office and the real world of electoral politics." *Chisom,* 501 U.S. at 400. Judges subject to regular elections are "likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it

[1] John Paul Stevens, Assoc. Justice, U.S. Supreme Court, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug 3, 1996)*, in 12 St. John's J. Legal Comment. 21, 30-31 (1996).

could hurt their re-election prospects." *Republican Party of Minn.* v. *White,* 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring).

This tension is particularly acute in the criminal context because the electorate often subjects judges to heightened scrutiny in criminal cases. Citizens, worried about crime, may put political pressure on judges for more convictions and harsher sentencing. They are frequently joined by police, prosecutors and victims' rights groups in agitating for such measures. Criminal defendants, on the other hand, are politically unpopular and lack the political power to respond in kind.

But in order to enforce the rights granted to criminal defendants by the Constitution, judges must at times make unpopular decisions. Decisions upholding a criminal defendant's rights – by, for example, excluding a coerced confession or evidence obtained unconstitutionally; barring out of court statements against the defendant under the Confrontation Clause; or granting a motion to dismiss for lack of evidence – often provoke a decidedly negative reaction among the voting public. The media frequently contribute to the response, portraying such decisions as "letting a criminal defendant off on a technicality." The political pressures faced by judges persist at the appellate level, where elected appellate judges must review these same issues while also confronting defendants' claims of ineffective assistance of counsel and bias by the trial court.

The result is that many candidates for elected judicial office run on "tough on crime" platforms. To demonstrate their dedication to the cause of putting criminals behind bars, judicial candidates often highlight past rulings that show the requisite "toughness" on crime or promise – at varying levels of specificity – to be tough on crime if elected. The examples below illustrate these campaign tactics:

- In campaigning for an Illinois Supreme Court position, one candidate bragged in his literature that he had "never written an opinion reversing a rape conviction." *Buckley* v. *Ill. Judicial Inquiry Bd.,* 997 F.2d 224, 226 (7th Cir. 1993).

- A candidate for an Indiana judgeship pledged to "stop suspending sentences" and to "stop putting criminals on probation." *In re Haan,* 676 N.E.2d 740, 741 (Ind. 1997).

- A judicial candidate in Florida running a "tough on crime" campaign "pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (*i.e.*, police and victims of crime)." *In re Kinsey,* 842 So. 2d 77, 89 (Fla. 2003) (per curiam).

- A Tennessee Supreme Court Justice running in a retention election was opposed based on her vote against the death penalty in a case in which she, along with four other justices, had affirmed the defendant's conviction.[2] This outcome was twisted in inflammatory

[2] See Fred B. Burnside, comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1036-37 (1999).

mass mailings, which denounced the justice as wanting to "free more and more criminals and laugh at their victims."[3]

- A judge running for election in Ohio stated she wasn't afraid to use the death penalty and *favored* it for convicted murderers. *In re Burick*, 705 N.E.2d 422, 425 (Ohio 1999).

- In his re-election campaign, a judge on the Texas Court of Criminal Appeals stated, "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim." Clay Robison, Editorial, *Judge's Politics an Exception to Rulings*, Hous. Chron., Feb. 4, 2001, at 2.

By the same token, many judicial candidates attack their opponents as being "soft on crime." For example, in the 2008 campaign for the Wisconsin Supreme Court, Judge Michael Gableman ran television ads that labeled his opponent Justice Louis Butler "'Loophole Louis' for rulings favoring defendants in criminal cases." Debra Cassens Weiss, ABA J., *Wisconsin Justice Dubbed 'Loophole Louis' in TV Ads,* http://www.abajournal.com/news/wisconsin_justice_dubbed_loophole_louis_in_tv_ads/ (last visited Dec. 4, 2009). In the 2006 primary campaign for Chief Justice of the Alabama Supreme Court, Justice Tom Parker excoriated the Alabama Supreme Court for its decision "to passively accommodate – rather than actively resist" the Supreme Court's decision in *Roper* v. *Simmons,* 543 U.S. 551 (2005), which held that it is unconstitutional to execute someone for a crime committed as a minor. David White, *Chief Justice Race Hinges on Respect for U.S. Supreme Court,* Birmingham News, May 22, 2006, at B1.

Indeed, the judicial campaign in *Caperton v. A.T. Massey* was a classic (if exceptionally well funded) example: television advertising accused Justice Warren McGraw of "[l]etting a child rapist go free" and labeled him, "too soft on crime. Too dangerous for our kids." Deborah Goldberg et al., *The New Politics of Judicial Elections 2004,* at 4-5 (2005).

The latter examples vividly illustrate an ironic phenomenon. Often the interest of outside groups is greatest and the most money is available to pump into a judicial election when the underlying issue has nothing whatsoever to do with the criminal justice system. Rather, the highly exploitable vulnerability of judges to attacks on criminal justice rulings is used as a stalking horse to divert attention from the true objective. This cynical manipulation is of paramount concern to the National Association of Criminal Defense Lawyers because it is the reality and appearance of justice in the criminal context that is placed at risk. Liberty in this country depends upon judges who are willing and able to discharge their sworn duty to uphold the Constitution and the Bill of Rights, especially the Fourth, Fifth and Sixth Amendments. Yet the difficult rulings in this context are what put an electoral bull's eye on a judge's back.

While prohibiting the described examples of incendiary campaign speech may seem the most expedient approach, restrictions on judicial speech have not fared well in the courts. In *Republican Party of Minnesota v. White* (2002), the Supreme Court held that the state's "announce clause," which prohibited judicial candidates from announcing their position on legal

[3] Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*. 72 N.Y.U. L. Rev. 308 app. A. at 332 (1997).

issues, violated the First Amendment. The lower courts have interpreted the case broadly to strike down most restrictions on judicial speech. David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 B.Y.U.L. Rev. 481, 482. The ABA Model Code of Judicial Conduct states that "with respect to cases, controversies, or issues that are likely to come before the court . . . [judges and judicial candidates shall not] make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." This aspirational goal, which may or may not be adopted by states, will have limited effect on campaign conduct and is inadequate to address the concerns of criminal defendants.

Ensuring Impartiality Through Recusal Reform

As noted by Justice Kennedy in *White*, recusal rules are a useful tool for balancing judicial free speech and the right to an impartial forum. Recusal policies must take into account the impact of campaign platforms on judicial behavior, particularly the threat of "tough on crime" rhetoric to judicial impartiality. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75* B.U. L. Rev. 760, 765-67 (1995) (citing statistics and anecdotal evidence indicating judges facing election are (1) more likely to sentence a defendant to death and (2) less likely to enforce constitutional protections to a fair trial); *see also* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights,* 81 N.Y.U. L. Rev. 1101, 1109-12 (2006) (citing statistics indicating a correlation between increased sentences and proximity to re-election and between affirming sentences of death and proximity to re-election).

In some circumstances, statements made by judges during the course of judicial electioneering may jeopardize a criminal defendant's due process rights by depriving him of the actuality or at least the appearance of an unbiased judge. The difficulty lies in determining when "tough on crime" promises by judicial candidates become so problematic that they require recusal under the Due Process Clause. It is unclear whether the test in *Caperton* – "whether the contributor's influence on the election under the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true'" – will prove useful outside the context of judicial campaign contributions.

While NACDL has not formally endorsed a specific approach regarding campaign speech and recusal, we believe there are several proposals and models worth considering. To avoid separation of powers problems, it is best if these rules are adopted by the courts rather than the legislature.

- Motions seeking recusal of a judge should be assigned to a different judge.
- Judges should be required to disclose on the record any information that the judge believes the parties might considerer relevant to the question of recusal.
- Recusal should be mandatory in any criminal case that will raise an issue about which the judge promised to be "tough." Mandatory recusal (disqualification) offers the additional benefit of giving judicial candidates cover to avoid "tough on crime" rhetoric and

Mr. JOHNSON. And last, but certainly not least, Professor Hellman.

TESTIMONY OF ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH, SALLY ANN SEMENKO ENDOWED CHAIR, PITTSBURGH, PA

Mr. HELLMAN. Thank you, Mr. Chairman. The starting point for much of today's discussion is of course the *Caperton* decision which deals with recusals in State courts. One year before the *Caperton* decision, two Justices of the United States Supreme Court expressed concern about the impartiality of a Federal judge. The judge was Manuel Real of the Central District of California. He was sitting by designation in the District of Hawaii, and the case involved competing claims to funds in a brokerage account that had been established by the former Philippine President Ferdinand Marcos. Justice Stevens in a dissenting opinion described some of the things that Judge Real had done in the case. He then said, "These actions bespeak a level of personal involvement and desire to control the proceedings that create at least a colorable basis for a concern about his impartiality." He suggested that it would be best if the case were transferred to a different judge on remand. And Justice Souter agreed.

Well, the case went back to the district court. Judge Real continued to preside over those proceedings. Some of the parties requested an accounting. They got one but it wasn't very satisfactory. So they appealed to the Ninth Circuit.

Just last month the Ninth Circuit handed down its decision. The court noted that Judge Real's written accounting was filled with cryptic notations. His oral accounting contradicted the record on several points. All this, said the panel, confirmed the doubts about his impartiality that Justice Stevens and Justice Souter had expressed. So the panel did order the case reassigned to another judge.

Well, this wasn't the first time that Judge Real has been criticized by his fellow judges for departing from the ideal of neutrality. In January 2008, he was formally reprimanded by the Judicial Council of the Ninth Circuit, under the 1980 misconduct statute that you heard about a moment ago. The council found that Judge Real improperly intervened in a bankruptcy case to help one litigant at the expense of another.

Well, there was another misconduct proceeding against Judge Real, this one a pattern and practice complaint. It was investigated very thoroughly by the Ninth Circuit Judicial Council. After that investigation, the council concluded that Judge Real failed in many cases to give reasons for his decisions when the law required reasons. The council pointed to his obduracy in implementing directives from the appellate court. It found that his actions had caused needless appeals, unnecessary cost, undermined the public's confidence in the judiciary. These occurrences were more than anecdotal, more than occasional.

Well, that is a pretty damning recital, isn't it? And you would think that these findings would lead to some sort of discipline, but they did not. The council dismissed that complaint and it did so because the national committee, the Judicial Conduct Committee, in

an earlier phase of these proceedings, had said that a pattern or practice of this kind could be misconduct only if there was clear and convincing evidence of willfulness. The council found that there just was not.

Well, the 1980 act is not the subject of this hearing, and this isn't the occasion to debate the correctness of that ruling. The point, rather, is that Judge Real's actions in the Philippine case and the bankruptcy case were not aberrations in his very long career on the bench. They were all too representative of a pattern of behavior that is totally at odds with judicial impartiality and the rule of law, the goals that Justice Kennedy and the Court spoke of in *Caperton*.

Mr. JOHNSON. Professor Hellman, if you would sum up. Though I really want to know what happened to this judge, but if you could sum up because the red light is on. Thank you.

Mr. HELLMAN. Sure. Judge Real's behavior doesn't fit any of the standard categories of bias or partiality. A new kind of law is needed, and one law that I think would be helpful would be a peremptory challenge law that is discussed in some of the other statements. I would be happy to elaborate on that for the panel. Thank you.

Mr. JOHNSON. Thank you, sir.

[The prepared statement of Mr. Hellman follows:]

Statement of
Arthur D. Hellman

Chairman Johnson, Ranking Member Coble, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on "Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*." In this statement I will address recusals in the federal system.

Overall, I believe that federal judges are quite sensitive to their ethical obligations, and that they generally recuse themselves from participation in cases when their impartiality might reasonably be questioned. But no system is perfect, and in this statement I will suggest two measures that can enhance transparency and help judges to avoid even the appearance of impropriety. First, judges should be encouraged to post "conflict lists," including financial holdings, on their courts' websites. Second, litigants should be given one opportunity to secure reassignment of a civil case to another judge. In colloquial terms, each side would have a right of "peremptory challenge." I will also suggest a clarification of the recusal statute and a modification of the approach to appellate review taken in most of the circuits.

Before turning to the subject of today's hearing, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. Since 2007 I have published three articles dealing with judicial misconduct and other aspects of federal judicial ethics.[1] In November 2001, I testified at a hearing of the Subcommittee on Courts,

[1] The articles are cited *infra* notes 4 and 40.

the Internet, and Intellectual Property on "Operation of the Judicial Misconduct Statutes." Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. Last June, I testified at the hearing held to consider the possible impeachment of District Judge Samuel B. Kent.

I. *Caperton v. A.T. Massey* and the Federal Judiciary

On June 8, 2009, the United States Supreme Court handed down its eagerly awaited and highly controversial decision in *Caperton v. A.T. Massey Coal Co., Inc.*[2] In *Caperton* the Court considered, for the first time, whether a state-court judge might be required by the Due Process Clause of the Fourteenth Amendment to recuse himself from a case because of campaign contributions made by an individual with a stake in the litigation. The Court held that on the record before it, recusal was required. The Court emphasized that the case involved "extreme" and indeed "extraordinary" facts. The opinion explained:

> We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

The vote was 5-4, with the dissenters insisting that the Court's rule "provides no guidance," would lead to an increase in allegations of bias, and ultimately "will do

[2] 129 S. Ct. 2252 (2009).

far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case."

Of course the holding in *Caperton* has no direct application to the federal judiciary. Nevertheless, I think it is entirely appropriate for this Subcommittee to use *Caperton* as a springboard for examination of conflict of interest and disqualification in the federal judicial system. Justice Anthony M. Kennedy, the author of the *Caperton* opinion, has emphasized that an important function of Supreme Court opinions is to teach. As he observed in a recent interview, the Supreme Court "is really … a teaching institution when it functions at its best." So we can look at the *Caperton* opinion and ask: apart from the law it lays down – which is law for the state courts – what does it teach about disqualification in the federal courts?

Two relevant themes emerge from the Court's opinion. First, the idea of fairness – which lies at the root of disqualification rules – is not static; it evolves over time. In particular, the historical account in the opinion suggests that there is greater sensitivity today to possible conflicts of interest than there was in past eras. This certainly points in the direction of re-examining existing standards and procedures to assure that they accord with current views of the ethical obligations of federal judges.

Second, although the Court is careful not to hold that the *appearance* of partiality can violate *due process*, the opinion emphasizes the value to "the integrity of the judiciary and the rule of law" of codes of conduct that require judges to disqualify themselves when their impartiality "might reasonably be questioned." Justice Kennedy quotes his concurring opinion in the judicial campaign speech case; there, he suggested that courts can perform their functions

effectively only if citizens have confidence in the judges' probity. The implication is that legislatures and rule-making bodies can usefully pursue measures that will help to assure that judges do not sit in cases where "an objective assessment of [their] conduct produces a reasonable question about impartiality."

There is another reason for taking up the subject of recusals at this time. Although federal judges do not run for election, over the last two decades the process of nomination and confirmation has become politicized to a disturbing degree. There is a real danger that the judges will come to be perceived not as dispassionate servants of the law but as political actors who pursue political or ideological agendas. I do not think we have reached that point, but the warning signs are up; for example, it is now common for the media, when reporting court decisions, to specify the President who appointed the judges.[3] One consequence of these developments is likely to be increased scrutiny of judges' responses to motions to recuse. Here as in other aspects of the operations of the judiciary, "just trust us" is no longer sufficient.

Against this background, I turn to the laws and decisions that now govern the disqualification of federal judges.[4]

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[3] As I write this statement, the Associated Press has just posted a story about a decision involving California's Proposition 8, the initiative that bans same-sex marriage. The story includes this sentence: "The panel members … were all appointed to the court by former President Bill Clinton."

[4] This discussion draws on a recently published article, Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. Pitt. L. Rev. 189 (2007) [hereinafter Hellman, Judicial Ethics]. Additional material and citations will be found in that article, which can be accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015858.

II. Conflict of Interest and Disqualification: Current Law

Two provisions of Title 28 of the United States Code deal with conflict of interest and the disqualification or recusal of federal judges. ("Disqualification" and "recusal" will be treated as synonymous.) Section 144 establishes procedures for assuring that no case is heard by a district judge who "has a personal bias or prejudice" against or in favor of any party. Section 455 lays down elaborate rules to govern the disqualification of judges and avoid conflicts of interest. Because § 455 is so much broader in its definition of the circumstances that require disqualification (and for other reasons), it is invoked far more often than § 144.[5]

As explained in a comprehensive monograph prepared for the Federal Judicial Center, § 455 includes two "separate (though substantially overlapping) bases for recusal."[6] Subsection (a) speaks in broad general terms; it requires recusal "in any proceeding in which [the judge's] impartiality might reasonably be questioned." Subsection (b) lists five specific circumstances that require recusal. These include personal bias, prior involvement with the case, and "a financial interest . . . in a party to the proceeding."

A. Conflict of interest based on stock holdings

The "financial interest" prohibition in § 455(b)(4) has proved to be a fertile ground for muckraking by investigative reporters. This is so for four interrelated reasons. First, the statutory bar is absolute. Section 455 defines "financial interest" as "ownership of a legal or equitable interest, *however small*."[7] Thus, it

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[5] For further discussion of § 144, see infra Part IV-B.

[6] Alan Hirsch & Kay Loveland, Fed. Judicial Ctr., Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at 5 (2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Recusal.pdf/ $file/Recusal.pdf [hereinafter FJC Recusal Study].

[7] 28 U.S.C. § 455(d) (emphasis added).

does not matter whether the judge owns many shares or only one; it does not matter whether the party involved in the proceeding is a small partnership or a huge publicly-held corporation like Microsoft. Second, the prohibition extends not only to the judge's own financial interests, but also to the financial interests of the judge's "spouse or minor child residing in his household." Third, the prohibition cannot be waived. Indeed, none of the specific circumstances listed in subsection (b) are subject to waiver.[8] Finally, although the statute requires judges to inform themselves about their "personal . . . financial interests," experience has shown that judges can easily fail to remember or recognize that they own shares in corporations that are parties to cases on their dockets. When they proceed to adjudicate those cases, they are violating § 455, however inadvertent or unknowing their conduct.

Journalists, litigants, and other citizens can monitor judges' compliance with § 455(b)(4), but doing so requires considerable effort. Judges, like other federal officials, are required to file annual financial disclosure statements listing their stock holdings.[9] But the reports are not readily accessible by anyone outside the judiciary. The documents are filed only in Washington, and the Judicial Conference of the United States, citing security concerns, has resisted efforts to make their contents available on the Internet. Moreover, when investigators are able to review the reports, they often find that some of the required information has been omitted. And because the reports are filed annually in May and cover the previous calendar year, they will not necessarily reflect a judge's current holdings at the time of hearing a case.

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[8] *See id.* § 455(c). In contrast, waiver is permitted when "the ground for disqualification arises only under" § 455(a).

[9] *See generally* 5 U.S.C. app. § 101-111 (2000).

Notwithstanding these obstacles, newspapers and advocacy groups have occasionally undertaken investigations to determine whether federal judges have participated in cases in spite of a conflict of interest that mandated disqualification under the statute. One well-known example is the study conducted by the Kansas City Star in 1998. The newspaper reported that federal judges in Kansas City and elsewhere "repeatedly have presided over lawsuits against companies in which they own stock." A year later, the Community Rights Counsel (CRC) publicized a research report indicating that in 1997 eight federal appellate judges took part in at least eighteen cases in which they had a disqualifying conflict of interest.

This evidence of repeated violations of § 455 was brought to the attention of Congress in November 2001. The occasion was a hearing of the predecessor of this Subcommittee—the Subcommittee on Courts, the Internet and Intellectual Property—on the operation of the misconduct statutes. No one seemed to dispute that the judges' participation in the conflict cases came about because of innocent mistakes or memory lapses. Nevertheless, as I observed in my own statement, "episodes of this kind are harmful to the judiciary. At best, the judges—and perhaps the winning lawyers—suffer embarrassment. At worst, a cloud is cast over the judges' integrity."

A few years later, history repeated itself: in 2006, blogs and advocacy groups accused two district judges – James H. Payne of the Eastern District of Oklahoma and Terrence W. Boyle of the Eastern District of North Carolina – of failing to recuse themselves from cases involving companies in which they held investments. Both judges had been nominated to their respective courts of appeals. Judge Payne withdrew as a nominee, largely because of the conflict-of-interest

accusations; Judge Boyle was not confirmed to the appellate court (though the alleged conflicts were not the major issue).

Perhaps prompted by these new controversies, in September 2006 the Judicial Conference of the United States – the administrative policy-making body of the federal judiciary – adopted an important measure to avoid such episodes in the future. The Conference directed all federal courts (except for the Supreme Court, over which the Conference has no jurisdiction) to institute "automatic conflict screening" using standardized hardware and software. The new policy—implemented and directed by the circuit councils—requires all federal judges to "develop a list identifying financial conflicts for use in conflict screening, [to] review and update the list at regular intervals, and [to] employ the list personally or with the assistance of court staff to participate in automated conflict screening."

The Judicial Conference initiative was widely applauded, and we can hope that the new policy will reduce to a minimum the instances in which judges participate in cases involving corporations or other entities in which they own stock. But computerized conflict screening is not necessarily a complete solution. It is a purely internal mechanism, and in my view, there are issues of transparency that an internal mechanism does not address. In Part IV of this statement I will suggest an additional step to complement the automatic conflict screening program.

B. Other issues relating to disqualification under § 455(b)

Except for the "financial interest" provision, the specific prohibitions of § 455(b) seldom become the subject of media coverage, nor have they given rise to an extensive body of reported decisions. This is so in part because the other circumstances that require recusal occur less frequently than financial conflicts

and in part because the criteria are easily applied. For example, under § 455(b)(2), a judge must not sit on a case if "in private practice he served as lawyer in the matter in controversy." But after a judge has been on the bench for several years, such cases will be rare. Nor will there be many cases in which a judge must recuse himself because he "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding." The statute also requires recusal where a judge or a close relative is a party to the proceeding or is acting as a lawyer in it. Circumstances of that kind will generally be so obvious that recusal will be immediate, automatic, and not worthy of notice anywhere outside the docket sheet.

A different situation is presented by § 455(b)(1), which provides that a judge must disqualify himself "[w]here he has a personal bias or prejudice concerning a party." One would not expect to see many cases in which a federal judge was found to have an actual "personal bias or prejudice concerning a party," and one does not. As the Seventh Circuit said more than 20 years ago: "The disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by *compelling evidence*."[10] That is an extremely stringent standard and, not surprisingly, there are few decisions holding that a litigant has made the necessary showing.

As a practical matter, however, the difficulty of proving actual bias under § 455(b)(1) counts for little. The reason is that the concerns that underlie § 455(b)(1) are served by reliance on § 455(a), which requires disqualification "in any proceeding in which [a judge's] impartiality *might reasonably be questioned*." To that important provision I now turn.

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[10] United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (emphasis added).

C. Disqualification under § 455(a)

Section 455(a) requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." How have the courts interpreted that requirement, and what does it mean in practice?

1. The "reasonable observer" standard

The courts have held that § 455(a) "adopts the objective standard of a reasonable observer."[11] To be sure, the reasonable observer is one who is "fully informed of the underlying facts."[12] As the Second Circuit has said, "the existence of the appearance of impropriety is to be determined 'not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether *a reasonable person knowing and understanding all the relevant facts* would recuse the judge.'"[13] But the courts also stress that "the hypothetical reasonable observer is not the judge himself or a judicial colleague but *a person outside the judicial system*."[14] This external perspective elevates the standard at least to some degree, because "these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be."[15]

As a corollary of this approach, the courts are careful to emphasize that a finding that recusal is required under § 455(a) is not tantamount to saying that the judge harbors actual prejudice toward a litigant or class of litigants. Typical is this

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[11] United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000).

[12] *Id.* (internal quotation marks omitted) (quoting Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir. 1988).

[13] *Id.* at 126-27 (alteration in original) (emphasis added) (quoting *In re* Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)).

[14] United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998) (emphasis added).

[15] *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990).

statement by the Third Circuit: "We underscore that we are not intimating that Judge Kelly actually harbors any illegitimate pro-plaintiff bias. The problem, however, is that regardless of his actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted."[16]

The statute's focus on the reasonable observer's *perception* of bias led the Supreme Court to conclude that when the circumstances create an appearance of partiality, recusal is required under § 455(a) "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case."[17] The case was *Liljeberg v. Health Services Acquisition Corp.*, and it involved a district judge whose failures of memory were aptly characterized by the Court as "remarkable." The Court rejected the argument that its interpretation of the statute "call[s] upon judges to perform the impossible—to disqualify themselves based on facts they do not know." Rather, the statutory requirement comes into play when the judge learns of the disqualifying facts; the judge is then "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." If the judge fails to do so, relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure may be available. In the case before it, the Court found that the circumstances were so suspicious that the court of appeals was justified in reopening the closed litigation and ordering a new trial.

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[16] *In re* Sch. Asbestos Litig., 977 F.2d 764, 782 (3d Cir. 1992).

[17] Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860-61 (1988) (quoting opinion below, 796 F.2d 796, 802 (5th Cir. 1986)).

2. Application of the standard

The body of decisions applying § 455(a) is large and varied. Occasionally a court of appeals uses the case before it as a vehicle to establish a rule applicable to an entire class of cases. For example, the Third Circuit exercised its supervisory power to require that district judges within the circuit recuse themselves "from participating in a 28 U.S.C. § 2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which that judge presided in his or her former capacity as a state court judge."[18] But that kind of categorical rulemaking is rare. Ordinarily, recusal motions under § 455(a) "are fact driven," and the outcome will depend on the court's "independent examination of the unique facts and circumstances of the particular claim at issue."[19]

The cases span a wide gamut of judicial behavior, including personal animosity, public comments, and pre-appointment activity. The Federal Judicial Center monograph provides a thorough summary of the published decisions; additional illustrations are found in an article that I published two years ago.[20]

These compilations provide a valuable insight into the operation of the system, but it is important to recognize that the picture they present is incomplete and indeed distorted. When a trial judge grants a motion to recuse or takes himself out of a case sua sponte, there will be no appeal and no appellate decision, reported or otherwise. Moreover, the cases we see are those in which the disqualification issue is close or in any event not readily resolved. The corpus of

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[18] Clemmons v. Wolfe, 377 F.3d 322, 329 (3d Cir. 2004).

[19] United States v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999).

[20] FJC Recusal Study, supra note 6, at 14-51; Hellman, Judicial Ethics, supra note 4, at 199-200.

decisions thus gives the impression that the system is fraught with uncertainty and controversy – an impression that is almost certainly misleading.

3. The "extrajudicial source" doctrine

An important limitation on § 455(a) was reaffirmed by the Supreme Court in the 1994 decision in *Liteky v. United States*.[21] The Court held in *Liteky* that the so-called "extrajudicial source" doctrine applies to § 455(a). Although the Court asserted that "there is not much doctrine to the doctrine," the opinion makes it very difficult for a litigant to secure recusal without relying on an "extrajudicial source." This follows from two propositions endorsed by the Court:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they . . . can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Given this language, it is predictable that "courts of appeals rarely reverse refusals to recuse when the alleged partiality did not derive from an extrajudicial source."[22]

The Court in *Liteky* was careful, however, to distinguish between *rulings* by a judge and *comments* that a judge might make incident to a ruling. In rare cases, comments in the course of a judicial proceeding can demonstrate bias requiring recusal. The point is illustrated by a recent Tenth Circuit decision involving a colloquy at a sentencing hearing following a plea agreement.[23] The trial judge

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[21] 510 U.S. 540 (1994).

[22] FJC Recusal Study, supra note 6, at 21.

[23] United States v. Franco-Guillen, 196 F. App'x 716 (10th Cir. 2006).

said, "I will not put up with this from these Hispanics or anybody else, any other defendants." This was followed by another reference to "a Hispanic defendant" who was "lying" to the judge. The court of appeals held that the judge should have recused himself sua sponte, saying, "The judge's statements on the record would cause a reasonable person to harbor doubts about his impartiality, without regard to whether the judge actually harbored bias against [the defendant] on account of his Hispanic heritage."

4. Trial-court referral and appellate review

Motions for recusal are generally decided by the judge who is the subject of the motion. Indeed, some courts have taken the position that there is no option to do otherwise – that, under the statute, such motions "*must* be decided by[] the very judge whose impartiality is being questioned."[24] The language of § 455 certainly lends itself to that interpretation, but other courts have determined that it is permissible for the target judge to refer the matter to another judge, and that is sometimes done. For example, in a prominent Florida environmental case, one of the parties sought disqualification of District Judge William M. Hoeveler because of a series of comments he had made to newspapers. Judge Hoeveler referred the motion to the chief judge of the district, who granted the motion.[25]

As the citations above illustrate, a trial judge's refusal to recuse is subject to appellate review. Sometimes, as in the Tenth Circuit case involving comments about Hispanics, the issue is raised on appeal from a final judgment. More often, the party seeking recusal files an interlocutory appeal. "All courts of appeals

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[24] In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994) (Kozinski, J.) (emphasis added).

[25] United States v. S. Fla. Mgmt. Dist., 290 F. Supp. 2d 1356 (S.D. Fla. 2003). The opinion noted: "In the Southern District of Florida the practice is to refer such motions, if referred, to the Chief Judge." *Id.* at 1359 n. 1.

permit a party to seek interlocutory review via mandamus, reasoning that, at least in some cases, the damage to public confidence in the justice system (or perhaps to the litigants) would not be undone by post-judgment appeal."[26] Except in the Seventh Circuit, the courts of appeals apply an "abuse of discretion" standard.[27] On occasion, the reviewing court, rather than requiring a judge to step down from a case, will suggest that the judge reconsider his refusal to recuse.[28]

D. Reassignment "to preserve the appearance of justice"

It would be easy to assume that §§ 144 and 455 are the only provisions in the Judicial Code that permit a party to seek a judge's removal from a case on the ground of actual or apparent bias. But that is not so. Independent of those statutes, when a case is remanded for further proceedings in the district court, the court of appeals has power to order that the case be reassigned to a different judge. This authority comes from 28 U.S.C. § 2106, which provides in general terms that all federal appellate courts, in reviewing cases, may "require such further proceedings . . . as may be just under the circumstances."[29]

When District Judge Manuel L. Real testified at an impeachment hearing held by the House Judiciary Committee in 2006, he emphasized that "I have never been sanctioned for any judicial misconduct." That was correct at the time, but on several occasions the court of appeals had reassigned Judge Real's cases "to

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[26] FJC Recusal Study, *supra* note 6, at 68.

[27] *Id.* at 65.

[28] *See, e.g.*, Moran v. Clarke, 296 F.3d 638, 648-49 (8th Cir. 2002) (en banc).

[29] For a discussion of the reassignment power under § 2106, see United States v. Sears, Roebuck & Co., Inc., 785 F.2d 777, 779-81 (9th Cir. 1986).

preserve the appearance of justice."[30] In one of the cases Judge Real denied a litigant's motions before they were even filed; the record also reflected "incidents of animosity" toward the party's counsel.[31] The court of appeals thus used § 2106 as a device for enforcing an ethical standard almost identical to that of § 455(a). The court did so again a few weeks after the impeachment hearing. It found that Judge Real, presiding over an employment discrimination suit, "fail[ed] faithfully to apply our prior decision in [the] case."[32] The court acknowledged that the plaintiff had not satisfied the "demanding" test for proving actual judicial bias, but it ordered reassignment under § 2106 "to preserve the appearance of justice."[33]

Other courts of appeals have invoked their supervisory authority and § 2106 in a variety of circumstances involving evidence of bias or antagonism on the part of a district judge. For example, the Fifth Circuit removed District Judge Samuel Fred Biery, Jr., from a criminal case "because of [the] judge's brazen antagonism to both the tenets of the [sentencing] guidelines and to [the defendant]."[34] The appellate court condemned Judge Biery's behavior in extraordinarily strong language: "[W]e remove the district judge from this case because he has breached the barrier between the rule of law and the exercise of personal caprice."

It appears that the *Liteky* guidelines do not apply to the exercise of supervisory power by courts of appeals under § 2106. The Supreme Court said in

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[30] Subsequent to the impeachment hearing, Judge Real was publicly reprimanded by the Judicial Council of the Ninth Circuit for the conduct that was the subject of the hearing. See infra Part III.

[31] Beckman Instruments, Inc. v. Cincom Sys., Inc., 2000 WL 1023224, at *4 (9th Cir. July 25, 2000) (unpublished table decision).

[32] Obrey v. England, 215 F. App'x 621, 623 (9th Cir. 2006) (mem.).

[33] *Id.* at 624. For further discussion of cases involving Judge Real, see infra Part III.

[34] United States v. Andrews, 390 F.3d 840, 851 (5th Cir. 2004).

Liteky that § 2106 "may permit a different standard," and courts of appeals have sometimes ordered reassignment of cases based on an appearance of bias created by a judge's prior rulings in the proceedings under review.[35]

III. Abuse of Power and the Judicial Misconduct Statutes

In June 2008 – one year before the *Caperton* opinion came down – two Justices of the Supreme Court expressed concern about the impartiality of a *federal* judge. The judge was District Judge Manuel L. Real of the Central District of California – the judge who was the subject of the impeachment hearing in 2006 and whose cases have been reassigned so often under 28 USC § 2106. Judge Real was sitting by designation in the District of Hawaii, and the case involved competing claims to funds in a brokerage account established by the former Philippine president Ferdinand Marcos. Justice John Paul Stevens (in a dissenting opinion) described some of the actions taken by Judge Real in the case and said: "These actions bespeak a level of personal involvement and desire to control the Marcos proceedings that create at least a colorable basis for the [litigants'] concern about the District Judge's impartiality."[36] He suggested that it would be desirable to transfer the case to a different district judge. Justice David Souter agreed.[37]

On remand from the Supreme Court, Judge Real continued to preside over the proceedings. Some of the parties requested an accounting. Dissatisfied with the

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[35] That is certainly what the Ninth Circuit has done in many of the cases involving Judge Real. Last year, the Federal Circuit removed Judge Real from a patent case, invoking § 2106 and pointing to "a pattern of error based on previously-expressed views [and] findings." Research Corp. Technologies, Inc. v. Microsoft Corp., 536 F.3d 1247, 1255 (Fed. Cir. 2008).

[36] Republic of the Philippines v. Pimentel, 128 S. Ct. 2180, 2196 (2008) (Stevens, J., dissenting).

[37] Justice Souter said: "For reasons given by Justice Stevens, I would order that any further proceedings in the District Court be held before a judge fresh to the case." *Id.* at 2198 (Souter, J., dissenting).

accounting that Judge Real provided, they appealed to the Ninth Circuit. They also asked that the case be reassigned. Just last month, the Ninth Circuit Court of Appeals handed down its decision.[38] The court noted that Judge Real's written accounting was "filled with cryptic notations," and that his oral accounting "contradicted the record on several points." Judge Real's handling of the case on remand, the panel said, "confirm[ed] the prescience of [the views expressed by Justices Stevens and Souter]." It ordered the case reassigned to a different district judge.

This was not the first time that Judge Real's behavior has been criticized in strong terms by his fellow judges. In January 2008, Judge Real was formally reprimanded by the Judicial Council of the Ninth Circuit for his conduct in improperly intervening in a bankruptcy case to help a woman whose probation he was supervising after she was convicted of various fraud offenses.[39] The reprimand was issued under the authority of the Judicial Conduct and Disability Act of 1980 (1980 Act).[40] It was based on findings made by the Council and

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[38] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc., -- F.3d – (9th Cir. Nov. 13, 2009).

[39] The Judicial Council order was actually filed in November 2006, but the order of reprimand was not issued until after it was approved by the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States. That did not occur until January 2008. The documents can be found on the Ninth Circuit website, http://www.ce9.uscourts.gov/misconduct/orders.html?OpenDocument, under the date of January 17, 2008.

[40] For a brief account of the procedures under the 1980 Act, see Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 Justice System J. 426 (2007). For a more detailed account of the history and operation of the misconduct system, see Hellman, Judicial Ethics, supra note 4, at 206-41. For a description and analysis of the new national rules for handling misconduct complaints, see Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 Notre Dame J. L. Ethics & Pub. Pol. 325 (2008). The latter can be accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116703.

endorsed by the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States (Conduct Committee). The Conduct Committee wrote:

> First, [Judge Real's] versions of relevant events have been incomplete and involved serious, material variations. Second, there is overwhelming evidence that [Judge Real's] withdrawal of the reference of the bankruptcy proceeding was based on a contact with the debtor, … and occurred without any notice to other parties to the bankruptcy proceeding. This was judicial action based on an improper *ex parte* contact …

Of greater relevance to the present hearing is a misconduct proceeding growing out of a separate complaint against Judge Real under the 1980 Act. This complaint alleged that Judge Real had committed misconduct by engaging in a "pattern and practice of failing to state reasons when required." The chief judge of the Ninth Circuit referred the complaint to a special committee. The committee carried out a wide-ranging investigation, examining more than 80 cases handled by Judge Real.[41] After reviewing the special committee report, the Judicial Council of the Ninth Circuit concluded that Judge Real had failed "in many cases to give reasons for his rulings when the law require[d] that reasons be given." The council pointed to Judge Real's "obduracy in implementing many directives from the appellate court." And it found that "Judge Real's acts and omissions have resulted in needless appeals and unnecessary cost to litigants in both money and time, and have tended to undermine the public's confidence in the judiciary." These occurrences were "more than anecdotal or occasional."[42]

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[41] Not all of the 80 cases were relevant to the "failure to state reasons" aspect of the misconduct proceedings.

[42] In re Complaint of Judicial Misconduct, Nos. 07-89000 & 07-89020 (Judicial Council 9th Cir. Dec. 12, 2008), available at http://www.ce9.uscourts.gov/misconduct/orders/07_89000_and_07_89020.pdf.

Notwithstanding these seemingly damning findings, the Council ordered dismissal of the complaint. It did so because the Conduct Committee, in an earlier phase of the proceedings, had determined that a "pattern and practice" of the kind alleged could not constitute misconduct unless there was "clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law." The special committee and the Ninth Circuit Judicial Council could not find that clear and convincing evidence.

To many people, this outcome will seem perplexing if not indeed perverse. The Council found that Judge Real was obdurate in failing to do what the law required him to do. His acts and omissions "resulted in needless appeals and unnecessary cost to litigants in both money and time." But this behavior did not constitute "conduct prejudicial to the effective and expeditious administration of the business of the courts" and thus could not be the basis for discipline under the 1980 Act. How can this be? The answer is that, in the view of the Conduct Committee, the allegation against Judge Real was, in substance, a challenge to the merits of Judge Real's rulings. As such, it could not constitute misconduct under the 1980 Act except under narrow and extreme circumstances.

The 1980 Act is not the subject of this hearing, and this is not the time or place to address the correctness of the Conduct Committee's interpretation of the statute. The point, rather, is that Judge Real's actions in the probationer's bankruptcy case and more recently in the Philippine assets case were not aberrations in Judge Real's long career on the bench; on the contrary, they were all

too representative of a pattern of behavior that is totally at odds with judicial impartiality and the rule of law.

But Judge Real's behavior does not fit into any standard category of "bias" or "partiality." He has not displayed animus toward any particular group, nor does he pursue any ideological agenda. Rather, what we see in his behavior is arbitrariness and, often, abuse of power. Yet under current law there seems to be nothing that can be done about a loose cannon like Judge Real. At the start of a case, lawyers cannot make a motion under § 455 because there is no basis for arguing that the judge is biased in the particular litigation. Once the case is under way, the "extrajudicial source" doctrine makes it very difficult to secure recusal. As for a "pattern and practice" complaint under the 1980 Act, if Judge Real's record does not satisfy the Conduct Committee's standard, it is hard to believe that any judge ever will. In the next section of my statement I will suggest one measure that would spare at least some litigants from the kind of ordeal that so many have experienced in Judge Real's court.

IV. Suggestions for Improving the System

Over the years, a variety of proposals have been offered for improving the operation of the federal judicial recusal laws. Here I shall discuss two such suggestions. One focuses on financial conflicts of interest; the other addresses the broad spectrum of other situations in which a judge's impartiality might reasonably be questioned. I believe that these proposals have strong potential to advance the goals of promoting greater transparency and increasing public confidence in the judiciary. More briefly, I will also suggest a clarification of § 455 and a modification of the approach to appellate review taken in most of the circuits.

A. Financial conflicts and transparency

Shortly after the 2001 hearing on the operation of the federal judicial misconduct statutes, Subcommittee Chairman Coble and Ranking Member Berman wrote to Chief Justice Rehnquist in his capacity as presiding officer of the Judicial Conference of the United States.[43] They pointed to the "questions [raised] in some minds about judges' compliance with the laws governing disqualification." They explained how the existing system makes it difficult for litigants to discover whether judges own stock that requires recusal in a particular case. And they suggested a concrete remedy. They proposed that the Judicial Conference should "require all federal courts to adopt the Iowa model" for posting "conflict lists" on court web sites.

The "Iowa model" is an approach pioneered by the federal district courts for the Northern and Southern Districts of Iowa. Under that model, the court web site posts separate lists for each judge of the court. Each list is preceded by this statement: "Pursuant to this court's policy of disclosing relationships that pose potential or actual conflicts of interest, financial or otherwise, Judge [X] will not be handling cases involving . . . ." The list that follows may include names of corporations, individuals, and law firms. As Mr. Coble and Mr. Berman explained, this method of disclosure offers substantial advantages in comparison with judges' annual financial disclosure reports:

> The benefits of this practice are manifest: the likelihood increases that genuine conflicts will be flagged earlier in the litigation process; journalists and advocacy groups will have greater access to relevant information that will enable them to monitor judicial compliance with conflict-of-interest requirements; the lists can be more easily updated than annual hard-copy disclosure filings; and the legitimate privacy and safety interests of judges [are]

[43] The letter is reprinted in H.R. Rep. No. 107-459, at 16-18 (2002).

not compromised (since the lists only indicate that a judge is recused from cases involving specific corporations, and nothing more).

The automated conflict screening initiated by the Judicial Conference in 2006 addresses some of the concerns that underlay the Coble-Berman letter, but not all of them. First, conflicts of interest can be created by mergers, acquisitions, and other changes in corporate structure that a judge may not be aware of. Litigants may have more current knowledge, and if the lists are posted on the court website, a litigant can spot newly created conflicts at the outset of a case.

Second, internal conflict screening does nothing to address the interest in transparency. That interest underlies the requirement that judges file annual disclosure reports, but as discussed in Part II of this statement, experience has shown that the annual reports serve that interest very poorly.

The Coble-Berman letter also refers to "the legitimate privacy and safety interest of judges." Under current law, judges must provide details of their financial holdings in their annual reports, even though recusal is required irrespective of the size of the holding. Congress might well determine that if judges post conflict lists on court websites, those judges need not file detailed financial information in their annual reports.

I recognize that only a handful of judges now post their conflict lists on their courts' websites. (See Appendix for examples.) It would be useful to ask those judges about their experiences – and also to ask judges who posted this information in the past but do not do so now.

B. "Peremptory challenges" of judges

Thus far I have said little about 28 U.S.C. § 144. This might seem surprising, because § 144 would appear to furnish a powerful tool for a litigant seeking to

secure the recusal of a judge who he believes cannot decide his case impartially. Section 144 provides in part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein*, but another judge shall be assigned to hear such proceeding.

(Emphasis added.) Some commentators believe that this statute, originally enacted in 1911, was intended "to provide for peremptory and automatic removal of judges on a party's motion."[44] But that is not the way it has been interpreted, and "disqualification under [§ 144] has seldom been accomplished."[45]

Whether or not the Supreme Court misconstrued the intent of § 144 as originally enacted, I believe that Congress should give serious consideration to enacting a new law that would explicitly give each side in a civil case one opportunity to secure reassignment of the case to another judge. In colloquial terms, each side would have a right of "peremptory challenge."

Although this procedure would be a novel feature for the federal courts, there is ample precedent for it in state practice.[46] Moreover, the idea has been endorsed by numerous commentators and (at least in the past) by the American Bar Association. Of particular interest are the comments of the late John P. Frank of Arizona, a highly esteemed lawyer and a widely quoted authority on judicial

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[44] Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 666 (1985); see also Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 671 (2d ed. 2007) ("Congress clearly intended [the predecessor of § 144] to be peremptory.").

[45] Flamm, supra note 44, at 695.

[46] Mr. Flamm's book provides a detailed state-by-state description. *See id.* at 789-822.

disqualification. More than 30 years ago, Mr. Frank urged Congress to enact a statute allowing peremptory challenges of trial judges. He said:

> I personally strongly recommend the peremptory challenge system and urge its adoption for the federal trial courts . . . . If another judge is available, there really is no reason why a case should be heard before a particular judge if one of the parties would prefer someone else. The system must not be allowed to be abused and an instrument of delay, but this is easily guarded against. The overwhelming number of cases in the federal system are heard in multi-judge district courts – and the timely shift of a case from Judge A to judge B is no inconvenience to anyone. Particularly in the large courts where cases are assigned by chance, the peremptory challenge serves as a constructive antidote to the inevitable occasional misfunctioning of the chance assignment system.[47]

The argument for a peremptory challenge system was also made in the 1987 edition of the American Bar Association's Standards Relating to Trial Courts. After discussing a recommended standard on disqualification for cause, the commentary continued:

> Consideration should be given to adopting a procedure for peremptory challenge of a judge. The theory of such a procedure is that a party should be able to avoid having his case tried by a judge who, though he is not disqualified for cause, the party believes cannot afford him a fair trial. . . . Although a party is not entitled to have his case heard by a judge of his selection, he should not be compelled to accept a judge in whose fairness or understanding he lacks confidence if that can be avoided without interfering with administration of the court's work. . . . Experience in jurisdictions having the peremptory challenge procedure indicates that, when subject to proper controls and limitations, it can provide [an additional measure of assurance to parties] without burdensome additional cost or complications in trial court administration.[48]

Although this commentary does not appear in the 1992 revision of the Standards, the argument remains persuasive. More recently, the ABA's Standing Committee on Judicial Independence has expressed support for the idea.

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[47] Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 63 (1973) (statement of John P. Frank).

[48] American Bar Association, Standards Relating to Trial Courts 51-52 (1987).

Allowance of peremptory challenges may also contribute to efficiency. In many instances, litigants who might otherwise file a motion to recuse would instead use the peremptory challenge. The saving in time, effort, and cost could be considerable. Peremptory challenges may also reduce antagonism between lawyers and judges, because (in the model I would prefer) the litigant would not have to allege bias or the appearance of bias on the part of the judge, as is required by the disqualification statute.

A peremptory challenge procedure also offers a means – perhaps the only means – of dealing with a judge like Manuel Real. Almost any lawyer familiar with Judge Real's record of reversals and reassignments would be legitimately dismayed upon learning that his case had been assigned to Judge Real; yet under current law, the lawyer would ordinarily have no basis on which to seek the judge's recusal. Although the availability of a peremptory challenge might mean that Judge Real would get no cases and would sit idle in his chambers, I think that outcome is preferable to the "needless appeals and unnecessary cost[s]" that occur under the present system.[49]

A contrary view of the peremptory challenge idea is taken by a Federal Judicial Center report authored by Alan J. Chaset and published in 1981. Space does not permit detailed discussion of Mr. Chaset's arguments; however, I note that many of his points apply only to criminal cases, which I would exclude from a peremptory challenge system, at least initially. Beyond that, many of the concerns raised by Mr. Chaset are quite speculative. Indeed, there is a sharp contrast between his dire predictions of future consequences and the generally positive picture that emerges from his report on the experience in the states.

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[49] See supra text accompanying note 42 (quoting Ninth Circuit Judicial Council order).

In any event, I do not propose that a peremptory challenge procedure be incorporated into the Judicial Code at this time. Rather, I suggest that Congress implement the idea through a pilot or demonstration program. Specifically, the legislation would authorize peremptory challenges of judges in civil cases in a small number of large and medium-sized judicial districts for a limited time. Congress would ask the Federal Judicial Center to monitor the use of the procedure in the pilot districts and to report its findings to Congress and the Judicial Conference of the United States. Based on the findings, Congress would decide whether to expand the program, modify it, or allow it to die.

C. Authority to refer recusal motions

As noted in Part II, some courts (probably the majority) take the position that a motion for recusal under § 455 *must* be decided by the judge who is being asked to step aside. There is no option to refer the matter to another judge. Whether or not this is a correct interpretation of the current statute, I do not think it is sound policy. If the judge believes that the decision is best made by someone who will approach it from an outsider's perspective, he or she should be able to refer the motion to a judge who will provide that perspective.

I suggest that this Subcommittee draft an amendment to § 455 to make clear that judges are permitted to refer recusal motions to another judge of the district. The legislation might adopt the practice of the Southern District of Florida and specify that referred motions are to be considered by the chief judge of the district;[50] however, I would add a provision authorizing the chief judge to designate another judge to decide all or particular motions.

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[50] See supra note 25.

D. Standard of appellate review

In most circuits, as stated in Part II, a judge's refusal to recuse is reviewed by the court of appeals for "abuse of discretion." This is a deferential standard, though my sense is that the actual degree of deference may not always be as great as the phrase suggests. Still, a question can legitimately be raised as to whether "abuse of discretion" is an appropriate test. The Seventh Circuit reviews de novo, explaining that "appellate review of a judge's decision not to disqualify himself, when he is asked to do so by a proper and timely motion supported by affidavits and perhaps other evidence, should not be deferential. The motion puts into issue the integrity of the court's judgment."[51]

The point is a good one, and I think courts outside the Seventh Circuit should take it into account in reviewing a judge's denial of a motion seeking his disqualification under § 455. This is something the courts may well be able to do within the framework of the "abuse of discretion" standard, as the Third Circuit has intimated.[52] On the other hand, if the motion has been referred to another judge for the initial decision, the traditional deferential stance makes much more sense.

(Appendix follows.)

1. Conflict List, District Judge Mark W. Bennett (N.D. Iowa).
2. Conflict List, District Judge Henry Lee Adams, Jr. (M.D. Fla.).

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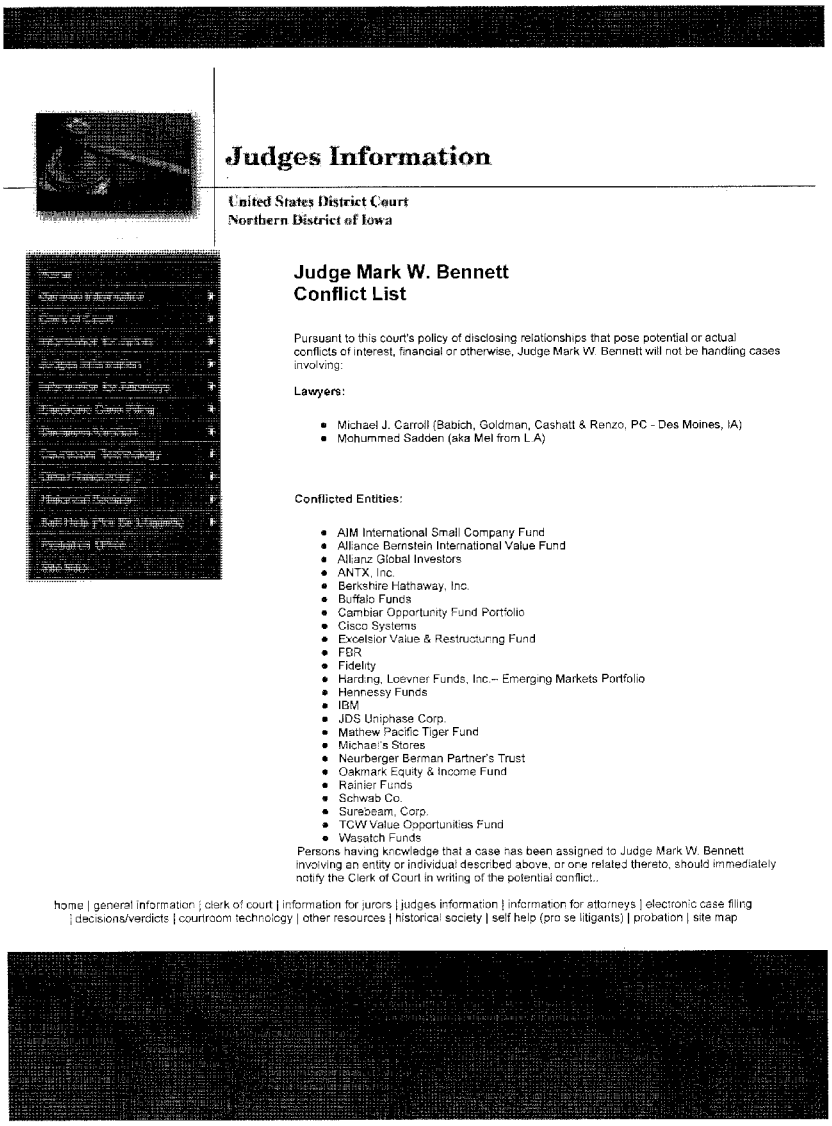
[51] United States v. Balistrieri, 779 F.2d 1191, 1203 (7th Cir. 1985).

[52] See In re Kensington Intern. Ltd., 368 F.3d 289, 301 & n.12 (3d Cir. 2004).



Judges Information

United States District Court
Northern District of Iowa

Judge Mark W. Bennett
Conflict List

Pursuant to this court's policy of disclosing relationships that pose potential or actual conflicts of interest, financial or otherwise, Judge Mark W. Bennett will not be handling cases involving:

Lawyers:

- Michael J. Carroll (Babich, Goldman, Cashatt & Renzo, PC - Des Moines, IA)
- Mohummed Sadden (aka Mel from L.A)

Conflicted Entities:

- AIM International Small Company Fund
- Alliance Bernstein International Value Fund
- Allianz Global Investors
- ANTX, Inc.
- Berkshire Hathaway, Inc.
- Buffalo Funds
- Cambiar Opportunity Fund Portfolio
- Cisco Systems
- Excelsior Value & Restructuring Fund
- FBR
- Fidelity
- Harding, Loevner Funds, Inc.– Emerging Markets Portfolio
- Hennessy Funds
- IBM
- JDS Uniphase Corp.
- Mathew Pacific Tiger Fund
- Michael's Stores
- Neurberger Berman Partner's Trust
- Oakmark Equity & Income Fund
- Rainier Funds
- Schwab Co.
- Surebeam, Corp.
- TCW Value Opportunities Fund
- Wasatch Funds

Persons having knowledge that a case has been assigned to Judge Mark W. Bennett involving an entity or individual described above, or one related thereto, should immediately notify the Clerk of Court in writing of the potential conflict..

The Honorable Henry Lee Adams, Jr.
United States District Judge

Jacksonville Division

Interests List: Back to top

The hyperlink below is a list of investments, of which the judge is aware, owned by family members or by him, which are subject to reporting on his annual Financial Disclosure Report, or which could constitute a financial interest that might necessitate recusal. This information is provided so that participants in this case will be able to advise the Court if there is any actual or apparent conflict of interest in the assignment of a case to this Judge. This information is not to be used for any other purpose. Attention is directed to the Ethics Reform Act of 1989, published in Title 5 of the United States Code Annotated, Appendix 4, Sections 101-112, for information concerning the procedure for obtaining copies of the Financial Disclosure Report.

Interests List

United States District Judge Henry Lee Adams, Jr.
List of Financial Interests

INVESTMENTS AND STOCKS

Alcatel-Lucent
AT&T
Bank of America
Canadian Pacific, Ltd.
Coca-Cola Co.
Conoco-Phillips
Delhaize Group
Florida Rock Industries, Inc.
Generex Biotechnology Corp.
Ford Motor Company
IVI Communications, Inc.
Johnson & Johnson, Inc.
Microsoft Corp.
Motorola, Inc.
Pfizer, Inc.
Tyson Foods, Inc.

MUTUAL FUNDS

Dreyfus
Federated Kaufmann
Waddell & Reed C.M. Fund

Revised 8/13/2009

Mr. JOHNSON. Now we will go to questions. I will take the first questions. Each one of us will have 5 minutes to ask questions.

In my statement, I have addressed the Siegelman, Walker and Porteous cases. Clearly these cases exist because of some default in

our Federal judicial recusal laws. How can we mend the holes in our laws on the front end to prevent these types of issues on the back end? I want all of the panel members to respond to that, starting with Professor Hellman.

Mr. HELLMAN. Well, I will take up the suggestion of a peremptory challenge law. This is something that I think 19 States have adopted. Basically the way I would work it is that each side would have one peremptory challenge of the judge. You would just say, I think this judge should not sit on the case. The judge would not sit on the case. Congress can build on the experience but I would not put it into the judicial code right away. I suspect that the Judicial Conference will express concerns about it.

What I suggest, rather, is a pilot program to be monitored by the Federal Judicial Center which would report to Congress and the Judicial Conference. And based on that report, you could decide whether to expand the program, modify it, or discontinue it. So I think that would take care of a lot of those problems.

Mr. JOHNSON. Thank you, Professor. Mr. Reimer.

Mr. REIMER. Yes, Mr. Chairman. Our association has not taken a formal position on the various options that are out there. We have concerns about separation of powers in terms of how the judiciary regulates itself. But we do believe that consideration should be given, whether it is in the first instance by the courts and their own governing mechanism or ultimately by Congress, to several different remedies, including the concept that motions for recusal should be decided by other judges: There is also a very interesting suggestion of a peremptory challenge of a judge, as well as the most important, which is full disclosure of any potential conflicts.

Mr. JOHNSON. Thank you, sir. Professor Volokh.

Mr. VOLOKH. I wish I had some suggestions that I felt confident enough in, but I am afraid I don't. I would be happy to yield to my colleagues.

Mr. JOHNSON. All right. Thank you, sir. Professor Flamm. Well, I called you Professor but——

Mr. FLAMM. I like it. Without knowing the specific facts of all the cases, I am not sure if I can properly opine on what provisions might prevent some of the problems you have alluded to.

The peremptory challenge provision that has been suggested is one that I think has worked very well in my home State of California. It seems to be fairly popular with attorneys and parties, and most judges but to my knowledge aren't too upset with it. I am not sure if it would cure any of the problems in the cases you have referred to, however, because peremptory challenge usually has to be exercised right at the outset of the case or right at the outset when a litigant first learns the identity of a judge. If they don't exercise it at that point, they can't do it later on. And usually when a motion to disqualify is based on bias, in most cases the bias doesn't appear until much later in the case. I am not sure if peremptory challenge would solve the problem in the specific cases you refer to.

I am not exactly sure of what would solve all the problems, but a more rigorous enforcement of the laws Congress has already enacted would certainly be a start.

Mr. JOHNSON. Thank you, sir. Professor Geyh.

Mr. GEYH. As I testified before, I think that the business of asking a different judge than the one who stands challenged would be a useful place to start, both for judges who are well-intentioned and think that they are impartial when they are not, and for judges who are less than well-intentioned who could conceivably be outed by such a process.

The problem is—and this refers back to something Mr. Flamm mentioned—in some of the cases we are talking about here, we have very late motions being filed or none at all for disqualification, and the success of this process does depend to no small extent on people filing timely motions, which complicates my analysis because we can't refer something to another judge if a motion isn't filed in the first place at the appropriate point in time.

Mr. JOHNSON. Thank you, sir. Last but not least, Judge McKeown.

Judge MCKEOWN. Let me first say that it is always difficult to generalize from three specifics or anecdotal situations. Nonetheless, it may be worth studying to see if there is something in the current system that didn't work.

But I think, as the other gentlemen have noted, that in the case of certain claimed dishonesty or direct flouting of the law that it is very difficult to write that into a procedure, and that there may be situations that can't be cured other than by the proceedings that have gone on. Judge Porteous, as you know, was referred to the House by the Judicial Conference itself.

I would like to comment very briefly, if I might, on the peremptory challenge issue or the one strike, just to let you know that this issue has been considered in the past by the Judicial Conference which opposes the peremptory disqualification of judges for several reasons. One, that it does encourage judge-shopping. Second, there is concern that that kind of a peremptory challenge would threaten the independence of the judiciary. And third, that it poses some very real issues in terms of case management, particularly, for example, in small districts, where an example might be the Southern District of Georgia where you only have three judges and in certain towns you only have one judge. If you have this kind of automatic disqualification there are very real concerns for both parties and the system with respect to cost and delay. The Federal districts are often very large, unlike the States, which generally operate in a county system.

So there are a number of reasons that the Judicial Conference opposed the peremptory disqualification, but of course we have in place the motion for recusal. If that motion is made, then there is quite a regularized procedure for that to move through the courts and on appeal.

Mr. JOHNSON. Thank you, Judge. My time has expired. The next person to ask questions will be the Ranking Member, Mr. Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. At the outset I said it appeared that we had a formidable panel. My words were prophetic; we do indeed have a formidable panel. Good to have you all with us.

Professor Hellman, this may have been touched on, but I want to revisit it. Would a recusal system that allows a litigant one pe-

remptory challenge per case be subject to abuse, A; and if so, what kind of abuse and how could this be checked?

Mr. HELLMAN. Thank you, Mr. Coble. Yes, it is subject to abuse. It can be, and the States have had some experience with that. I believe that the proposal was actually made to Congress by the late attorney John Frank among others in 1973. At that time, he pointed to experience in the States. We have now had, what, 30-plus more years of experience to draw on. So I think there is the risk. If you write the statute correctly and if you adopt my suggestion of doing it initially as a pilot project, those risks can be minimized.

Mr. COBLE. Professor, why would you not allow or permit a peremptory challenge in criminal cases?

Mr. HELLMAN. Well, first, I would. I am not opposed to them. The reason I suggested starting with civil cases and not including the criminal is twofold. First, every criminal case includes the United States Attorneys Office as a party, many of them include the Federal defender. And if either of those organizations decide that a particular judge could not hear their cases fairly, you would be in real trouble. Now I don't think they do that without great provocation. But if it happened it would be very disruptive.

The other—and Mr. Reimer may have something to say about this—it may be that each defendant in a criminal case would have to have his own right. And you have all these multiple-defendant narcotics conspiracy and other conspiracy prosecutions today, and that would be really disruptive. Whereas in a civil case, you could simply say, One to a side and that is it, no matter how many parties. So it is not opposition. It is just some practical concerns at the initial stage.

Mr. COBLE. I thank you, sir.

Mr. Reimer, you were sort of tough on candidates who accept contributions from third parties and who champion tough-on-crime philosophy. I am not being critical of you about that. What should happen to a candidate who campaigns on the ground that he opposes the death penalty and that he is subsequently elected? Should he be recused from hearing capital cases?

Mr. REIMER. Well, if the determination rests, as I believe it does now, pretty much exclusively in the hands of the jury, I don't think that that necessarily is a disqualifier.

Mr. COBLE. Would the same answer apply to, say, attorneys or candidates who accept contributions from trial lawyers? Should they be recused on tort cases?

Mr. REIMER. Well, on the issue of money, you have the *Caperton* case which basically talks in a very vague sense about the relative amount of money and the likelihood that it would impact the person's or the judge's ability to be fair.

I am more concerned and my association is more concerned less about the money itself than what the candidate is saying about how they will decide cases. And to me, that is a different slant on it than *Caperton*, where there was at least an appearance of a connection to one of the parties. That is a separate issue.

But when you have people going out there and saying, I am going to—I am always going to deny probation, for example, that is not a fair adjudication. Even if the judge makes the right deci-

sion in a particular case, the litigant is not going to feel that they got a fair shake.

Mr. COBLE. I got you.

Professor Volokh, your written testimony suggests that you don't think the current system is plagued with this many problems. Do you think some critics exaggerate the deficiencies of the system for other reasons?

Mr. VOLOKH. Every system has quite serious problems in particular cases. Some of them are—sometimes they may represent systemic problems with the system. Some of it may be the inevitable errors with any system that has humans in it.

Judge Porteous, for example, is being considered for impeachment. That, as I understand it, is for pretty serious transgressions. It is very hard to set up recusal rules that could adequately cabin people, judges, who engage in such transgressions.

Likewise, as I understand the second case that was mentioned, there was no motion to recuse filed before a judge. It is very hard to see that, declining to recuse in that case, as an example of a systemic problem with the recusal system because, as I understand it, all recusal systems are premised on a motion being filed in the first instance. So I am sure there are problems there as with any other system.

While I have heard some pretty systemic problems, at the very least alleged, I think with considerable weight behind them as to certain State systems, my sense is that the Federal system seems to have the kinds of problems that any working system or one that relies on human beings would have.

Mr. COBLE. Thank you, sir. I see my red light is illuminated. I thank you for being with us.

I yield back, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Ranking Member.

Next up at the plate is Chairman Conyers of the full Committee.

Mr. CONYERS. Thank you, Chairman. This has been a fascinating discussion this afternoon, necessitated by the fact that there is an investigation of an impeachment process going on in the room that this hearing was supposed to have been heard of a Federal judge. Only last week or the week before, we resolved another case of a Federal judge who reconsidered and decided to terminate his career as a judicial officer. And what this discussion has demonstrated to me, Chairman Johnson, is that this is a much more intricate subject than first meets the eye. It is complex.

Of course, I have to acknowledge quickly that lawyers like to make issues complex as a matter of profession perhaps. But behind the question about what to do and all of the issues that are involved in this, there is another question that has occurred to me and I think every Member of this Subcommittee. That is the larger question of the fairness of the American system of justice, period, without particular reference to the judges, State or Federal.

One of the things that draw us and our staff to is, how do you do that? It is so fascinating, isn't it, that here we are in a country that has been working through this process for 236 years or so, and there are still some very big questions out there that have yet to be resolved.

I would like to just—please feel free to interject your views at any point in this. I am approaching this as the Chairman of the Committee, that I went to the Speaker of the House then to it appeal that I be the first African American in the history of the Congress to be placed on the Judiciary Committee. And he was impressed with that. Speaker John W. McCormack was his name.

At that time there were only lawyers could be on the Judiciary Committee; no scholars or professors or business people. We have relaxed that now. We don't do that anymore. In the Senate Judiciary Committee, they adopted the same process.

So we will be looking, beyond this afternoon's hearings, for any subsequent recommendations of how we ought to proceed from you and any ideas that may come from your colleagues or anybody in the system, because this is the way democracy works at its best, when we have a candid review.

Now, I came to Congress working with Bob Kastenmeier. I am going to tell him about you and what you did and said here, Professor, because much of it was very good. Could I get an additional minute, Mr. Chairman?

Mr. JOHNSON. Without objection.

Mr. CONYERS. What I would like to do now is just to invite all of you, if our Chairman would indulge, to let you tell us how this subject matter relates to the greater issue that hangs over us all as members of the bar and members of the court in terms of how these two come together and how we ought to look at this exciting part of the Federal legislature.

The Judiciary Committee reviews constitutional amendments that are proposed by the Members; jurisdiction over the criminal justice system and the Federal corrections system as well; intellectual property matters of trademark, patents, copyrights, all exciting subjects, treaties even. If any of you would just like to give us a parting thought about how you see this discussion I am trying to raise, I would be very grateful.

Mr. GEYH. I would be happy to offer a 30-second answer. It seems to me that the overriding theme of the committee's work is access to justice in all of the variety of forms that you articulate. And that that means that we need to worry, in order to provide access to justice, about how judges are selected, which is what Mr. Reimer is talking about; how judges are disciplined and removed, and Judge McKeown talked a little bit about that process; and how the courts are administered, which is beyond the scope of this hearing but is very much in your bailiwick.

To me, the problem is a perennial one because access to justice is an always-moving target. It is not a matter of getting it right because there is no way to get it right. You can only do the best you can at a moment in time, and that is really what the story is all about. I think right now we are at a given place in time and worrying about disqualification rules and what is the best system for the current place and time, that might not have been the best system 50 years ago. But that is fine. That is why there is always a Congress.

Mr. REIMER. If I can, just to amplify on some of the points I was making before, we have approximately 2.5 million people in prison. We have a conviction mill in our misdemeanor courts that is an ab-

solute disgrace. So we have countless numbers of our citizens passing through these systems. The mix of money and rhetoric and electioneering is undermining the faith of the people in the independence and impartiality of the judiciary.

That is the problem, and I don't think that one hearing is the answer. I proposed a study. I don't think one study is the answer. But we certainly have to shine a light on it if we are going to correct it, because, ultimately, if the people don't have confidence in the judicial system, we are in trouble.

Mr. CONYERS. Your Honor.

Judge MCKEOWN. Thank you. Mr. Chairman, I appreciate that you have recognized how intricate and complex these issues are and not just subject to a simple solution. But something that you said really was brought home to me and that is the importance of fairness in the system.

On that point, I think it is important, not just the actual fairness of the system, but the public's perception of the system. That is something that I think the Committee obviously is looking at here. What can we do?

Well, certainly we welcome, on the part of the Federal judiciary, simply having the subject of ethics being so prominent. It is important to us. It is important to the public. And we go back from this hearing with a renewed mission and vigilance to look at our ethics procedures and to continue with our education and with our advice.

I am happy to take back to members of the judiciary the many comments we have gotten from the Members, your thoughts and your concerns. It is a privilege to be able to be here, and we welcome ethics being first and foremost. It is important to us. It is important to the public.

Mr. HELLMAN. I will just add one thing to that. I think one of the problems that underlies some of the concerns is that judges are so used to carrying on most of their work in confidence that they don't always realize how important transparency is. I think one of the virtues of this hearing is that it emphasizes that. And I am sure Judge McKeown will go back to the Judicial Conference to the Circuit Council and to the other judges, and that will help to build understanding of the importance of not just doing the right thing, but telling people what is going on.

Mr. CONYERS. I thank you very much, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Chairman.

Is there anyone else that cares to respond? Okay. All right.

Well our next questioner—interrogator, some say—is the Honorable Sheila Jackson Lee out of Houston, Texas.

Ms. JACKSON LEE. Mr. Chairman, let me thank you very much for this very provocative hearing. And I think the Judiciary Committee, as I have come to understand, has a dominant role both in the business of this Congress, but also the important business of justice in this Nation. I believe in the optimism of America. And frankly believe that we can design the appropriate framework for the Federal bench to contemplate this whole area of recusal.

I would offer to say that as I listened to one idea—and I love creative thought about a preemptive strike of sorts—that I would only offer this expanded explanation. The Federal courts saved me, as a representative of a body of people that were second-class citizens

for centuries. And I am reminded of the courts that Thurgood Marshall went in, and was able to find Federal judges that would provide the opportunity for justice, the opportunity in *Brown v. Topeka,* and Justice Warren to be able to open the doors for opportunities for those individuals like myself. It has happened for women. It has happened for Latinos. It has happened for others of less economic conditions. So I am sensitive to this question of recusal or the automatic recusal.

I believe that our basic framework should be in the integrity of our judiciary. But at the same time when that integrity is pierced, we lose. The justice system loses. America loses.

And I do want to associate myself with the Chairmen, both the Chairman of the full Committee and the Chairman of the Subcommittee, on cases such as the former Governor of Alabama, Peter Polyvios and Vicky Polyvios, a case or cases that I have followed. The interesting point about these cases is that they include prosecutorial abuse where these petitioners are seeking documents that would help produce prosecutors and agents for interviews. We don't know whether there was a hand-in-glove relationship between prosecutors and judges. The Jenna Six case I consider expanded, because it deals with prosecutorial abuse where there was inaction as opposed to action.

So my point would be that we need to look at these questions with a very keen eye and a sensitive heart and mind, because what we do want to have happen is that lawyers can go into a court and find justice.

So I ask this question: I think the overall problem that we have is a stigma that comes about when a judge recuses himself or herself. People begin to look for suspicious behavior, and it may be that that judge has the highest level of integrity.

So my first question would be—and I would like you to go down the line. We need to develop from the highest levels the Attorney General's Office, the Judicial Conference, the Supreme Court, that recusal is not an indictment. It is not a conviction of that court and that judge, at the minimal level, if they decide to do that on the grounds of making sure there is integrity. My first question.

The second question is: Do you feel that we have a system of justice where there are victims because a judge has not recused themselves, because there is conflict of interest? And if that is the case, we cannot tolerate it.

I would appreciate it if we could start with the judge quickly on the stigma and how we can break that to make it all right for a judge to make a determination based on our criteria that they recuse themselves. If you could quickly go down because my time is short.

Judge MCKEOWN. Thank you. On that, I guess I would paraphrase yours to say recusal is not a four-letter word.

Ms. JACKSON LEE. I like that.

Judge MCKEOWN. We would like to have judges know that. I think we have made a good start at that. We have a number of these advisory opinions that start through all the reasons a judge should recuse, and we want judges to be mindful of that.

With your comments in mind, I think it just renews the importance of education in this area, because recusal is good for the judiciary and for the public when done appropriately.

Ms. JACKSON LEE. And you know that justice has been denied probably in cases where that recusal did not occur?

Judge MCKEOWN. You know, I do not have personal knowledge of various circumstances. I have seen cases where it came up on appeal and the court of appeals either reversed a denial of someone who declined to recuse, or a case where the court of appeals said, yes, we believe it was improper for the judge to stay on the case, and we are going to reassign that case both through our statutory authority and through our inherent oversight over the district courts.

Ms. JACKSON LEE. Mr. Chairman, could you indulge me an additional minute so I could just go down the line and just include in there whether you believe justice has been denied. I ask unanimous consent, Mr. Chairman.

Mr. JOHNSON. Without objection.

Mr. GEYH. The first problem to which you allude is one that really is a cultural one within the judiciary. At common law, the notion that a judge could be biased was simply not even contemplated. It was an irrebuttable presumption that a judge was impartial, that he couldn't be challenged. And while we are past that now, I think there is still the norm that they are impartial. I think it is a fair norm.

But getting to my earlier testimony, the problem is that judges are people too, and in the 20th century and beyond, we understand that judges as people, too, are subject to biases. So we need to reach that kind of agreement that, yes, we can presume impartiality without begrudging the fact that judges are human, too, and they are capable of the same biases and thoughts that others have. And when that happens and when they go over the top, they need to step down.

As to whether justice has been denied, I am sure that it has. The problem is that the only circumstances we have in which a judge has done badly is typically in cases where they are outed. So we have a hell of a time figuring out about the great silence, but I am sure it has happened. Identifying cases is hard.

Ms. JACKSON LEE. Thank you.

Mr. FLAMM. There are certainly cases where justice has been denied, and there are an exponential number of cases beyond that where litigants believe justice has been denied. I guess the one thing I would say about that is that no system that Congress—no framework that Congress enacts is going to cure that. There are always going to be problems with the system. There are always going to be some litigants that don't believe justice was served.

But as to the particular one that you alluded to, which is a mechanism for trying to alleviate some of that concern, the peremptory challenge, I think you have expressed a concern about a stigma associated with that. I think the opposite is true. I think that when there is no peremptory challenge, what tends to happen is that if a litigant is going to do anything at all, they are going to challenge a judge for cause and they are going to make a claim that the judge is actually biased. That is where judges tend to get their hackles

up and there tends to be a real donnybrook and there tends to be more public attention. If a peremptory challenge exists, and it can be exerted in a timely fashion, there is usually no stigma involved at all.

Ms. JACKSON LEE. That wasn't my exact point, but that is okay.

Mr. FLAMM. I will just add, in my home State of California, where we do have the peremptory challenge right, judges don't even see the peremptory challenge. It goes directly to the clerk and a new judge is assigned. So there is no stigma. Maybe that is one of the advantages of the peremptory challenge system.

I guess I should say that even in your home State of Texas, there is a peremptory challenge rule on the book now for visiting judges, and so far there has been no report that I have heard of any concern about abuse with that use of that statute.

Mr. VOLOKH. One reason I am cautious about some of the procedural proposals is precisely because I think recusal should be seen as not something to be embarrassed about. And in fact it is good if judges in close cases, even if they think recusal isn't strictly necessary, step aside just to avoid any shadow of a doubt.

Ms. JACKSON LEE. Without the stigma.

Mr. VOLOKH. Exactly. One problem, though, is that some of the suggestions might—I am not at all sure they will—but might have actually counterproductive effect along those lines. So for example, has has been called to encourage the publication of opinions explaining why a judge recused himself. That may be very good, but it might also leave judges in close cases to decline to recuse themselves because they don't want to set up precedent for themselves in the future, or they don't want to be seen as implicitly criticizing another judge who didn't recuse himself under similar circumstances. So in a sense, the ability to do a silent recusal actually encourages people to recuse themselves without having to give all the reasons and without having more attention. Perhaps it is still a good idea to have that, but once you consider some of these possible perverse consequences——

But as to your second question, I am positive that in any system the size of the Federal judicial system, injustice has been done because of failure to recuse them and because of lots of other reasons. The question is: Are there particular proposals that will diminish the risk that injustice will be done, rather than substituting some other possible causes for injustice which might be as bad or worse?

So the question isn't just, has it ever happened? I am sure it has happened. The question should be: Is there something that we think will materially decrease the risk of it happening without compromising other very important concerns?

Mr. REIMER. I want to just confine myself to answering the two questions; but just, again, recognizing that the slant that we have on this is concern about what is going on in the States and particularly the 39 States that elect judges. First of all, court administrators should encourage a climate in which recusal is acceptable. In many jurisdictions, judges are saddled with huge dockets and there is a lot of internal pressure to move these dockets along. So we need to have court administrators say, Look, if there is the slightest question in your own mind, give up the case. It is not bad. You won't get a demerit for doing that.

With respect to whether or not injustice has taken place, I don't know. I am sure that it has. But what I do know is that the perception of injustice is taking place. We can't know, because we can't look into the heart and mind of an individual judge to know whether or not their decision was colored by statements that they made before they took the bench or getting to the bench.

I am not concerned about the heart and the mind. I am concerned about the mouth. If they say it, and a litigant goes before them and they make a decision, it is a perception that the person hasn't had a fair chance.

Mr. HELLMAN. To start with the second question, unfortunately there almost certainly have been injustices in particular cases, because the cases are handled by judges who, as others have said, are human. The task for the judiciary and the Judiciary Committee and Congress is to minimize those and to build structures that will make them as infrequent as possible. I do think that the judiciary, as Judge McKeown said, takes its responsibilities in that very seriously. And on the question of whether a recusal is seen as an admission of a lack of impartiality, I am not sure that it is. I think that in many instances, it is seen as a judge conscientiously doing what the law requires him or her to do.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. You have been very kind. I hope for the Polyvios, and others as well, we can get justice. I yield back.

Mr. JOHNSON. Thank you.

Next we will have questions from a battle-crusted gentleman who practiced law and was a litigator before he was elected to Congress from the great State of Illinois, Mr. Mike Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman. A great introduction. About 200 trials under my belt, and I can still say after surviving 10 years in Cook County, some of my best friends are judges. But the recusal system worked pretty well there. And in the criminal cases I worked on, you had an absolute right to a substitution of judge, and in very serious cases, too, which I will tell you from practical experience saved the system a tremendous amount of angst and problems. If you know anything about Cook County, it worked very well. It worked through the chief judge's office. So the judge didn't know about it unless the case was already before him. And then in a certain time frame, you still had the right to make a motion for substitution and a right of recusal. So I thought it worked quite well. It was very rare that you saw a judge find out about it or get offended by it.

But as to the minority of judges—and I think it is a minority—who are deficient in some respects, in some cases, that can be ethically deficient or without the realization that they might have at least the appearance of impropriety, I always found it a very difficult time finding another judge willing to sit in judgment, and say I think my guy I go play golf with, or my partner, one of my fellow judges, you know, should step down in this because, as you say, I think someone said, besides the stigma, they are being accused implicitly of not being impartial. So is it harder to do it yourself? Or is it harder to do for somebody else that you worked with? So two professors I think mentioned that.

I mean, if you could give us your assessment of whether or not you think judges can effectively sit in judgment of each other toward this sort of motion?

Mr. GEYH. Your point is well taken. To me, a big part of it is the perception of justice. When you have the fox guarding his own henhouse, it creates more of a perception problem than when you defer the matter to another judge, another neutral.

I think there is a study that the American Adjudicative Society ran in the 1990's which did reveal that it is hard for judges to rule on each other. A situation where, you know, in a variety of situations where the judge basically has to find out what the facts are in an inquiry—for example, in taking the Judge Porteous matter, where a lot of information was simply not disclosed because questions were not asked. If those questions were asked, for example, of the lawyers involved as to what they did or did not do vis-a-vis the judge, would they have perjured themselves? Or would they have answered directly? We will never know because the judge himself was the only one conducting the hearing, not someone else.

I think your point is very well taken, that it is hard for a judge to rule on his colleague in much the same way as it is hard to rule on himself. So I think it is an important procedure to consider if for no other reason than I think it does protect the seemingly self-interested aspect of a judge grading his own paper.

Mr. FLAMM. Professor Volokh and I were discussing that during the break, and I mentioned that in California when a judge is challenged for cause, the motion is transferred to another judge, but it isn't one of the judge's colleagues. Typically a Superior Court judge in California, if they are challenged for cause, the motion will be transferred to a different superior court, and a judge from a completely different court will decide the motion.

There has been no survey of how this has worked out and all of the evidence is anecdotal. But from everything that I have seen and heard, it seems to work pretty well, and I am certainly aware of a number of situations in which judges, California superior court judges, came down very hard on judges from other courts in saying that they should have recused themselves and didn't, when it is not clear that a judge would have come to the same conclusion if he was going to decide that motion himself, or if another judge on the same court was going to decide the motion.

Mr. QUIGLEY. If I could ask you a question, Your Honor, in your heart of hearts, in looking at this don't you think that issue and the issues of a judge reviewing themselves or putting themselves—is more challenged when it is a Federal judge, because they don't face reelection.

Just from my own perspective, a judge who at least every 6 years in Illinois has to be not reelected, but they have to be brought back by the voters in a different process. I just think it is human nature that a few of us, and we are all thin-skinned, a few of us more than others, some wear black robes, but those who do it in Federal court, perhaps it is just human nature, and they might sense that they can't be touched, and it is just one more reason to challenge the system as far as you can.

Judge MCKEOWN. Well, I can't tell you as an empirical matter, but I can say that judges, Federal judges do in fact recuse on a reg-

ular basis and take themselves out of cases. I think they are comfortable, because within the system there are usually other judges to hear the case. So it does often happen that judges do recuse.

I don't think there is a stigma about recusal; but you raise a question as to whether someone else should hear the case. The Judicial Conference hasn't taken a position on that particular point, and certainly it might merit some additional inquiry and consideration.

Questions one might have if you were looking at this, is there some kind of a threshold in terms of frivolousness or patent frivolity? A second point would be, what would be the criteria for referral to another judge, or would it be a blanket referral?

And, finally, you would have to look at issues of cost and delay, particularly given the geography of the Federal system.

But you raise an interesting point, obviously. I, like you, I have practiced in both the Federal and the State system, and I think to some degree the fact that Federal judges are not elected in fact gives them both the ability and the cushion to perhaps do the right thing in an easier manner because they are not subject to an election.

Mr. QUIGLEY. I appreciate your remarks. Thank you.

Mr. JOHNSON. Thank you, Mr. Quigley. We will adjourn this hearing but I would like to thank all of the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions which we will then forward to the witnesses and ask that you answer as promptly as you can to be made a part of this record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

Again, I thank everyone for their time and patience today. This hearing of the Subcommittee on Courts and Competition Policy is adjourned.

[Whereupon, at 3:22 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Chairman Conyers
Subcommittee on Courts and Competition Policy
Hearing on
"Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*"

December 10, 2009

Thank you Chairman Johnson for holding a hearing on this noteworthy topic and I would like to thank the panel members for being here with us and helping us analyze whether or not federal judicial recusal laws are ripe for legislative change.

Due Process Requires Impartial Judges

To me, judicial recusal laws are at the heart of our American judicial system. The U.S. Constitution grants all Americans the right of due process, including the right to a fair trial and an impartial judge. Judicial recusal laws are intended to insure these rights and to bolster public confidence in judges and in the courts.

Not Confident in Current System

Yet, like some of the panel members here, I am not confident that our current laws are achieving these goals: specifically with regard to whether a judge should be the arbiter of his or her own disqualification motions.

I adhere to the old maxim that "no person should be the judge of their own case." Addressing this point, on January 30 of 2004, Representative Waxman and I wrote a letter to Chief Justice Rehnquist, asking the U.S. Supreme Court to consider developing a formal procedure for reviewing recusal decisions of Supreme Court Justices. In this letter, I urged that, without the Court's careful consideration in recusal matters, public trust in the Supreme Court may deteriorate due to inconsistencies in judicial disqualification decisions.

Although this letter was sent in the wake of a specific case, the concern of having adequate laws to prevent partiality and judicial self-dealing extends not only to the U.S. Supreme Court, but to district and appellate courts as well.

A Fine Balance to Ensure Fairness but not Harm or Slow Judicial System

History has shown us that there is a fine balance between amending judicial recusal laws and ensuring that courts run efficiently without delay. Promoting transparency and public confidence in the judiciary is not possible without dedication of time by our judges and court personnel.

Yet judges must remember that their job is to serve justice and the American people without agenda or influence. To this end, I look forward to an informative and lively discussion on whether current federal judicial recusal laws adequately preserve this balance.

Thank you.

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

Thank you, Mr. Chairman. I appreciate your calling this hearing on the important topic of judicial recusals.

There has always been inherent tension among the three branches of our federal government. The Founders intended that no one branch would dominate the other two, and that each branch would guard its own constitutional territory from encroachment. This system of checks and balances has done a wondrous job of defending civil liberties, promoting national security, and expressing the popular will through a deliberative legislative process. The inevitable by-product of this construct is institutional tension, especially when one branch "checks" the other. But it's natural; in fact, it's a sign of civic health.

This hearing wasn't convened to create more tension than already exists. We're not here to poke a co-equal branch of government in the eye. All members of the Courts Subcommittee respect the work of the Judiciary even if we don't agree with their work product in every instance. And following the Founders' example, we appreciate the importance of judicial independence. Article III judges should be insulated from political pressure to render unbiased opinions—and that's why they enjoy life tenure.

However, this doesn't mean that federal judges are entitled to a free pass in life. We have a constitutional obligation to conduct oversight on judicial operations, just as the Judiciary is charged with reviewing our statutory handiwork for legal defects. But short of impeachment, a congressional prerogative rarely exercised, there's little we can do to discipline judges for ethical lapses. Still, we need to work with the Judiciary to identify areas of concern if they exist and to develop corrective responses when appropriate.

As a former Courts Subcommittee Chairman and a 25-year member of the full Judiciary Committee, I've participated in previous oversight efforts to review the state of judicial ethics and behavior. Much of this work culminated in a rewriting of the Judicial Conduct and Disability Act of 1980, the statutory mechanism by which individuals may file complaints against federal judges. While I'm sometimes plagued by senior moments, I do recall this project peripherally touched on the matter of recusals, with some arguing that the recusal statutes were dead law; in other words, judges weren't likely to recuse themselves from cases and lawyers were too frightened to ask them. And if memory further serves, part of this Subcommittee's impeachment investigation of District Judge Manny Real during the 109th Congress involved a recusal issue.

No open-minded litigant believes he's *entitled* to win in federal court. But every litigant expects and deserves to be treated fairly. At minimum, this means the presiding judge must be free of bias or prejudice toward any litigant. If this isn't the case, the judge should step aside.

We have a balanced panel of witnesses who can speak to this issue in great detail, so I'm eager to hear their views. I emphasize that I'm not out to "get" the Judiciary. I don't know if the complaints about the state of recusal jurisprudence are anecdotal or genuine. But that's why we're having this hearing, and I look forward to participating.

Thank you, Mr. Chairman.

Mr. Chairman, at this time I'd like to make a unanimous consent request that we enter into the record a statement and other information submitted by Michigan Supreme Court Justice Robert Young about his state?s experience with their recusal laws.

ATTACHMENT 1

Statement of Justice Robert P. Young, Jr., Michigan Supreme Court, to the House Subcommittee on Courts and Competition Policy

December 10, 2009 Hearing

I am informed that the House Subcommittee on Courts and Competition Policy is considering Michigan's new disqualification rule for possible application to the federal judiciary. The Michigan rule is facially unconstitutional and thus provides an inappropriate template for any other judicial system.[1] I dissented from the Michigan Supreme Court's enactment of an unconstitutional rule of disqualification.[2] Although the new rule references the United States Supreme Court's decision in *Caperton v Massey*,[3] the *Caperton* decision is not the impetus for the new rule. Furthermore, by requiring a justice's recusal for nonconstitutional reasons, not just when there is the "constitutionally intolerable probability of actual bias,"[4] the rule exceeds any constitutional problems *Caperton* sought to address. Instead, the new rule seeks to control for philosophical and political reasons the makeup of the Court. ***It does so by eliminating all due process protections for justices, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will. In effect, the majority of the Michigan Supreme Court created a 21st century Star Chamber with its rule.***

Moreover, this rule is part of a concerted effort by national interest groups to destroy election of judges and thus wrest control of state courts from the people and place them in the hands of lawyer-dominated "merit selection" groups.[5]

The issue here is not *whether* state courts should have disqualification rules—for the entire 173 years of the State's existence, the Michigan Supreme Court used a disqualification rule that mirrored the rule that the United States Supreme Court continues to use—but rather *which* disqualification rule best ensures that parties whose cases come before a state's highest court have neutral arbiters deciding those cases. Every justice on the Michigan Supreme Court purports to subscribe to the elementary principle of due process that parties whose cases are decided by this Court must have

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[1] Moreover, as Michigan, like many states, *elects* its judges, it is hard to see how many of the new rule requirements apply to appointed federal judges, who obviously do not campaign in elections.

[2] A copy of the November 25, 2009 Order is attached as Exhibit A and also available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf> (accessed December 7, 2009).

[3] *Caperton v A T Massey Coal Co*, ___ US ___, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

[4] *Id.*, 129 S Ct at 2262.

[5] See Justice Corrigan's dissenting statement to the November 25th Order, Exhibit A, at pp 12-20.

impartial justices deciding those cases.[6] ***However, the plain fact is that the rule enacted by the Michigan Supreme Court is facially unconstitutional in several critical ways, with the result that it will allow four justices to disenfranchise the millions of Michigan voters who elected a justice.***

Michigan's New Rule Violates the Fourteenth Amendment Right to Due Process

The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard.[7] Heretofore, only an appeal to the United States Supreme Court could reverse a Michigan justice's determination regarding a motion to disqualify. In an appeal taken from a Michigan justice's denial of a motion for disqualification, the challenged justice is entitled to the full range of due process rights that all appellees before the United States Supreme Court are entitled. A justice challenged on such an appeal from his decision not to recuse therefore has a right to counsel, to file briefs in opposition to the appeal, to have the issues on which the disqualification is predicated framed in advance, and the right to have it decided by a neutral arbiter. ***The new Michigan rule eliminates all of these due process rights.***

The new Michigan rule creates an appellate process whereby the members of the Michigan Supreme Court, rather than the United States Supreme Court, will determine whether one of their challenged colleagues may sit on a case. By interposing itself as an appellate body in the disqualification decision, the Michigan Supreme Court must afford the targeted justice no fewer rights than he enjoyed in such an appeal to the United States Supreme Court. As stated, a justice has the right to have an appeal be limited to the grounds stated in the motion for disqualification, to retain counsel in the matter, and to submit a brief in response to the motion for disqualification. Sometimes, due process will also necessitate an evidentiary hearing, as there may be facts in dispute between the moving party and the challenged justice. ***Notwithstanding these constitutional requirements of due process, the new Michigan rule protects none of them, even though I specifically raised each of them to the Court before the order entered and provided proposed language to the rule that would remedy these constitutional deficiencies.***

Moreover, if due process means anything—particularly in the disqualification setting where this issue is pivotal—a targeted justice is most assuredly entitled to have an *impartial* arbiter decide the question. When the United States Supreme Court is the arbiter, no serious question on this point arises. ***However, when the justices of a***

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[6] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[7] "'The fundamental requisite of due process of law is the opportunity to be heard.'" *Dow v State of Michigan*, 396 Mich 192, 205 (1976), quoting *Grannis v Ordean*, 234 US 385, 394 (1914). "The 'opportunity to be heard' includes the right to notice of that opportunity." *Id.*

state Supreme Court become the arbiters of a disqualification decision of one of its members, there are substantial questions whether an impartial arbiter is involved. It is no secret that the Michigan Supreme Court is riven with deep philosophical, personal, and sometimes frankly partisan cleavages. Where personal and political biases could affect the decision-making of members of the Michigan Supreme Court in the new disqualification appeal process, I cannot imagine that due process demands anything less than the right to challenge the potential biases of the decision-makers in this appellate procedure. Yet the new rule provides no mechanism for challenging the bias of a member of the Michigan Supreme Court in the appeal process it establishes. The majority *rejected* such protections in enacting its new rule.

Michigan's New Rule also Violates the First Amendment Right to Freedom of Speech

Even beyond the specific due process requirements that a majority of the Michigan Supreme Court has thrown overboard, the new rule facially violates a judge's First Amendment rights. In every written constitution since 1850, the People of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial candidates in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment.[8] The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[9]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The new Michigan rule, however, frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The order expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly-elected judge to be disqualified from hearing a case. This is so because the new rule establishes that campaign political speech is subject to an "appearance of impropriety" limitation. Apart from the fact that it is inherently a nebulous standard, the "appearance of impropriety"

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[8] *Republican Party of Minnesota v White*, 536 US 765 (2002).

[9] James Madison, *Report on the Virginia Resolutions*, available at <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html> (accessed November 19, 2009).

standard is not a constitutional standard and, indeed, infringes upon constitutionally protected political speech.[10]

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of such a party), an elected justice is still liable to be disqualified if his campaign comments were later determined to create an appearance of impropriety. It is not hard to contemplate campaign speech that might offend and later be considered "improper" under the new rule's standard.

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" during an election campaign.[11] While the Minnesota Supreme Court's restriction on campaign speech was more expressly content-based than the disqualification rules promulgated by the Michigan Supreme Court, ***the Michigan Supreme Court majority is attempting to achieve indirectly what the United States Supreme Court declared in* White *that a court could not do directly: stifle protected judicial campaign speech.*** The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard. ***The Michigan Supreme Court majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. Congress should avoid Michigan's mistake.***

Michigan's New Rule Will Enhance Gamesmanship That Will Undermine the Integrity of Judicial Elections and The Judiciary

The new Michigan disqualification rule is simply bad policy that is the product of a manufactured crisis. Although it purports to ensure that only impartial justices sit on cases, the new rule has the effect of "weaponizing" disqualification as a tool to achieve countermajoritarian results to nullify elections. Shockingly, my colleagues have set themselves up as the gunners on the artillery they have manufactured.

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[10] Even the rule's proponent recognizes that "appearance of impropriety" is an extraconstitutional standard. At our November 5, 2009 administrative conference, Justice HATHAWAY explained, "*Caperton* says that states can have stricter standards [than due process requires]. . . . We have Canon 2 of the Michigan Code of Judicial Conduct, which talks about a judge having to adhere to the appearance of impropriety standard." Justice HATHAWAY *clearly believes that the appearance of impropriety does and should trump First Amendment rights*. So, apparently, do her colleagues in the majority. **No other state provides such an *across the board* requirement of disqualification based on the appearance of impropriety.**

[11] *Republican Party of Minnesota v White*, *supra*, 536 US at 768.

For the entire existence of the Michigan Supreme Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial qualification, whether raised on motion by a party or by the justice. They have done so under our unvaried practice that mirrors the one used by the United States Supreme Court.[12] In short, a justice confronted with a disqualification motion has typically consulted with members of this Court and made a determination whether participation in a particular matter was appropriate. Other than providing their personal counsel, other members of the Court have not participated in the decision.

Until recently, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing the issue of a justice's disqualification. Of late, however, with the shift in the philosophical majority of the Michigan Supreme Court,[13] disqualification has taken on a new, more politicized role. One need look only as far as a recent volume of the *Michigan Bar Journal* for evidence of this new effort to politicize disqualification motions. In a letter to the editor, attorney John Braden suggests that the judicial electoral process is an unsatisfactory solution for addressing what he believed to be the unfavorable philosophy and decisions of the Court's former philosophical majority.[14] Therefore, he urged his colleagues in the Michigan Bar to use motions to disqualify as a suitable alternative to the electoral process guaranteed by the Michigan Constitution to alter the philosophical balance of the Court in order to achieve what he desired: more favorable results for his clients and himself. Moreover, it is entirely foreseeable that sophisticated and well-financed clients, like insurance companies and unions, will demand that their lawyers file motions for disqualification as a matter of course in order to alter the philosophical makeup of the Court in ways the electorate hardly intended. ***Thus, Michigan's new rule is no less than a call for the use of disqualification as a non-electoral political weapon to remove judges with whose judicial philosophy one disagrees. My colleagues, wittingly or not, in enacting this new rule, give aid to this politicized use of disqualification motions.***

Why do I claim that the new disqualification rule is a product of a "manufactured crisis"? The facts are very plain. After my Court's philosophical majority changed to

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[12] See *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007). See also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

[13] The philosophical majority of the Michigan Supreme Court changed from liberal to conservative with the 1998 Supreme Court election. The philosophical transformation of the Michigan Supreme Court that occurred eleven years ago, and the debate that has accompanied that transformation—a debate similar in some ways to that taking place within the federal judicial system—resonated strongly in the electoral political process, which the citizens of Michigan, through their constitution, have chosen as the method by which they select their justices. Perhaps not surprisingly, those who had been most comfortable with the approach of the Michigan Supreme Court over the previous decades were resistant to this transformation, and many responded forcefully in political opposition. The 2000 Supreme Court election, in which three members of the Court's prior conservative philosophical majority stood for election, was one of the most bitterly contested in the state's history, as was the most recent Supreme Court election, which again shifted the philosophical majority of the Court.

[14] See Opinion and Dissent, 85 *Mich B J* 10, 12 (2006).

conservative in 1999, disqualification motions became a tactic to alter the decision-making and outcome of a particular case. As I explained in my statement accompanying the proposed disqualification rules when originally published for public comment, each of the motions to disqualify made between 1999 and 2008 were brought against members of what was then the Court's conservative philosophical majority.[15] Importantly, nearly all of the motions to disqualify brought during my tenure on this Court were the product of one plaintiffs' law firm.

Each of the motions to disqualify made by this firm involved various allegations of claimed bias, principally stemming from political speech in Michigan Supreme Court judicial campaigns.[16] This firm has taken advantage of the review process that our traditional disqualification practice guaranteed parties, by appealing my previous denials of its motions to disqualify to the United States Supreme Court at least three times. Notably, that Court has denied certiorari on each occasion.[17] Moreover, this firm has unsuccessfully challenged in federal court the constitutionality of this Court's historic practice of handling motions for judicial recusal that the Court jettisoned.[18] While the United States Supreme Court has denied these meritless claims of bias directed at me, as its decision in the *Caperton* case demonstrates, when warranted, the United States Supreme Court is not uninterested in reviewing and reversing a state justice's decisions on disqualification.[19]

Finally, it is not beyond imagining that the new disqualification procedure will become fuel for the ever-intensifying fire of judicial election campaigns in Michigan and, if adopted elsewhere, across the country. For example, if Candidate A is running a campaign against Justice B, it is entirely possible that Candidate A would make a campaign issue over the number of times that Justice B's colleagues voted that he could not be an impartial arbiter of a case. ***Although the majority on my Court would no doubt deny it, the new rule creates ample ammunition for future judicial electoral warfare. The flagrant exacerbation of such judicial electoral warfare***

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[15] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 (2009).

[16] In addition to a motion to disqualify me in the pending case of *Pellegrino v Ampco Systems Parking* (Docket No. 137111), by counsel's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

[17] *Graves, supra, cert den* 542 US 920 (2004); *Gilbert v DaimlerChrysler Corp, supra, cert den* 546 US 821 (2005); *Grievance Administrator v Fieger, supra, cert den* 127 S Ct 1257 (2007).

[18] See *Fieger v Ferry*, 2007 WL 2827801 (E D Mich, 2007).

[19] See *Caperton v A T Massey Coal Co*, ___ US ___, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

also helps opponents of judicial elections undermine the support for allowing the people to elect their judges and justices.

Although judges in federal courts are appointed, rather than elected, the threat of politicization in the disqualification process remains. Moreover, to the extent that the federal courts serve as a model for administration of the state courts, adoption of Michigan's disqualification rule in the federal court system would serve a further attack on the decision by the people in the majority of states to elect their judges in some fashion. ***For all of these reasons, this Subcommittee should reject Michigan's new disqualification rule as a basis for any reform in the federal judicial system.***

ATTACHMENT 2

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9 WJR-AM - THE FRANK BECKMAN SHOW
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11 November 30, 2009
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13 INTERVIEW WITH COLLEEN PERO
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15 CD transcribed by Gail R. Stevens, CSR-3123
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1 November 30, 2009
2 The Frank Beckman Show - Interview with Colleen Pero
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6 FB: Hello Colleen.
7 CP: Good morning, Frank. How are you doing, sir?
8 FB: I'm all right. Now, this change here in Michigan rules
9 by the Supreme Court, it's unique to Michigan, isn't it?
10 CP: Well, the particular changes that were passed by the
11 Supreme Court earlier this month do seem to be particular
12 to Michigan. However, this kind of push we've seen
13 across -- in other states around the country.
14 FB: In fact, Wisconsin recently considered the same sort of
15 change, didn't they?
16 CP: Yes, they did last -- about three weeks ago the
17 Wisconsin Supreme Court considered a rule that was put
18 forward by the League of Women Voters there suggesting
19 that any judge who received $1,000 would have to recuse
20 themself from that -- from hearing a case involving that
21 party even though the law allows people to give up to
22 $10,000.
23 FB: Now, would that include judges who receive money from
24 trial lawyers?
25 CP: Yes, it would.

1 FB: Oh, so every Justice would be basically recused from
2 hearing a case given that kind of strict rule but that
3 was immediately turned down by the justices. But here's
4 what strikes me as interesting is that you say there
5 seems to be a move afoot throughout the country to make
6 rules changes like the one we saw here in Michigan which
7 would suggest to me that there is some sort of concerted
8 effort driven by whom?
9 CP: Well, in my research I found that the people that are
10 trying to drastically change the judiciary in America is
11 none other than George Soros who brought us the
12 MoveOn.org organization.
13 FB: How is he doing this?
14 CP: Well, it all started back in 2000, he was a very big
15 supporter of the Gore campaign and when Gore lost, he
16 realized how important judiciaries can be at the state
17 and federal levels and he started pumping millions of
18 dollars into organizations that were flying under
19 nonpartisan colors saying we need to change the way the
20 judiciary operates in the United States. Now, he did
21 this under the guise of reform but what's so curious is
22 this, at the same time he was spending millions of
23 dollars saying the judiciary needed to be reformed. From
24 a campaign finance standpoint he spent $27 million trying
25 to defeat George Bush through a series of 527s. So I

1 think the bottom line is he thinks it's okay to have lots
2 of money in the game so long as it's his money
3 representing his ideas.
4 FB: And he's setting all the rules. Now, what kind of
5 groups has he set up or is he supporting to affect this
6 change?
7 CP: Well, I think -- I would consider as sort of the
8 quarterback of this attempt to change the judiciary is
9 Justice at Stake. This actually was started at the -- at
10 Georgetown at -- through a grant from George Soros
11 Foundation, the Open Society Institute. I think he's put
12 in, oh, probably 4 or $5 million into this organization.
13 They receive almost all of their funding from him. Their
14 top -- their top leadership has always been comprised of
15 democratic political operatives. In fact, the first
16 three that were starting this were all members of the
17 Clinton/Gore administration and later worked on the Gore
18 campaign.
19 FB: Clearly nonpartisan.
20 CP: Ah, yeah, very much so, very much so. In fact, one
21 was -- did a long stint with the SEIU and that brings us
22 up-to-date there.
23 FB: All right. So the -- so Justice at Stake is the -- is
24 the main movement in all of this but --
25 CP: I think so and because when you look at all of the

1 organizations to which he has given money, and I've
2 actually documented at least forty at this point, many of
3 their grants specifically say this is to work with the
4 Justice at Stake program.
5 FB: All right, offshoots of that, the Brennan Center for
6 Justice, who are they?
7 CP: Now, the Brennan Center is at NYU Law and they have a
8 program there which is called Fair Courts Campaign and
9 that also has received, oh, 4 or $5 million from Soros.
10 They're a partner at Justice at Stake and what's curious
11 is this, when you look across the country whenever
12 there's an election that involves a conservative jurist,
13 I would say a judicial conservative, a rule of law judge,
14 you see these two organizations' names appear and they
15 appear in odd kinds of ways. They suddenly appear if the
16 conservative jurist is winning, they say, well, we
17 shouldn't be having elections because, you know, it just
18 has special interests involved, there's corporate people
19 getting involved and all of these. Oddly enough, they
20 never seem to mention trial lawyers but -- and so you see
21 these people hop up there and if you win the election
22 then they say, well, we shouldn't have elections but, you
23 know, maybe we should go to recusal, we should change the
24 way in which people hear the cases.
25 FB: Ala, the new Michigan rule.

1 CP: Exactly.
2 FB: Yeah. Now, were they directly involved in challenging
3 the Michigan rules on recusal?
4 CP: No, you know what I can't say that they were directly
5 involved because there are some on the Court who tried to
6 put this forward awhile back but what I can say is this,
7 that he's funded this organization pushing similar rules
8 elsewhere and that the organizations which hails this as
9 a major step forward were Justice at Stake, The
10 Constitution Society which has received $10 million from
11 Soros, The Michigan Campaign Finance Network and the
12 Brennan Center. So all of the organizations that are
13 hailing this as a major step forward have all received
14 money from George Soros' Open Society Institute.
15 FB: All right. And the American Constitution Society for
16 Law and Policy you point out has among its supporters
17 here in Michigan -- you've got John Conyers, Carl Levin,
18 Mark Brewer but also Chief Justice Marilyn Kelly who
19 voted for this change.
20 CP: That's right. And, in fact, last year during the --
21 during the Taylor campaign for reelection it was The
22 American Constitution Society, their Michigan Chapter
23 held a forum here in Michigan, at Michigan State,
24 nonpartisan of course, at which Chief -- now Chief
25 Justice Marilyn Kelly spoke and blasted the conservative

1 jurists from the Michigan Supreme Court, of course all
2 coinciding with the Taylor reelection campaign. This
3 took place in October, 2008.
4 FB: What is the point of all of this, Colleen? Why does --
5 what is Soros' ultimate goal here?
6 CP: I think his ultimate goal is this, he wants to take I
7 think the electorate, general citizens like you and me
8 out of the process of determining who our judges are. So
9 I think what he wants to do -- he has pushed merit
10 selection in so many states and of course we know what
11 merit selection is. This means that the elite choose
12 the -- choose the judges.
13 FB: The Bar Association, Trial Lawyers Association?
14 CP: The Bar Association which of course has received at
15 least $5 million from George Soros as well but yes, it's
16 set up by legislators or by the Bar Association and they
17 are the ones that get to choose the judges because, you
18 know, people like you and I, we're just not sophisticated
19 enough to understand the nuances of the judiciary and the
20 kinds of people we need there.
21 FB: Amazing. Colleen Pero, thanks so much, appreciate the
22 time.
23 CP: I'm glad to do it.
24 FB: Thank you. Talk to you again soon.
25 CP: Thank you so much.

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4 (Interview concluded.)
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1 STATE OF MICHIGAN)
2) SS.
3 COUNTY OF MACOMB)
4
5 CERTIFICATE OF NOTARY PUBLIC
6 AND COURT REPORTER
7 I, Gail R. Stevens, Certified Court Reporter in
8 the State of Michigan, do hereby certify that the
9 foregoing pages 1 through 9, inclusive, comprise a full,
10 true, and correct transcript of the taped interview had
11 on November 30, 2009 on The Frank Beckmann Show on
12 WJR-AM.
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20 Gail R. Stevens, CSR 3123
21 Notary Public, Macomb County, MI
My Commission Expires: July 15, 2014
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ATTACHMENT 3

Order

EXHIBIT A

Michigan Supreme Court
Lansing, Michigan

November 25, 2009

ADM File No. 2009-04

Amendment of Rule 2.003
of the Michigan Court Rules

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 2.003 of the Michigan Court Rules are adopted, effective immediately.

[Additions are indicated by underline, and deletions by strikethrough.]

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B~~A~~) Who May Raise. A party may raise the issue of a judge's disqualification by motion~~,~~ or the judge may raise it.

(C~~B~~) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a~~1~~) The judge is ~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a

party as enunciated in *Caperton v Massey*, US ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

(c2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d3) The judge has been consulted or employed as an attorney in the matter in controversy.

(e4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has ~~an~~ more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~

(g6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(ia) is a party to the proceeding, or an officer, director, or trustee of a party;

(iib) is acting as a lawyer in the proceeding;

(iiie) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(ivd) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(D~~C~~) Procedure.

(1) *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to Be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, ~~T~~the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i~~a~~) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii~~b~~) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) ~~Motion Granted~~ *If Disqualification Motion is Granted.*

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E~~D~~) ~~Remittal~~ Waiver of Disqualification. ~~If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.~~ Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

KELLY, C.J. (*concurring*).

I voted for this recusal rule and write to discuss it and respond, in part, to the criticism leveled against it.

In adopting this rule, the Michigan Supreme Court has, for the first time in its long history, reduced to writing a rule to govern when a justice should not vote on a case. In the past, the justices wrote rules on recusal but applied them to other judges only, not to themselves.

Some of us have long believed that the interests of the legal community and of the general public are best served if a Supreme Court recusal rule is put in writing. In that

way, all can see and understand something that has long been shrouded in mystery: how recusal works in the Michigan Supreme Court.

Curiously, until recently, it was generally unknown that, when a motion to recuse was filed, only the justice at whom it was directed acted on it. The Court then issued an order that appeared to be an action of all the justices. Typically, no reason was given to the petitioner or the public if the request to recuse was denied. Also, no procedure existed to permit the party seeking a justice's recusal to obtain a vote of the other justices if the motion was denied.

Important to this discussion is the fact that, this year, the United States Supreme Court rendered its decision in the case of *Caperton v A.T. Massey Coal Co, Inc.*[1] It reversed an order of the West Virginia Supreme Court in which a justice there refused to recuse himself following a procedure similar to that long used by the Michigan Supreme Court. The Court found that the party seeking the justice's recusal had been deprived of his constitutional right to due process. This was partly because, the Court found, a justice's decision on his or her own recusal is inherently subjective. But, the due process clause requires an objective decision.[2]

I read *Caperton* to mean that an independent inquiry into a challenged justice's refusal to recuse may be necessary to satisfy due process because the independent inquiry makes possible an objective decision. That independent inquiry has been written into Michigan's new rule where it allows the party requesting recusal to seek a vote on the motion by the entire court.

Those of us supporting Michigan's new rule believe that the situation that gave rise to the *Caperton* case should not be allowed to take place in this state. For that reason, together with the obvious need for increased clarity and understanding about our recusal procedures, we have voted for this rule.

I have read Justice Young's and Justice Corrigan's statements that accompany this order. I quite agree with them that the order must not be applied to curtail fundamental freedoms. I have not heard any of the justices who favored the order suggest that it will be used "to prevent judicial candidates from speaking their minds" or to prevent "the voters [from electing] judges of their choosing." I know of nothing that would reasonably lead one to believe that the order will be used to permit "duly elected justices

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[1] ___US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Since *Caperton* was decided, the Wisconsin Supreme Court amended its recusal rule in response. *See Wisconsin Supreme Court Rule Petitions 08-16, 08-25, 9-10, and 9-11* (acted upon October 28, 2009). Michigan is not the first state to react with a rule change.

[2] *Caperton, supra* at 2263.

[to deprive] their co-equal peers of their constitutionally protected interest in hearing cases." And it seems an outrageous stretch of credulity to suggest that "starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court."

In suggesting that no precedent exists for a judge to be removed from a case against his or her will, Justice Corrigan and Justice Young forget this: under our existing rules,[3] trial judges are removed from cases against their will in our courts every day and have been for years. Unanswered in their statements is the question: Why should trial judges be subject to having their decisions not to recuse themselves reversed by their peers while justices are insulated from the same treatment?

With respect to the constitutional arguments posed by Justices Corrigan and Young, it should be noted that these arguments were made only at the eleventh hour. The parts of the rule that they attack have been actively before the Court for more than a year. If any serious treatment of them was intended, it would seem it would have been put forth well before the rule was voted on.

As Justice Weaver has pointed out in her statement, the decision to adopt this rule has been anything but "hasty," notwithstanding the assertions of Justices Corrigan and Young. In fact, the rule has received the Court's constant vision and revision, particularly during the last year. The normal procedure for rule adoption has been followed, including public comment and public hearing.

Justice Young belatedly raises numerous constitutional challenges to the rule. Certainly, the Court can and, no doubt, will discuss them in due time. There has been no decision to refuse to place Justice Young's proposals on the conference agenda. Suffice it to say that the rule in no way prevents the United States Supreme Court from reviewing a recusal decision made by our Court, as he apparently fears.

No factual basis exists on which to ground the insinuation that those who voted for this rule will use it to remove a justice from a case for improper reasons. No facts have been shown to support this assertion. None exist. Justice Markman's fears of "gamesmanship" and "politicization" in the Court's future handling of recusal motions

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[3] MCR 2.003(C)(3). If the challenged judge denies the motion to recuse, in a court having two or more judges, the chief judge may reverse the decision and require recusal. In a single-judge court or if the challenged judge is the chief judge, the state court administrator may assign the decision to another judge who may overturn the refusal to recuse.

arise only from his imaginings. Whether there will be further "acrimony" lies, in part, in the hands of each justice.

Moreover, it is a gross perversion of law for Justice Corrigan to allege that, "In one administrative order [the recusal rule], the majority takes away the right of every citizen of Michigan to have his or her vote count." The accurate statement is, with this rule, the Court permits a justice's recusal where that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and this Court can only be stronger for it.

CAVANAGH, J. (*concurring*). The process by which justices are disqualified from hearing a case before this Court is not merely a theoretical matter. The disqualification process has very real consequences for the parties who seek justice from this Court, as well as the public at large. Our current practice provides no avenue to redress a decision by a justice who refuses to disqualify himself, no matter how much evidence is produced that the justice is indeed actually biased.

If my dissenting colleagues truly believe that our current practice is the best for Michigan's citizens, then they should have no problem explaining their rationale to the public and hearing the public's assessment of this rationale. However, I believe they know that there is no reasonable justification that can be proffered for allowing a justice accused of bias to be the only one who decides whether he should be disqualified, other than "we have always done it this way." I can think of no reasonable explanation that would be acceptable to the public for maintaining this procedure because it is apparent that it is incongruous with reason. This is especially true in light of the fact that Michigan's own court rules—adopted by *this Court*—govern disqualifications for all other judges and explicitly provide the recourse of having the denial of a disqualification motion reviewed by another judge. See MCR 2.003(C)(3). Remarkably, the majority believes that members of this Court are above the same rules that it has adopted to apply to *all other judges in the state*.

Weaver, J. (*concurring*). At last this Court has adopted clear, fair, written disqualification rules for Michigan Supreme Court justices.[4]

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[4] This concurring statement is submitted November 24, 2009 at approximately 3:20 p.m. and although other justices have indicated a desire to submit concurring and dissenting statements, no other statements have been submitted as yet. Because the order is scheduled for entry on November 25, Thanksgiving Eve, there will not be a reasonable opportunity to respond to subsequently submitted statements. If any response to statements submitted hereafter is necessary, my response will be submitted to the Court on a date after Thanksgiving for the Court to file and distribute to the public, and will also be posted on my personally funded website: **justiceweaver.com**.

This newly amended rule is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding his or her recusal decisions and requiring the Court—the remaining justices—if requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

I concur in this Court's adoption of such rules, but write separately to inform the parties in pending cases and the public of the improper delay and procedure concerning entry of this order adopting the amendment and its effective date.

Since May 2003, I have repeatedly called for this Court to recognize; publish for public comment; place on a public hearing agenda; and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.[5]

On November 5, 2009, this Court finally adopted rules for disqualification of justices by amending Michigan Court Rule (MCR) 2.003—Disqualification of Judge. At our regularly scheduled public administrative conference, Justice Hathaway moved for the adoption of amendments to that court rule. The motion was seconded by Chief

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[5] See, e.g., the statements or opinions by Weaver, J., in *In re JK*, 468 Mich 202, 219 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027, 1044 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Ass'n*, 739 NW2d 631 (2007); and *Citizens Protecting Michigan's Constitution v Secretary of State and Reform Michigan Government Now! (RMGN)*, 482 Mich 960 (2008).

Justice Kelly and Justice Weaver, and the motion was adopted by a vote of 4-to-3,[6] with the understanding that Justice Young and Justice Hathaway would possibly offer an amendment to MCR 2.003(D)(1) (Time for Filing) that might be proposed at the next, or a future, public administrative conference for discussion and vote. The only portion of Justice Hathaway's proposed revision that was not adopted on November 5, 2009 was her proposed amendment to Subsection (C)(1) (Time for Filing), which remains and is re-designated now as MCR 2.003(D)(1). By adopting an amendment to MCR 2.003—Disqualification of Judge—this Court has finally established clear, written, and fair rules governing the disqualification of justices on the Michigan Supreme Court.

"Immediate effect" of the amendment to MCR 2.003—Disqualification of Judge—that had just been adopted was established by a 4-to-3 vote on motion by Justice Cavanagh,[7] seconded by Justice Weaver. "Immediate effect" was necessary because there were already two cases with pending motions for disqualification against various justices. One of these pending cases, *Pellegrino v Ampco Systems Parking,* Docket No. 137111, was a case that had originally been scheduled for oral argument on November 3, 2009, but was adjourned because it was anticipated that adoption of clear written disqualification rules would occur at the November 5, 2009 public administrative conference.[8]

Incredibly, although "immediate effect" was given to the amendment of MCR 2.003 on November 5, the order informing the public of the rule change did not enter on that date or promptly thereafter. Instead it is finally being entered 20 days later on November 25, 2009.[9] This Court should not have delayed issuing the order for any amount of time.[10]

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[6] Voting for adoption of the motion were Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway. Voting against the motion were Justices Corrigan, Young, and Markman.

[7] Voting for the motion were Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway. Voting against the motion were Justices Corrigan, Young, and Markman.

[8] The discussion and possible adoption of disqualification rules had been passed at Justice Young's request and removed from the October 8, 2009 public administrative conference because Justice Young wanted to participate in the discussion, but he was unavailable for that properly noticed public administrative conference.

[9] As a result, apparently when the Michigan Supreme Court says that something has "immediate effect," that is not the case in this matter.

[10] In my 15 years' service as a justice, my experience in the adoption of proposals and other administrative matters, and the entry of orders, is as follows:

It is rare when this Supreme Court adopts proposals or other administrative matters with "immediate effect."

Such matters usually are adopted without an effective time as it is the general rule that the adopted item is effective at the time the Clerk of the Court enters the order within a reasonable time—usually a few days or a week—as the Court "speaks through its orders."

For an administrative matter, not a case matter, if any justice indicates he or she will write a statement, he or she has 14 days to submit it and other justices wishing to respond to it have 14 days to respond—a maximum of 28 days delay from adoption to entry.

Exceptions to the general rule above are:

Sometimes a matter is adopted with a specific future time to be effective like 30 days, 6 months, or 1 year later and the order is entered (after statements within 28 days) before the effective date, but is only effective on the specific adopted date, not the date of the entry of the order.

Other times, those of emergency, which rarely occur, the adopted matter is voted "immediate effect" and should be entered and therefore effective on that day of adoption. For example, see Administrative Order 2006-08, "the Gag order," which stated:

> The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.
>
> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.
>
> Cavanagh, Weaver and Kelly, JJ., dissent.
>
> Dissenting statements by Weaver and Kelly, JJ., to follow.

If delay occurs for entering the day of adoption, the order is entered as soon as possible "*nunc pro tunc*" (Latin for "now for then") making the late-entered order effective retroactive to the date of adoption. In either case, concurring, dissenting and responding statements by justices are not included with the order and the order has a notation that statements will follow.

Unfortunately these rules were not followed in this administrative item and it would not matter but for these two consequences:

1. Justices Young and Corrigan's attempts to avoid being governed by the new rule adopted in their presence November 5, by filing their statements refusing to be disqualified right before the close of business on November 18, apparently trying to beat the clock, believing the disqualification order would enter November 19 at an emergency (but not identified as such) private administrative conference.

After the Court provided for "immediate effect" of the amendment to MCR 2.003, this Court *should* have issued the order containing the amendment with a notation that any statements by justices, whether concurrences or dissents, would be released together at a future time. Instead, in a private administrative conference on November 19, 2009,[11] a majority of this Court established that all statements from justices had to be circulated to the Court by November 25, 2009 and that the order adopting the amendment to MCR 2.003 would also issue at that time, November 25, 2009.[12]

The delay and seeming confusion that has arisen from the entry of this order is unfortunate because it deprived the parties and the public for 20 days of their right to have access to the language of the amendment to MCR 2.003, which was given "immediate effect." Further, it allowed two justices to attempt to avoid the application of a new written rule for a justice's disqualification to pending motions for their disqualification in a case.

Specifically, on November 18, 2009, Justices Corrigan and Young directed the Clerk of the Court to submit their responses to the pending motions for recusal against them in the case of *Pellegrino v Ampco Systems Parking*, Docket No. 137111. In his response to the recusal motion, Justice Young stated that "I am deciding this motion under this Court's current and traditional rules for disqualification because they are still in effect . . . ." Thereafter, Justice Corrigan indicated in her responding statement that "[l]ike Justice Young, I am deciding this motion under this Court's current and traditional rules of disqualification . . . ."[13] Despite the fact that Justices Corrigan and Young attempted to avoid complying with the new amended court rule, it remains to be seen whether their denials to the motions for their recusal will be subject to the procedures and safeguards in the newly amended MCR 2.003—Disqualification of Judge.

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2. Leaving "immediate effect" with an Alice in Wonderland definition where "immediate effect" does not mean "immediate effect" and the public is deprived of knowledge of what exactly was adopted with no copies available for now 20 days.

[11] This private administrative conference was justified as not being held in a noticed public administrative conference because it was rightfully an emergency, although it has not yet been so identified.

[12] A motion was made by Justice Weaver to issue the order that day, November 19, with a statement indicating that the order was *nunc pro tunc* to November 5, meaning that it would be retroactive to November 5, 2009 when the Court actually voted to give the amendment to MCR 2.003 "immediate effect." There was no second to this motion.

[13] Justice Markman recognized that the rules were adopted with "immediate effect" on November 5, 2009 when he stated in a e-mail dated November 18, 2009: "This Court made clear at conference that it intended the new disqualification rules to be 'effective immediately.'"

Again, the adoption of the amendment to MCR 2.003—Disqualification of Judge—is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court. The amended rule provides a fair disqualification process to ensure that the parties appearing before the Court have justices deciding their cases that are not actually biased, nor objectively appear to be biased. It does so in a transparent process by requiring a justice challenged by a party to submit his or her decision and reasons in writing regarding recusal decisions and requiring the Court—the remaining justices—as requested by a party to review the challenged justice's decision and to publish the remaining justices' decision and reasons in writing. This process, of written decision and with written reasons, is fair to the parties and to the challenged justice. It provides the public with more knowledge of how the justices conduct the people's judicial business.

Hopefully, the day will come when every justice will give these new, written and fair rules for disqualification of justices an opportunity to work and, if experience proves necessary, to refine such rules by workable proposed amendment. And hopefully the day will come when some justices no longer resort to proclaiming dramatic forecasts of failure, negative consequences, or unconstitutionality, and no longer attempt to avoid application of the disqualification rules to themselves as we have seen so far.

Unnecessary delay and attempts to avoid application of adopted rules do not contribute to public confidence in the way some justices perform their duties and in the way the Michigan Supreme Court conducts its business.[14]

CORRIGAN, J. (*dissenting*).

"*May God save these United States, the State of Michigan, and this Honorable Court.*" -- Michigan Supreme Court traditional *oyez*

It is always wise to be wary of any government action taken the day before a holiday or late on a Friday. Such actions are designed to travel under the radar screen. So it is with this 4-3 order.

Tomorrow we celebrate Thanksgiving. Many Americans will pause to thank our Creator for the blessings of liberty—for the right to speak free from government oppression and for the right to vote in free elections and have those votes count.

How sadly ironic, then, that this order empowers the Court to curtail those fundamental freedoms—the rights of judicial candidates to speak their minds under clear standards and the rights of voters to elect judges of their choosing. For the first time in our state's history, duly elected justices may be deprived by their co-equal peers of their constitutionally protected interest in hearing cases. Starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court.

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[14] This statement and the order amending MCR 2.003—Disqualification of Judge—will be published on my personally funded website: **justiceweaver.com**.

The justices in the majority, having assumed the power to remove a co-equal justice, have not lifted a pen to establish their authority to do so. Their new regime brings to mind George Orwell's *Animal Farm*: "All animals are equal[,] but some animals are more equal than others."[15] Of all the justices who have served during this Court's 173-year existence, only the four justices adopting these rules arrogate to themselves this new, "more equal" dominion over their colleagues.

This Court's order also imperils civility among the justices. The current philosophical and personal divisions on this Court are no more than a mild case of acne compared to the cancerous vitriol sure to spew from justices' pens. "Every kingdom divided against itself is laid waste, and no city or house divided against itself will stand." Matthew 12:25 (New Revised Standard). Today's order will guarantee a permanent siege within this institution.

No issue that I have ever tackled is as important as these disqualification provisions. The majority's action here will precipitate a constitutional crisis.

Many have applauded this Court's disqualification initiative. They have not done their homework! The devil is always in the details, and the details of this order eviscerate fundamental freedoms.

I support clear rules that would establish written constitutional standards for the disqualification of judges and justices. But I oppose the ill thought out provision of MCR 2.003(D)(3)(b) that allows justices to review de novo another justice's decision not to disqualify from a proceeding.

Chief Justice THOMAS GILES KAVANAGH once said that the members of this Court are seven people on a boat in stormy seas. This provision allows those seven people to throw one another overboard. Peer review of recusal decisions will lead to rancor and incivility in this most fragile and battered institution.[16] This rule is a lacerating wound to this institution. Those who are privileged to be at the Supreme Court table are short timers, just temporary occupants of these chairs. This order will do lasting harm to this institution—and the case for change has not been made.

Violation of the United States and Michigan Constitutions[17]:

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[15] Orwell, *Animal Farm* (New York: Signet Classics, 1996), p 133.

[16] The State Bar of Michigan Board of Commissioners narrowly voted in favor of permitting peer review of a justice's recusal decision despite recognizing the potential for litigants' gamesmanship in the review process. The Board also suggested creating an independent review panel but acknowledged that a constitutional amendment may be required to create the panel. Several commissioners told me that the issue was hotly debated and that the independent review panel was proposed because they did not believe that members of the Court should review de novo a justice's declination to recuse.

[17] Contrary to Chief Justice Kelly's suggestion that our constitutional arguments were not raised before the rule was passed, the arguments were raised at administrative hearings, as Justice Young has explained. Further, the text of the recusal rule as enacted by the

Michigan Constitution

The basic question is whether the Michigan Constitution authorizes today's move. It does not.

Our constitution created a Supreme Court composed of seven elected or appointed justices. Const 1963, art 6, §§ 2 and 23. Under our constitution, a sitting justice may be removed from the bench only in certain ways. First, a justice may be removed under the impeachment provisions in Const 1963, art 11, § 7. Next, a justice may be removed for reasonable cause by a concurrent resolution of two-thirds of the members elected to and serving in each house of the Legislature. Const 1963, art 6, § 25. And finally, this Court may remove a justice upon recommendation of the Judicial Tenure Commission. Const 1963, art 6, § 30(2). The constitution provides no other authority for justices to remove one another. The majority's new rule falls within none of the express methods of removal set forth in our constitution.

So if it is not to be found in the constitution, then where do my colleagues in the majority derive their newly discovered power to remove a fellow justice? They offer not the slightest justification. If the majority believes that such authority somehow inheres in the judicial power of this Court, they are fundamentally mistaken. The judicial power is the "authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Risser v Hoyt*, 53 Mich 185, 193 (1884). Our state constitution vests the "judicial power" in one court of justice, headed by this Court, which consists of seven justices of equal power and authority. Const 1963, art 6, §§ 1 and 2. Although we "hear and decide controversies" and "make binding orders and judgments respecting them" by majority vote, no individual justice has more authority to exercise the judicial power than another justice, and nothing in the nature of the judicial power gives this Court or any justice the power to remove a duly elected or appointed justice. See, e.g., *People v Paille #1*, 383 Mich 605, 607 (1970) ("Whatever intra-court battles occasioned the adoption of the restriction upon intra-court review, *the wisdom of preventing judges of equal station from overruling each other abides*.") (emphasis added); *Dodge v Northrop*, 85 Mich 243, 245 (1891) ("Courts of concurrent jurisdiction cannot set aside or modify the orders and decrees of other courts of like jurisdiction."); *In re Wayne Co Prosecutor*, 110 Mich App 739, 742 (1981) (noting the holding in *Paille* that "the dual function of Detroit Recorder's Court as a magisterial court as well as a felony trial court *does not provide for intra-court review whereby judges of equal station might overrule one another*.") (emphasis added); *Wayne Co Prosecutor v Recorder's Court Judges*, 81 Mich App 317, 322 (1978) ("Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges."). Indeed, that may be precisely why in the United States Supreme Court each justice

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majority was not circulated to the Court until one day before the November 5, 2009, administrative conference.

decides the recusal question individually; the other justices possess no authority to remove a justice.[18]

To make matters worse, it appears the majority's violations of our state constitution may have only just begun. At the November 5, 2009, public hearing, the Chief Justice suggested that the majority may promulgate a rule for appointing a replacement justice when a duly elected or appointed justice is recused. She opined:

> Clearly this rule isn't perfect, and I view it as the first step in the realization of a truly excellent rule. Missing from this is any discussion of replacing a disqualified justice with another judge for the purpose of hearing the case involved. I think that's essential. It isn't here. I'd like to see that subject addressed another day.

Const 1963, art 6, § 2, however, provides that the "supreme court shall consist of seven justices ...." Because a recused justice simply does not participate in the case and does *not* cease to be a justice of the Court, the Chief Justice's suggestion would at the very minimum add an eighth justice. As Justice YOUNG explains more fully, referencing my statement at 483 Mich 1205, 1229-1234 (2009), our constitution does not authorize the appointment of temporary justices in excess of the seven justices that have been duly elected or appointed. The majority's potential arrogation of power to itself apparently knows no bounds.

United States Constitution

The new rule also fails to ensure that minimal due process protections will be accorded to the challenged justice in a recusal appeal. Because justices elected to this Court have a vested property right in exercising their judicial duties, they cannot be divested of that right without an opportunity to be heard before an impartial arbiter. See *Goldberg v Kelly*, 397 US 254, 271 (1970); *Ng Fung Ho v White*, 259 US 276, 284-285 (1922). The majority has not adopted Justice YOUNG's proposed amendments that would have provided the challenged justice the right to counsel, the right to file a brief, and the right to an evidentiary hearing to determine any material factual questions. Also, as Justice YOUNG's cogent dissenting statement, which I join in its entirety, explains well, the majority's new rule violates the First Amendment right to freedom of speech because it trenches on judicial campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765 (2002). The majority's refusal to accord even basic constitutional rights thus calls the validity of the entire new scheme into question.

This rejection of clearly defined procedural protections will likely encourage baseless recusal motions by those seeking to "justice-shop."[19] Indeed, some members of

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[18] See also Letter: New court rules may let minority win, The Detroit News, letter to the editor from Timothy Baughman, November 18, 2009, attached as Appendix A.

[19] See Bashman, *Recusal on appeal: An appellate advocate's perspective*, 7 J App Prac & Process 59, 71 (2005) (stating that while the "subject of strategic recusal . . . is not often discussed, no doubt because the goal seems to be unfair and unethical . . . you can be sure that strategic recusals do occur.").

the current majority seem willing to entertain ploys to remake the elected composition of this Court to fit the ideological or partisan preferences of certain parties or lawyers.[20] Both this Court and, more importantly, the people of Michigan whom we were elected to serve, deserve better.

By far the most troubling implication of today's new rule is the majority's outright deprivation of the retained sovereign right of the people of Michigan to elect the members of their judicial branch of government. The constitutional magnitude of this action should not be underestimated. With one fell swoop, the majority simply casts aside the one-man, one-vote principle of *Baker v Carr*, 369 US 186 (1962). The justices of this Court were elected by our fellow citizens to hear and decide cases. We campaigned on our judicial philosophies, explaining our philosophies in deciding cases that come before us. The people then chose the justices that they preferred to sit on this Court in free elections where each vote counted equally. In one administrative order, the majority takes away the right of every citizen of Michigan to have his or her vote count. Instead of "one-man, one-vote," we now have "four-justices, one-vote," as four justices usurp the people's constitutional right to choose who decides the cases coming before the highest Court in our state.

Caperton v A.T. Massey Coal Co, Inc:

I have also studied carefully the United States Supreme Court's recent decision in *Caperton v A.T. Massey Coal Co, Inc.*[21] The question under *Caperton* is whether the Due Process Clause of the federal constitution requires this change—that is, that this Court review de novo a justice's decision not to disqualify himself from a proceeding. My research reflects that not one state that has examined its rules post-*Caperton* has changed its rules regarding the identity of the decision maker.[22] Indeed, Michigan becomes an outlier by doing so. The federal constitution plainly does not require any such action.

The United States Supreme Court itself has not changed its own recusal practices in response to *Caperton*. That is, it continues to leave recusal decisions to each individual justice. Nothing in *Caperton* remotely suggests that this longstanding practice violates due process. *Caperton* considered the standards for recusal, not the identity of the decision maker. And unlike the United States Supreme Court, where individual

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[20] See, e.g., *Commentary: Beware power grab for Michigan court*, The Detroit News, November 19, 2009, attached as Appendix B.

[21] *Caperton v A.T. Massey Coal Co, Inc*, ___ US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton* held that a state supreme court justice was required to recuse himself from a case involving a corporate party whose chairman and CEO supported the justice's campaign both by directly donating the statutory maximum to the justice and by contributing $2.5 million to an independent group that targeted the justice's opponent during the electoral process because the sum of these contributions raised "a serious, objective risk of actual bias" on the part of the justice. *Id.* at ___, slip op at 16.

[22] My memo to the Court on this subject is attached as Appendix C.

justices' recusal decisions are entirely unreviewable, recusal decisions of justices of this Court *are* subject to review in the United States Supreme Court.

National Implications:

"*The game is out there and it's either play or get played . . . [It's] all in the game.*"
- *The Wire*[23]

Myriad questions of national importance bob in the wake of this new disqualification procedure. Do judicial candidates or incumbent justices seeking reelection show "an appearance of bias or prejudice" even if they merely respond to an organization's questionnaire about their personal views on legal and social issues?[24] Across the country, organizations have challenged, with varying degrees of success, the constitutionality of certain provisions in state codes of judicial conduct insofar as those provisions infringe on the campaign speech of judicial candidates.[25] Plainly, a line exists between what a judicial candidate can and cannot say during the electoral process.[26] Nevertheless, the amorphous standards in the new rule do not clarify the appropriate demarcation between constitutionally protected campaign speech and disqualifying conduct.

Moreover, the national debate regarding the necessity of new federal recusal procedures is ongoing.[27] Regrettably, however, most of the discussion is glaringly one-sided. I see little interest in truly considering opposing viewpoints. The House Judiciary Subcommittee on Courts and Competition Policy, chaired by Georgia Congressman Hank Johnson, recently postponed a hearing regarding judicial recusals scheduled for October 20, 2009. The chairman of the Judiciary Committee, Michigan Congressman John Conyers, has apparently rescheduled the hearing for December 10, 2009. Three of my colleagues who voted for the new recusal rules have apparently been invited to testify in person at the upcoming Judiciary Committee hearing. In contrast, no member of the

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[23] The Wire, 100 Greatest Quotes, <http://www.youtube.cpm/watch?v=-Sgj78QG9B> at 3:36 and 9:50 to 9:55 (accessed November 25, 2009).

[24] See, e.g., *Duwe v Alexander*, 490 F Supp 2d 968 (WD Wis, 2007).

[25] Compare *Kansas Judicial Review v Stout*, 562 F3d 1240 (CA 10, 2009) (dismissing lawsuit filed by political action committee, judicial candidate, and prospective candidate as moot because the Kansas Supreme Court adopted a new Code of Judicial Conduct after answering questions certified about former Code provisions) with *Duwe*, *supra* at 977 (holding that judicial candidates' responses to survey questions are constitutionally protected speech and do not constitute commitments that could be restricted in the interest of protecting judicial openmindedness).

[26] See *Republican Party of Minnesota*, *supra*.

[27] David Ingram, The National Law Journal, *Congress Set to Take Aim at Judicial Recusals,* <http://www.law.com/jsp/article.jsp?id=1202435099939> (accessed November 23, 2009).

Court who voted against these rules has been invited to testify. My offer to testify in person was rejected by a staffer for the House Judiciary Subcommittee on Courts and Competition Policy. I was told that I could submit a five-page written statement. So much for full and robust debate about the appropriate scope and structure of any potential recusal guidelines.

Moreover, there appears to be a national push among a handful of well-funded interconnected advocacy groups to disqualify judges who express their views during the electoral process. I am aware that George Soros does not support judicial elections. Certain Soros-sponsored groups, including the Brennan Center for Justice and Justice at Stake, have enthusiastically lauded the efforts of the majority.[28] Many voters would be surprised to know about the extensive financial ties that exist between these organizations and George Soros's main foundation, the Open Society Institute. Preliminary scrutiny of IRS Form 990s reveals that the Open Society Institute has spent at least $34 million to derail judicial elections in favor of merit selection since 2000.[29]

Consistent with these national efforts, when Chief Justice KELLY told the public that the Court has only begun its efforts at divining detailed disqualification rules at our November 5, 2009 public administrative conference, she added:

> Also not present in this rule is the question of when financial contributions to sitting justices constitute the appearance of bias or the probability of bias such as to require disqualification. That's I think an important matter that has to be addressed and I hope that we will address it soon in the future.[30]

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[28] See Jonathan Blitzer, *Recusal Reform in Michigan*, July 31, 2009 ("With Justice Elizabeth Weaver leading the charge, the Michigan Supreme Court is poised to codify new standards for how and when judges must recuse themselves.") <http://www.brennancenter.org/blog/archives/recusal_reform_in_michigan/> (accessed November 23, 2009); see also Gavel Grab Blog, *Brandenburg on the Future of Recusal*, November 19, 2009 (where the executive director of Justice at Stake describes the new "tougher" recusal rules as a sign that Michigan is moving "forward instead of backward.") <http://www.gavelgrab.org/?cat=42> (accessed November 23, 2009).

[29] See <http://www.eri-nonprofit salaries.com/index.cfm?FuseAction=NPO.Form990&EIN=137029285&Year=2009> (accessed November 23, 2009). Additionally, since December 4, 2008, regional advocacy groups, including the Joyce Foundation, have donated $400,000 to the Brennan Center and $190,000 to Justice at Stake. See *Money and Politics Grants List* <http://www.joycefdn.org/programs/moneypolitics/grantlist.aspx> (accessed November 23, 2009).

[30] See minutes 1:02:25 to 1:03:35 of the November 5, 2009 public administrative conference at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed November 23, 2009).

Any effort to expand our new disqualification procedure is ill-advised. The Wisconsin Supreme Court, for example, recently rejected two proposals submitted by the League of Women Voters of Wisconsin Educational Fund and former Justice William Bablitch respectively. The League of Women Voters' proposal would have required justices to disqualify themselves if a lawyer, law firm, or party to a case donated more than $1,000 or if a party contributed to "a mass communication that was disseminated in support of the judge's election" within the preceding two years. In contrast, Justice Bablitch's proposal would have mandated recusal if a lawyer or party donated $10,000, the legal limit for individual contributions to a judicial candidate's campaign, and the proposal would require recusal for certain third party expenditures.[31] After a lengthy public hearing, the Wisconsin Supreme Court instead adopted a proposal clarifying that endorsements, campaign contributions, and independent ad expenditures, standing alone, are not enough to require a justice to recuse himself or herself.[32] In other states, including Florida, committees continue to evaluate appropriate recusal procedures after soliciting input from judges, attorneys, and legal scholars.[33] In light of the uncertainty in various states concerning judicial disqualification procedures, the hasty adoption of these rules today is imprudent and unwise.

Finally, the majority's action is a self-inflicted wound. This rule will take the honor from "your Honor." What foolish person would run for this Court and allow his or her hard earned reputation to be sacrificed not by the slings and arrows of a vitriolic election campaign, but at the hands of colleagues? So much for civility initiatives.

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[31] Adam Korbitz and Alex De Grand, State Bar of Wisconsin, *Court to tackle recusal issue and other rules petitions*, October 27, 2009, <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=87014> (accessed November 24, 2009); Patrick Marley, The Milwaukee Journal Sentinel *State Justices Skeptical of Recusal Proposal*, October 28, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137049882> (accessed November 23, 2009).

[32] Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, The Milwaukee Journal Sentinel October 29, 2009, <http://www.leagle.com/unsecure/news.do?feed=yellowbrix&storyid=137059379> (accessed November 23, 2009).

[33] Gary Blankenship, The Florida Bar News, *To Recuse or not to Recuse: How to do it is the Real Question*, November 1, 2009, <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/f5197831018965348525765700 6e60e4%21OpenDocument> (accessed November 23, 2009).

The people of Michigan cannot possibly benefit from this order. Today's order is a lacerating wound to this institution and the people of Michigan.[34] May God save these United States, the state of Michigan, and this honorable Court.

YOUNG, J., concurs with CORRIGAN, J.

YOUNG, J. (*dissenting*). I respectfully dissent from the new majority's enactment of this unconstitutional rule of disqualification. ***In eliminating all due process protections, compromising and chilling protected First Amendment rights, and conducting secret appeals that might lead to the removal of an elected justice from a case against his will, the majority has created a 21st Century Star Chamber with its new disqualification rule.***

The issue here is not *whether* this Court should have a disqualification rule—we have had a disqualification rule for 173 years that mirrored the rule that the United States Supreme Court continues to use—but rather *which* disqualification rule best ensures that parties whose cases are decided by this Court have neutral arbiters deciding those cases. Every member of this Court purports to subscribe to the elementary principle of due process that parties whose cases are decided by this Court must have impartial justices deciding those cases.[35] ***However, the plain fact is that the rule issued today is facially unconstitutional in several critical ways, with the result that it will allow four justices to disenfranchise the millions of Michigan voters who elected a justice. And it is also the fact that the justices who voted for this rule—KELLY, CAVANAGH, WEAVER and HATHAWAY—enacted this new rule despite having knowledge that the rule was constitutionally deficient.***[36] The citizens of Michigan should be concerned when a

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[34] In the event the majority precipitates a constitutional crisis by purporting to oust a justice from a case, I leave all my possible options open.

[35] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[36] There are two responses to Chief Justice KELLY's claim that these constitutional concerns were raised only at the "eleventh hour." First, as Justice CORRIGAN states, the rule that the Court voted on was circulated to the Court just the day before conference. Second, Chief Justice KELLY's suggestion that the Court has no obligation to consider these constitutional objections, even if raised at the hearing, is an abrogation of the obligation that each justice makes to uphold the federal and state constitutions. Moreover, Justice Markman also proposed several amendments at the November 5, 2009 administrative hearing to address some of the constitutional deficiencies with the rule, which he circulated to members of the Court well in advance of the administrative hearing. I also circulated to all members of the Court on November 19, 2009 written proposals to address the constitutional problems I raised. This memorandum is attached as Appendix A. The public is invited to access our administrative hearing at <http://www.michbar.org/courts/virtualcourt.cfm> (accessed November 24, 2009), to

majority of their Supreme Court is indifferent to the state and federal constitutions they have been entrusted and have sworn to uphold.

The New Rule Violates the Fourteenth Amendment Right to Due Process

The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard.[37] Heretofore, only an appeal to the United States Supreme Court could reverse a Michigan justice's determination regarding a motion to disqualify. In an appeal taken from a Michigan justice's denial of a motion for disqualification, the challenged justice is entitled to the full range of due process rights that all appellees before the United States Supreme Court are entitled. A justice challenged on such an appeal from his decision not to recuse therefore has a right to counsel, to file briefs in opposition to the appeal, to have the issues on which the disqualification is predicated framed in advance, and the right to have it decided by a neutral arbiter. ***The new rule eliminates all of these due process rights.***

The new rule creates an appellate process whereby the members of the Michigan Supreme Court, rather than the United States Supreme Court, will determine whether one of their challenged colleagues may sit on a case. By interposing itself as an appellate body in the disqualification decision, this Court must afford the targeted justice no fewer rights than he enjoyed in such an appeal to the United States Supreme Court. As stated, a justice has the right to have an appeal be limited to the grounds stated in the motion for disqualification, to retain counsel in the matter, and to submit a brief in response to the motion for disqualification. Sometimes, due process will also necessitate an evidentiary hearing, as there may be facts in dispute between the moving party and the challenged justice. ***Notwithstanding these constitutional requirements of due process, the new majority protected none of them, even though I specifically raised each of them to the Court before this order entered and provided proposed language to the rule that would remedy these constitutional deficiencies.***

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determine whether Chief Justice KELLY or I have accurately described the discussion of constitutional questions I raise herein.

As important, the Chief Justice has refused to place on our next administrative agenda my written proposals so that they can be considered by the Court. This course of conduct underscores my contention that the new majority is indifferent to the serious constitutional questions I and my colleagues in dissent have placed before them.

[37] "'The fundamental requisite of due process of law is the opportunity to be heard.'" *Dow v State of Michigan*, 396 Mich 192, 205 (1976), quoting *Grannis v Ordean*, 234 US 385, 394 (1914). "The 'opportunity to be heard' includes the right to notice of that opportunity." *Id.*

Moreover, if due process means anything—particularly in the disqualification setting where this issue is pivotal—a targeted justice is most assuredly entitled to have an *impartial* arbiter decide the question. When the United States Supreme Court is the arbiter, no serious question on this point arises. ***However, when the justices of this Court become the arbiters of a disqualification decision of one of its members, there are substantial questions whether an impartial arbiter is involved.*** It is no secret that this Court is riven with deep philosophical, personal, and sometimes frankly partisan cleavages.[38] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands anything less than the right to challenge the potential biases of the decision-makers in this appellate procedure. Yet the new rule provides no mechanism for challenging the bias of a member of this Court in the appeal process it establishes today. At the November 5, 2009 administrative conference, the new majority specifically repudiated Justice MARKMAN's proposed amendment addressing this issue. The new majority also refused to consider all of the specific due process rules I later proposed in writing. ***The majority's open rejection of these basic constitutional protections indicates that it is willing to sacrifice essential requirements of due process in enacting this rule. The open question is why.***

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[38] Justice WEAVER has already gone on record stating that I ought "to recuse [myself in a case] in which Mr. Fieger is himself a party" because of campaign remarks I made in 2000. *Grievance Administrator v Fieger*, 476 Mich 231, 328 and 340 (2006) (WEAVER, J. dissenting). See also *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007). She has also gone on the record as dissenting from my participation in cases "where Mr. Geoffrey N. Fieger's law firm represents" a party. *Ansari v Gold*, 477 Mich 1076, 1077 (2007). See also *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); and *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007). As I note below, Mr. Fieger and his firm have been responsible for nearly all the disqualification motions filed during my tenure on the Court. All have been based on campaign speech and all have been unsuccessful here and in the federal courts, including the United States Supreme Court, where he appealed my denials.

Other of my colleagues have made explicitly hostile partisan comments. See, for example, our Chief Justice's recent comment wherein she promised to "undo a great deal of the damage that the *Republican* Court has done." Brian Dickerson, *Justices Gird for Gang of 3½*, Detroit Free Press, January 11, 2009, at 1B (emphasis added). Some sitting members of this Court openly campaigned against Chief Justice TAYLOR's re-election last year. These actions and published statements fairly call into question how impartially some of my colleagues will decide disqualification appeals under the new rule they have established.

The New Rule also Violates the First Amendment Right to Freedom of Speech

Even beyond the specific due process requirements that the new majority has thrown overboard, the new rule facially violates a judge's First Amendment rights. In every written constitution since 1850, the People of Michigan have retained their sovereign right to elect judges rather than surrender that right to some other process. Accordingly, judicial candidates in Michigan campaign for judicial office. In campaigning, they will engage in political speech that is clearly protected under the First Amendment.[39] The protection of speech guaranteed under the First Amendment is especially important within the context of political campaigns. James Madison, drafter of the First Amendment, wrote:

> The value and efficacy of [the right of elections] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[40]

Thus, any restrictions on campaign speech not only infringe on a candidate's right to speak, but also infringe on the *public's* right to vote intelligently on their candidates.

The importance of citizens' decisions regarding whom to entrust with public office deserves no less than a robust public discussion of issues by candidates seeking their votes. ***The order issued today, however, frustrates this kind of political discussion between judicial candidates and voters and penalizes a judicial candidate for trying to do so.*** The order expressly contemplates that campaign speech protected under the First Amendment will nevertheless cause a duly-elected judge to be disqualified from hearing a case. This is so because the new rule establishes that campaign political speech is subject to an "appearance of impropriety" limitation. Apart from the fact that it is

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[39] *Republican Party of Minnesota v White*, 536 US 765 (2002).

[40] James Madison, *Report on the Virginia Resolutions*, available at <http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html> (accessed November 19, 2009).

inherently a nebulous standard,[41] the "appearance of impropriety" standard is not a constitutional standard.[42]

Thus, even if the challenged political speech in no way implicated actual bias against a party (or any other constitutional right of such a party), an elected justice is still liable to be disqualified if his campaign comments were later determined to create an appearance of impropriety. It is not hard to contemplate campaign speech that might offend and later be considered "improper" under the new rule's standard.[43]

Moreover, the mere *threat* of future disqualification produces a chilling effect on protected speech. The United States Supreme Court's decision in *Republican Party of Minnesota v White* struck down the Minnesota Supreme Court's rule forbidding an incumbent judge or candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" during an election campaign.[44] While the Minnesota

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[41] We cannot even be sure that the justices who voted for the rule understand its own implications. See, e.g., note 23, *infra*.

[42] Even the rule's proponent, Justice HATHAWAY, recognizes that "appearance of impropriety" is an extraconstitutional standard. At our November 5, 2009 administrative conference, Justice HATHAWAY explained, "*Caperton* says that states can have stricter standards [than due process requires]. . . . We have Canon 2 of the Michigan Code of Judicial Conduct, which talks about a judge having to adhere to the appearance of impropriety standard." Justice HATHAWAY *clearly believes that the appearance of impropriety does and should trump First Amendment rights*. So, apparently, do her colleagues in the majority.

[43] I made this very point in my statement concerning a disqualification motion addressed to Justice HATHAWAY. See *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 60 (2009) (statement of YOUNG, J.). In fact, journalists looking at Justice HATHAWAY's campaign statements questioned whether she could be fair and impartial to all parties. An article written on the occasion of Justice HATHAWAY's investiture suggested that "[i]n her campaign . . . Hathaway seemed to take sides. She suggested that, if elected, she would be the 'voice' of and stand up for 'middle-class families,' instead of 'siding with big insurance companies and polluters' and 'big corporations.'" Todd Berg, *Diane M. Hathaway Sworn in as Michigan Supreme Court's 104th Justice*, Michigan Lawyers Weekly, January 12, 2009. It will be interesting to see how Justice HATHAWAY fares under the new recusal standard she has championed if challenged by the very parties she stated she would "side against" if elected.

[44] *Republican Party of Minnesota v White, supra*, 536 US at 768.

Supreme Court's restriction on campaign speech was more expressly content-based than the rules promulgated by this order, ***the new majority here is attempting to achieve indirectly what the United States Supreme Court declared in* White *that a court could not do directly: stifle protected judicial campaign speech.*** The new "appearance of impropriety" standard is so broad and vague that judges and judicial candidates will be forced to self-limit their campaign speech so that, once they are elected, they can actually exercise the duties of the office they have sought. Thus, this rule is facially unconstitutional because it expressly allows a jurist's First Amendment right to free speech to be subordinated to a nonconstitutional standard. ***The new majority is untroubled by this obvious abridgement of First Amendment rights that their new rule causes. Again, the question remains how the new majority could be so unconcerned about such a serious matter.***

The Michigan Constitution Does Not Allow this Court to Remove a Justice from an Individual Case

Under the Michigan Constitution there are at most *four* ways a duly-sitting justice may be removed against his or her will:

- The People can choose not to reelect that justice.[45]
- The House can impeach a justice "for corrupt conduct or for crimes or misdemeanors" by majority vote. Upon impeachment, a judicial officer is forbidden from "exercis[ing] any of the functions of his office...until he is acquitted." The Senate can permanently remove a justice from office by a two-thirds vote.[46]

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[45] Const 1963, art 6, § 2: "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years . . . ."

[46] Const 1963, art 11, § 7:

> The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment. . . . No person shall be convicted without the concurrence of two-thirds of the senators elected and serving. Judgment in case of conviction shall not extend further than removal from

- The House and Senate can enact a concurrent resolution removing a justice "[f]or reasonable cause" that "is not sufficient ground for impeachment" by a vote of 2/3 of the members elected to each house, at which time the governor "shall" remove the justice.[47]

- This Court can remove a justice from the Court upon recommendation of the Judicial Tenure Commission.[48]

Notably, these constitutional provisions only refer to removal of a justice from *all* cases, not from a particular *individual* case, as this order allows. It is important to note, however, that there is no provision in the Michigan Constitution that explicitly allows this Court to overturn the elective will of the People and remove a justice from an individual case, nor is there any language that would even implicitly provide such authority.

Significantly, the Michigan Constitution has provided extra protections for judicial officers that no other officeholder enjoys. And it is not hard to imagine why the People would want to insulate judicial officers from political attacks that would impede their ability to discharge their duties of office. Accordingly, our Constitution acknowledges the primacy of judicial office—*even as between judicial office and executive or legislative offices*. It expressly precludes the recall of judges by Michigan voters while allowing the recall of all other elective officers.[49] In other words, the People have decided that, once they have elected a justice, that decision is final, at least for the duration of the justice's eight-year term. This extraordinary constitutional protection for judicial office is an important backdrop against which to assess the new majority's asserted right to prevent a sitting justice from exercising the duties of his office. If statewide judicial elections are to mean anything, it should not be up to four justices to

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office . . . . No judicial officer shall exercise any of the functions of his office after an impeachment is directed until he is acquitted.

[47] Const 1963, art 6, § 25: "For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution."

[48] Const 1963, art 6, § 30(2): "On recommendation of the judicial tenure commission, the supreme court may . . . retire or remove a judge . . . ."

[49] Const 1963, art 2, § 8.

pick and choose when to allow the will of the People to be heard and when to stifle that will. By creating through court rule the power to remove justices from individual cases, the majority has done just that.

The authority of this Court to remove an elected justice from a particular case is, therefore, highly questionable. In issuing its new recusal rules, the new majority has not adequately considered, much less justified, the authority of the Court to remove a justice in a particular case, especially since such removal by the fiat of four silences the People, who elected *seven* particular justices to the Court, who are not fungible. I am not sure by what logic an administrative rule may be used to amend our Constitution and create a new authority whereby an elected justice can be removed from a case by his co-equal justices. ***While justices are constitutionally protected from political attacks from without, the new majority has conceived a clever means to launch political attacks from within the Court, giving a majority of four justices the ability to disenfranchise millions of Michigan voters by removing their elected justices from hearing cases that will affect their daily lives.***

The New Rule Will Enhance Gamesmanship That Will Undermine the Integrity of Judicial Elections and This Court

The new disqualification rule is simply bad policy that is the product of a manufactured crisis. Although it purports to ensure that only impartial justices sit on cases, the new rule has the effect of "weaponizing" disqualification as a tool to achieve countermajoritarian results to nullify elections. Shockingly, my colleagues have set themselves up as the gunners on the artillery they have manufactured.

For the entire existence of our Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial qualification,whether raised on motion by a party or by the justice. They have done so under our unvaried practice that mirrors the one used by the United States Supreme Court.[50] In short, a justice confronted with a disqualification motion has typically consulted with members of this Court and made a determination whether participation in a particular matter was appropriate. Other than providing their personal counsel, other members of the Court have not participated in the decision.

Until recently, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing the issue of a justice's disqualification. Of late,

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[50] See *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007). See also Statement of Recusal Policy, United States Supreme Court, November 1, 1993, available at 483 Mich 1237.

however, with the shift in the philosophical majority of this Court,[51] disqualification has taken on a new, more politicized role. One need look only as far as a recent volume of the *Michigan Bar Journal* for evidence of this new effort to politicize disqualification motions. In a letter to the editor, attorney John Braden suggests that the judicial electoral process is an unsatisfactory solution for addressing what he believed to be the unfavorable philosophy and decisions of the Court's former philosophical majority.[52] Therefore, he urged his colleagues in the Bar to use motions to disqualify as a suitable alternative to the electoral process guaranteed by the Michigan Constitution to alter the philosophical balance of the Court in order to achieve what he desired: more favorable results for his clients and himself. Moreover, it is entirely foreseeable that sophisticated and well-financed clients, like insurance companies and unions, will demand that their lawyers file motions for disqualification as a matter of course in order to alter the philosophical makeup of the Court in ways the electorate hardly intended. ***Thus, today's order is no less than a call for the use of disqualification as a non-electoral political weapon to remove judges with whose judicial philosophy one disagrees. My colleagues, wittingly or not, in enacting this new rule, give aid to this politicized use of disqualification motions.***

Why do I claim that the new disqualification rule is a product of a "manufactured crisis"? The facts are very plain. After the Court's philosophical majority changed in 1999, disqualification motions became a tactic to alter the decision-making and outcome of a particular case. As I explained in my statement accompanying the proposed disqualification rules when originally published for public comment, each of the motions to disqualify made between 1999 and 2008 were brought against members of what was

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[51] It is no secret that the philosophical majority of this Court changed with the 1998 Supreme Court election. The philosophical transformation of the Michigan Supreme Court that occurred eleven years ago, and the debate that has accompanied that transformation—a debate similar in some ways to that taking place within the federal judicial system—resonated strongly in the electoral political process, which the citizens of Michigan, through their constitution, have chosen as the method by which they select their justices. Perhaps not surprisingly, those who had been most comfortable with the approach of the Michigan Supreme Court over the previous decades were resistant to this transformation, and many responded forcefully in political opposition. The 2000 Supreme Court election, in which three members of the Court's prior philosophical majority stood for election, was one of the most bitterly contested in the state's history, as was the most recent Supreme Court election.

[52] See Opinion and Dissent, 85 *Mich B J* 10, 12 (2006).

then the Court's philosophical majority.[53] Importantly, nearly all of the motions to disqualify brought during my tenure on this Court were the product of one law firm.

Each of the motions to disqualify made by this firm involved various allegations of claimed bias, principally stemming from political speech in Michigan Supreme Court judicial campaigns.[54] This firm has taken advantage of the review process that our traditional disqualification practice guaranteed parties, by appealing my previous denials of its motions to disqualify to the United States Supreme Court at least three times. Notably, that Court has denied certiorari on each occasion.[55] Moreover, this firm has unsuccessfully challenged in federal eourt the constitutionality of this Court's historic practice of handling motions for judicial recusal that the Court today is jettisoning.[56] While the United States Supreme Court has denied these meritless claims of bias directed at me, as its decision in the *Caperton* ease demonstrates, when warranted, the United

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[53] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 (2009). Since this statement, three additional motions for disqualification have been filed with the Court: an additional motion by the law firm described above to disqualify Justices MARKMAN and CORRIGAN and myself, and two separate motions to disqualify Justice HATHAWAY.

[54] In addition to a motion to disqualify me in the pending case of *Pellegrino v Ampco Systems Parking* (Docket No. 137111), by counscl's own admission, he has filed motions for my recusal in the following cases: *Tate v City of Dearborn*, 477 Mich 1101 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098 (2007); *Flemister v Traveling Med Services*, 729 NW2d 222 (2007); *Short v Antonini*, 729 NW2d 218 (2007); *Ansari v Gold*, 477 Mich 1076 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068 (2007); *Grievance Administrator v Fieger*, 476 Mich 231 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *McDowell v Detroit*, 474 Mich 999 (2006); *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Graves v Warner Bros*, 469 Mich 853 (2003).

[55] *Graves, supra, cert den* 542 US 920 (2004); *Gilbert v DaimlerChrysler Corp, supra, cert den* 546 US 821 (2005); *Grievance Administrator v Fieger, supra, cert den* 127 S Ct 1257 (2007).

[56] See *Fieger v Ferry*, 2007 WL 2827801 (E D Mich, 2007).

States Supreme Court is not uninterested in reviewing and reversing a state justice's decisions on disqualification.[57]

Finally, it is not beyond imagining that the new disqualification procedure will become fuel for the ever-intensifying fire of judicial election campaigns in Michigan. For example, if Candidate A is running a campaign against Justice B, it is entirely possible that Candidate A would make a campaign issue over the number of times that Justice B's colleagues voted that he could not be an impartial arbiter of a case. ***Although the new majority would no doubt deny it, the new rule it enacts today creates ample ammunition for future judicial electoral warfare.***

The New Rule was Enacted with Unseemly Haste and in Violation of the New Majority's Commitment to "Transparency"

I close with a final point about the new majority's methods in enacting the rule contained in today's order. So eager was the new majority to enact this unconstitutional rule that they did so with unseemly haste.[58] They not only ignored the obvious

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[57] See *Caperton v A T Massey Coal Co*, ___ US ___, 129 S Ct 2252, 173 L Ed 2d 1208 (2009).

[58] Furthermore, the arrogance that characterizes the majority's eagerness to enact new recusal rules *without even understanding their content* is utterly astounding. The following exchange occurred at our November 5, 2009, administrative conference, when I sought clarification regarding how the new "appearance of impropriety" standard would actually work:

> *Justice HATHAWAY.* If there is an appearance of impropriety, then you cannot sit on a case.
>
> *Justice YOUNG.* And from what perspective is the appearance of impropriety standard? Is it a subjective standard? Is it an objective standard?
>
> *Justice HATHAWAY.* I haven't thought through all that to be honest with you, to answer you here.
>
> *Justice YOUNG.* But we're going to vote on this today.
>
> *Justice HATHAWAY.* Then let's vote.

constitutional problems I and Justices CORRIGAN and MARKMAN had brought to their attention, they enacted the rule in violation of this Court's public administrative process. ***The order issued today does <u>not</u> contain the rule this Court voted on in its November 5, 2009 public administrative conference.***

The disqualification rule approved at our November 5, 2009 administrative conference included my amendment to subsection (D)(1). When the motion to approve Justice HATHAWAY's proposed version of the rule was moved, it was explicitly subject to a friendly amendment I offered (which amendment Justice HATHAWAY accepted) regarding the language of subsection (D)(1). My amendment provided that the actual language of subsection (D)(1) of the rule would be determined *at a later date after conferring with Justice HATHAWAY*. In proof of this, I offer the following exchange that occurred at our November 5, 2009 public administrative conference when we voted on her proposal:

> *Chief Justice KELLY.* Can we act on the motion at this point? Shall we start, Justice Hathaway?
>
> *Justice HATHAWAY.* Well, first I'm going to include Justice Young's . . .
>
> *Justice WEAVER.* Well, no, you can just let him bring it up next time. Just keep it as it is.
>
> *Justice HATHAWAY.* I move that this Court adopt my November 4, 2009 version of alternative C as Michigan Court Rule 2.003 regarding disqualifications of judges.
>
> *Justice WEAVER.* Second.
>
> *Justice HATHAWAY.* And I support.
>
> *Justice YOUNG.* ***With a friendly amendment we can work out.***
>
> *Justice HATHAWAY.* ***Right. Regarding (D)(1).***
>
> *Chief Justice KELLY.* I think we've discussed this issue. Would you like to vote? [Roll call vote omitted.] It passes by a 4 to 3 vote. We have a new

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As this exchange indicates, the members of the new majority are less interested in understanding how the rule actually works than in pushing through immediate adoption of these unconstitutional and ill-advised rules, whatever the cost, in order to supplant a practice that has served this state well for 173 years.

> recusal rule. ***We will take it up again at next month's meeting for further discussion at least of (D)(1).***[59]

Thus, this Court did not vote on a complete rule in our November 5, 2009 administrative conference.[60]

As this exchange shows, there remained a significant procedural issue to resolve before an order effectuating a new disqualification rule could enter and be given immediate effect: the actual language of subsection (D)(1) must still be settled.[61] Chief Justice KELLY acknowledged this and stated on the record that the rule would be returned to our December administrative conference to resolve the language of subsection (D)(1). ***All of this was done in open Court, and members of the public are invited to verify whether I have accurately represented the proceedings and vote by accessing the video recording of the administrative conference from the State Bar of Michigan's "Virtual Court."***[62]

Therefore, I believe that issuing an order today before resolving the status of my amendment is improper and a contravention of the Court's commitment to conduct its administrative matters in public. ***The issuance of the order today enacting this new disqualification rule that was not approved in open Court belies any pretense that this Court is functioning "transparently."***

Given the stated desire of this rule's proponents for having this Court's business done "in an open, transparent, restrained, orderly, fair, and efficient manner,"[63] there is

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[59] Emphasis added.

[60] Once the language of the rule is finalized, however, it is to have immediate effect, as a subsequent majority vote determined.

[61] Justice WEAVER wanted an order that was *retroactive* to the November 5, 2009 vote on the new rule. No other justice supported her position. A court speaks through its orders. *Johnson v White*, 430 Mich 47, 53 (1988). The vote to establish a new disqualification rule cannot be given immediate effect without an order. The order being entered today is being given immediate effect, as desired by the majority. Whatever the timing of the order's effective date, ***my point is that this order does not reflect the actual vote on November 5, 2009.***

[62] http://www.michbar.org/courts/virtualcourt.cfm (last accessed November 23, 2009).

[63] Justice WEAVER's dissenting statement to the minutes of November 13, 2008 conference, available at <http://www.justiceweaver.com/pdfs/eaw-dissent_satellite%20offices_12-2-08.pdf> (accessed November 19, 2009).

another important aspect of this new rule that violates the new majority's alleged interest in transparency: ***The rule enacted today permits an elected justice of this Court to be removed from a case in secrecy.*** At our November 5, 2009 conference, Justice MARKMAN proposed and the new majority repudiated an amendment that would require all appeals of a justice's initial decision to deny a motion for disqualification to be heard in an open session of this Court. So much for the openness and transparency that the new majority has continuously trumpeted.

Finally, as its proponents admit, this order is but an opening salvo for additional radical changes to this Court, ***including the unconstitutional replacement of an elected justice with some other judge not elected to the Supreme Court.***[64] At our November 5, 2009 administrative conference, Chief Justice KELLY indicated her support for the new disqualification rule but also reiterated that it was only "the first step in the realization of a truly excellent rule." She considers it "essential" for this Court to have a rule that would allow the "replac[ement of] a disqualified justice with another judge for the purpose of hearing the case involved." As Justice CORRIGAN explained in great detail in her statement on the proposed disqualification rules,[65] unlike other states, the People of Michigan have not authorized this Court to appoint temporary justices. Rather, the Michigan Constitution provides that "[t]he supreme court *shall* consist of seven justices *elected at non-partisan elections as provided by law*."[66] Thus, this order appears to be preparatory for additional unconstitutional changes to this Court that would further disenfranchise Michigan voters.

This is truly a sad day for this Court, the citizens of Michigan, and for the judicial elective system that our citizens as sovereign have mandated. For all of these reasons, I dissent.

CORRIGAN, J., concurs with YOUNG, J.

MARKMAN, J. (*dissenting*). In place of a judicial disqualification rule that has worked satisfactorily for over 175 years to ensure an honorable Michigan Supreme Court

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[64] As I explained in my statement accompanying the three proposed rules, Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1236 n 2 (2009): "[T]wo of [my] colleagues have made the radical proposal that justices *can* be replaced by other judicial officers. See *Adair v State of Michigan*, 474 Mich 1027, 1045, 1051 (2006)."

[65] Proposals Regarding Procedure for Disqualification of Supreme Court Justices, 483 Mich 1205, 1229-1234 (2009) (statement by CORRIGAN, J.).

[66] Const 1963, art 6, § 2.

and that remains employed by the United States Supreme Court and the majority of other state supreme courts, the new rule adopted by the majority, by establishing justices as the reviewing authority for the disqualification decisions of other justices and by adopting a vague "appearance of impropriety" standard applicable to all judges throughout the state: (a) will incentivize disqualification motions and thereby produce a considerable increase in the number of such motions and in the amount of time and effort devoted by this Court to addressing such motions; (b) will introduce an unprecedented degree of gamesmanship and politicization into the judicial process by enabling attorneys to influence which duly-elected justices will be allowed to participate in deciding their own cases and controversies; and (c) will seriously undermine the collegiality of this Court. In the end, the new rule is far more likely to reflect adversely upon the integrity of this Court than it is to enhance this Court's standards of conduct.

Although I opposed the adoption of the new rule, recognizing that there was majority support, I did move for the adoption of four amendments. Each of these was rejected by the same 4-3 vote. Most importantly, in my judgment, the majority refused to adopt the following amendment:

> All disqualification decisions other than the challenged justice's own initial decision shall be decided in public administrative session.

For this Court to disqualify an elected justice of this Court from participation in a case constitutes an action of extraordinary significance in a democratic system of judicial selection and should be undertaken in as open and as transparent a manner as possible. Indeed, it is hard to imagine a more consequential decision of this Court than that of some justices disqualifying an elected and coequal colleague. In view of the emphasis on transparency that has motivated this Court to adopt open administrative hearings, I cannot think of an action that more compellingly requires an open decision-making process than that of determining which justices will, and which justices will not, be allowed to participate in a case. The people are entitled to know why a justice whom they have elected to serve on this Court has been deprived of this right, and they are entitled to the opportunity to assess the rationale and motives of those who have rendered this judgment.

The majority also rejected the following amendment:

> A justice shall raise the issue of another justice's disqualification within 14 days after the former discovers the alleged basis for disqualification, including where a justice discovers the alleged basis during a non-public conference of the Court.

This amendment would have made clear that a justice may raise the issue of another justice's disqualification and that such disqualification could be predicated upon inappropriate conduct or behavior reflected during closed conferences. Tellingly, the single justice on this Court who has repeatedly cast public aspersions upon colleagues on the basis that they have committed unspecified misconduct and misbehavior at closed

conferences not only voted against this amendment, but also voted against the amendment requiring public deliberation on disqualification motions. Under this amendment, in the event a justice exhibits bias or prejudice for or against a party or an attorney, another justice would have 14 days from when they first became aware of this to move for that justice's disqualification. Absent an opportunity for a justice to sua sponte challenge the participation of another justice, statements of genuine bias or prejudice made in the context of confidential case discussions cannot be addressed, and attorneys exclusively will control the flow of disqualification motions, in particular, the few attorneys who have demonstrated a disproportionate inclination to repeatedly offering disqualification motions. Moreover, MRPC 8.3(b) requires "[a] lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office [to] inform the Judicial Tenure Commission." Given that the justices of this Court are all lawyers, it seems clear that our rules of conduct *require* us to raise disqualification issues if we believe that a justice should be disqualifying himself and is not doing so.

The majority likewise rejected the following amendment:

> Participation in a disqualification decision is subject to the same disqualification procedures as are applicable to a justice's participation in a particular case.

This amendment was intended to ensure the integrity of the disqualifying justices with reference to the justice whose disqualification is being sought. For instance, if Justice A, the subject of a disqualification motion, believes Justice B is prejudiced against him, or is himself partial for or against lawyers or parties in a particular case, Justice A in fairness ought to be permitted to challenge the propriety of Justice B's participation in the disqualification decision. For instance, if Justice A may be disqualified from participation because he received a campaign contribution from a particular lawyer or party, it cannot be proper for Justice B, whose opponent received a contribution from that same lawyer or party, or who himself received a contribution from the opposing lawyer or party, to participate in the disqualification decision. Individual justices, no less than lawyers and parties, are entitled to a fair hearing before their rights are adjudicated, and this cannot be obtained if there is a conflict of interest between himself and the decision maker. Can a justice who has campaigned against the challenged justice, or who has benefitted from political support from the party or attorney seeking the disqualification, or who has benefitted from political support from groups or organizations that might be advantaged by a justice's disqualification, decide any better than the challenged justice himself whether the latter can participate in a case?

Lastly, the majority rejected the following amendment:

> A decision by an individual justice to disqualify himself or herself from participation may be accompanied by a

> statement that provides the reasons for such decision, but this is not required.

This amendment would have maintained our existing practice of neither requiring nor prohibiting a statement by an individual justice deciding a motion. Making such statements mandatory is likely only to prove embarrassing to third persons who do not deserve to be embarrassed. Further, it is ironic that most of the justices in the majority have had no compunction in the context of even full-blown *opinions* of this Court in choosing not to offer even a whit of explanation for their positions.

As explained above, all four of my proposed amendments were rejected 4-3. So, now we have a rule that allows a majority of justices to decide behind closed doors which other justices can and cannot do what they were duly elected to do-- participate in deciding cases and controversies-- and without any regard to whether the justices making this decision are themselves biased in some manner. However, not only did the majority adopt a rule that confers upon itself the authority to determine which justices may participate in deciding what the law of this state is, but by adopting a novel "appearance of impropriety" standard-- which applies to the entire judiciary in this state, not merely to the justices of this Court-- it has enlarged its own discretion for rendering such decisions. The majority can now disqualify a justice from participation in a case even though it does not believe that the challenged justice is *actually biased*, but merely by reciting that it believes there to be some "appearance of impropriety."

The threshold problem, of course, with the new "appearance of impropriety" standard is its utter vagueness. What is an "appearance of impropriety," and from whose standpoint is the "appearance of impropriety" to be gauged? As this Court once explained, an "appearance of impropriety" standard will subject justices "to vague, subjective, and increasingly politically directed, allegations of misconduct, against which no justice could effectively defend himself or herself." *Adair v Michigan,* 474 Mich 1027, 1039 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). Further, an "appearance of impropriety" standard is likely to vitiate all other existing grounds for disqualification and create an ethical snare for judges. For example, under the new rule, MCR 2.003(C)(1)(e) requires a judge to disqualify himself where he had been a member of a law firm representing a party within the preceding two years, but MCR 2.003(C)(1)(b)(ii) requires a judge to disqualify himself if his participation would create an "appearance of impropriety." What if the judge has not been a member of the law firm that is representing a party for two years and one month? The judge would be able to participate under MCR 2.003(C)(1)(e), but would he be able to participate under MCR 2.003(C)(1)(b)(ii)? That is, if a judge would be required to disqualify himself if he has been a member of that law firm within the preceding two years, presumably because the chance of bias would be too substantial to allow his participation, could it truly be said that there was no longer any "appearance of impropriety" where that judge has not been a member of that law firm for two years and one month? Is that one month sufficient to alleviate any "appearance of impropriety"? Who knows? In the case of this Court, this decision will be left to the

discretion of other justices who have been no less involved in the political process than the justice whose disqualification has been sought. In other words, there will no longer be any rules, or "safe harbor," on the basis of which a judge can act. Instead, everything will be dependent upon ad hoc standards applied on a case-by-case basis by justices whose own biases and prejudices will apparently never be subject to challenge.

Furthermore, how does the "appearance of impropriety" standard operate in connection with statutes that specifically permit certain actions? For instance, MCL 169.252 and 169.269 specifically allow individual and political committee contributions to Michigan judicial candidates up to certain limits. "Such limits must be understood as clearly reflecting the Legislature's, and the people's, understanding that contributions in these amounts will not supply a basis for disqualification." *Adair,* 474 Mich at 1042 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). "If justices . . . were to recuse themselves on the basis of [legal] campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities." *Id.* For these reasons, I believe that where a justice has abided by all applicable statutes and specific court rule provisions that address the asserted basis for disqualification, disqualification is not required. That is, I would "decline to allow general allegations of impropriety that might overlap with specifically authorized or prohibited behavior and conduct to supersede [statutes and court rules] that specifically apply to the conduct in question." *In re Haley,* 476 Mich 180, 195 (2005). "Otherwise, such specific rules and [statutes] would be of little consequence if they could always be countermanded by the vagaries of an 'appearance of impropriety' standard." *Adair,* 474 Mich at 1039 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.). However, such details did not appear to interest the majority during the court's recent deliberations, and the relationship between the court rules and the new "appearance of impropriety" standard will undoubtedly be resolved on a case-by-case basis at the majority's standardless discretion.

I am also uncertain as to whether, where a justice has been prohibited from participation in a case on the basis that he is biased against an attorney, that justice will *always* be prohibited from participation in a case in which that attorney is involved. In other words, once a majority of this Court has determined that a justice is biased against an attorney, will parties then be permitted to effectively choose which justices can participate in their cases by simply choosing that attorney to represent them? This would take forum shopping to an altogether new length.

An additional concern I have with the new rule pertains to the manner by which a justice is to responsibly review his colleagues' disqualification decisions. That is, what is the basis upon which a justice is to know whether another justice is or is not biased for or against a party or an attorney, or whether his disqualification is required on other grounds? For example, if another justice is accused of having a "more than de minimis

economic interest in the subject matter in controversy that could be substantially impacted by the proceeding," MCR 2.003(C)(1)(f), without knowing that justice's financial situation, how am I to render an intelligent and responsible decision? What may be a "de minimis economic interest" to one justice might be a substantial economic interest to another justice depending on the particular justice's financial situation. Are justices going to be required to disclose all information that may be pertinent to this decision? Am I then entitled to know the entirety of their, and their spouses', financial circumstances? Am I entitled to question such justice as to aspects of his financial circumstances? Am I entitled to review what I might consider to be relevant financial records or documents? Are fact-finding hearings to be required? If so, will these be done in public or behind closed doors like the disqualification decisions themselves? The majority was uninterested in discussing these and related questions when they were raised during debate.

For all these reasons, and especially for those set forth in the first paragraph of this statement, I strongly dissent from the adoption of the new disqualification rule. The majority will doubtlessly enjoy plaudits from those who fail to look beneath the surface of the majority's claims of "reform." However, as time goes by, it will become increasingly clear that the majority has replaced a time-tested disqualification procedure with one that will lead inevitably to politicization, gamesmanship, and acrimony.[67]

Staff Comment: The amendments adopted by the Court in this order explicitly apply the judicial disqualification rule to all state judges, including Supreme Court Justices. In addition, the amendments revise disqualification standards and establish procedures for the disqualification process.

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[67] In once again revealing a confidential communication of this Court, Justice WEAVER also once again fails to supply fair and necessary context. In suggesting in note 10 of her dissent that I agree with her that the Court "adopted" the new disqualification rule, she cites my statement that the majority "intended" the rule to become "effective immediately." I contiuue to believe this was the majority's intention. However, Justice WEAVER fails to note my related observation at conference that courts "speak through their orders," not through their subjective intentions. Every other justice, except for Justice WEAVER, agreed with this proposition and concluded that the new rule had not yet been "adopted," but would only become so upon the issuance of an order. To subject ourselves to the new rule, Justice HATHAWAY and I have chosen to wait until such order has been issued before deciding pending disqualification motions.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 25, 2009

Corbin R. Davis

Clerk

APPENDIX A

The Detroit News www.detnews.com

November 18, 2009 http://detnews.com/article/20091118/OPINION01/911180309

Letter: New court rules may let minority win

The Nov. 10 editorial ("Justice disqualified") notes that "New rules on recusal of state Supreme Court members could cause problems with subjective standard." It is worse than that. The promulgation of the four-justice Michigan Supreme Court majority rule that permits justices to oust other justices from consideration of a case is a seizure of power without authority that is unprecedented in the history of the court.

The majority of justices speak for the court. But nothing in our Constitution gives a majority of justices – and here, only a majority of justices who have not been challenged by a litigant, which might be a minority of the court – the authority to decide whether another justice or justices may sit on a case. Undoubtedly some litigants will, calculating on past decisions that they are likely to lose 4-3 in a case, challenge two justices of what they perceive will be the majority.

Under the new recusal rule, the remaining justices will vote on whether the challenged justices may sit, and in a 3-2 vote the three justices who might be in the minority in the case may oust two other justices from the case.

In the U.S. Supreme Court, each justice individually decides questions of recusal in any case, and there is no recourse to either the chief justice or the rest of the court should a justice not excuse himself or herself from a case.

This is precisely because the members of that court understand the limits on their authority, which, unfortunately, four members of our state Supreme Court do not.

Tim Baughman, Royal Oak

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APPENDIX B

The Detroit News www.detnews.com

November 19, 2009

http://detnews.com/article/20091119/OPINION01/911190343

Commentary: Beware power grab for Michigan court

DAN PERO

There's a discredited practice in politics: If you can't win the game, change the rules. The majority of justices on the Michigan Supreme Court is attempting to do just that by making it far easier to dismiss justices elected by Michigan voters from controversial cases and blatantly shift the balance of power on the court.

Michigan Supreme Court justices historically have voluntarily removed themselves from cases they cannot hear impartially. Under the new rules, the well-defined "actual bias" test for disqualification will be replaced by a fuzzy "appearance of impropriety" standard.

The definition of what constitutes the perception of bias is a moving target. Does a $1,000 campaign contribution create the "appearance" that a justice cannot be impartial? Who knows?

What happens if a trial lawyer compares a judge to "Adolf Hitler and Goebbels," as Geoffrey Fieger has done? Isn't it easy to claim there is at least an "appearance" that a judge who has been tagged with that epithet shouldn't rule in cases involving that lawyer? What's to stop an unscrupulous attorney from smearing a justice so the justice is removed from cases down the road?

The new rules also make the disqualification process less transparent and accountable.

Under the old system, litigants could request that individual justices recuse themselves, but the justices made the ultimate decision on whether to hear a case. This worked well in Michigan because justices knew if they abused this process or ruled on cases in which there was clear bias, voters could throw them off the court in the next election.

The new rules, however, give justices the power to request (and achieve) the removal of their colleagues. This policy invites retaliatory recusal demands and endless bias accusations, especially given the petty and vindictive proclivities of many court members.

Even worse, justices will be allowed to vote on disqualification challenges with no public oversight. Any justice can be removed from any case for any reason -- and the court will never have to justify or even explain its actions to the voters.

This is an especially ironic twist since the new liberal majority has railed for more transparency. Justice Elizabeth Weaver has made it her mantra. Justice Diane Hathaway campaigned on it. And Chief Justice Marilyn Kelly promised it.

There's not a shred of evidence the existing rules failed to keep Michigan's high court impartial, giving this entire exercise the whiff of partisan politics and ideological gamesmanship. In the future, any combination of four justices on the seven-member court can temporarily unseat a democratically elected colleague and shift the direction of the court. The result will be heightened cynicism about the judicial branch.

The court's new recusal rules are the culmination of an effort to get conservative justices off the court -- or at

least push them to the sidelines. If the court does so, it will undermine the ability of Michigan voters to decide who is going to hear the cases that affect their lives, jobs and businesses.

Dan Pero, former chief of staff to Gov. John Engler, is president of the American Justice Partnership, a national organization headquartered in Lansing that focuses on enacting legal reform at the state level. E-mail comments to letters@detnews.com">letters@detnews.com

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APPENDIX C

STATE OF MICHIGAN
SUPREME COURT

MEMORANDUM
FOR COURT USE ONLY

TO: The Justices
cc: Corbin Davis, Mike Schmedlen, and Danilo Anselmo

DATE: November 2, 2009

FROM: Justice Maura Corrigan

SUBJECT: ADM 2009-04, #3 on 11/5/09 administrative agenda

In light of my call for further study of *Caperton v A T Massey Coal Co, Inc*, 556 US ___ (2009); 129 S Ct 2252 (June 8, 2009),[1] I would like to share my follow-up research with regard to whether and how *Caperton* bears on courts' general recusal policies. The *Caperton* opinion itself, courts' and commentators' interpretations of *Caperton*, and court practices in the wake of *Caperton* have convinced me that *Caperton* applies very narrowly and does not suggest that due process requires us to change our recusal practices. Indeed, this Court would be a true outlier if we read *Caperton* to require evidentiary hearings or a vote by the full Court in order to resolve recusal motions consistent with due process principles. The fact that *Caperton* does not require such changes to our historical recusal practice provides additional support for my vote in favor of alternative A.

First and foremost, the *Caperton* majority took pains to explain the limited nature of its holding. Indeed, it devoted Part IV of the opinion to clarifying that the Court's "decision today addresses an extraordinary situation where the Constitution requires recusal." Slip op at 16. It

[1] See my statement accompanying the order denying the motion for recusal in *United States Fidelity Insurance & Guaranty Co v Michigan Catastrophic Claims Assoc*, 484 Mich 1, 49-60 (2009).

specified: "the facts now before us are extreme by any measure." *Id.* at 17.[2] Otherwise, it acknowledged that "'most matters relating to judicial disqualification [do] not rise to a constitutional level.'" *Id.* at 6, quoting *FTC v Cement Institute*, 333 US 683, 701 (1948).

Recall that *Caperton* held that a state supreme court justice was disqualified from hearing a case involving a corporate party whose chairman and CEO made "extraordinary efforts to get [the justice] elected" by expending $3 million to support the justice's campaign. *Id.* at 2-3, 11. *Caperton* explicitly limited itself to "the context of judicial elections," *id.* at 11, and, more specifically, to extreme facts when a party directs or significantly contributes to a campaign while that party's case is pending. See *id.* at 13 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."), 14 ("[T]here is a serious risk of actual bias ... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."), 15 ("The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is ... critical."), 17 ("The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.")

Accordingly, I tend to agree with the following observations by former Texas Chief Justice Thomas Phillips, who authored the amicus brief in *Caperton* on behalf of the Conference of Chief Justices, concerning the limited scope of *Caperton*:

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[2] And see *id.* at 17 ("[E]xtreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong"; "[t]his Court's recusal cases ... deal[] with extreme facts ... .").

> Some have suggested that judges can never rule in any case where parties to a case or their attorneys are donors. It does no such thing. The holding, as I read it, is that due process is only violated when "[1] a person [2] with a personal stake in a particular case [3] had a significant [4] and disproportionate influence [5] in placing the judge on the case ... [6] when the case was pending or imminent." Given how narrow that holding is, I'm not sure *Caperton* will ever be direct precedent for another recusal. [Coping With 'Caperton': A Q&A With Former Texas Chief Justice, Tony Mauro, The National Law Journal June 11, 2009.]

Cases interpreting *Caperton* have reached similar a conclusion, that is: *Caperton* is limited to extreme facts in the context of campaign support in judicial elections. For just a few examples see *Rhiel v Hook (In re Johnson)*, 408 BR 123, 127 (Bankr, SD Ohio 2009) (*Caperton* is limited to "the specific issue of recusal 'in the context of judicial elections'"); *Ala Dep't of Pub Safety v Prince*, 2009 Ala Civ App LEXIS 510 (Oct 2, 2009) (quoting Chief Justice Roberts' dissent to observe that it is unclear whether *Caperton* applies beyond financial support in judicial elections but, in any event, the majority made clear that *Caperton* was "an exceptional case" that presented "extreme facts" and concluding that the facts in the case before it "are not the 'extreme facts' of *Caperton*"); *Marek v Florida*, 14 So 3d 985, 1000 (Fla 2009) (rejecting a defendant's claim that his constitutional right to due process was violated under *Caperton* when the same judge presided over his 1984 sentencing and the 1988 evidentiary hearing on his initial motion for postconviction relief; *Caperton's* "extraordinary facts regarding a litigant's campaign contributions to a state supreme court justice" are "irrelevant" to this case); *South Dakota v List*, 2009 SD 73, 8 (SD 2009) (citing *Caperton* for the proposition that "most matters relating to judicial disqualification [do] not rise to a constitutional level").

Perhaps most significantly, the few state courts I have discovered that have publicly considered whether *Caperton* bears on their recusal practices have primarily addressed the

case's ramifications for rules concerning contribution limits to judicial elections. These states have not read *Caperton* to require evidentiary hearings or a vote by unchallenged judges or justices.[3] For example, the Supreme Court of Nevada's Commission on the Amendment to the Nevada Code of Judicial Conduct issued a supplementary report recommending two additional rule changes in response to *Caperton*; both changes address recusal on the basis of a judge's financial or electoral campaign support from a party or attorney.[4] Similarly, on October 28, 2009, the Wisconsin Supreme Court conducted a hearing on petitions asking whether to amend the Supreme Court Rules concerning judicial campaign contributions and whether there are circumstances when recusal is required if a party or lawyer in an action "previously made a campaign contribution to or spent money on a media campaign relating to a judicial election for

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[3] At least one state also considered, but rejected, rephrasing its general recusal standards in reaction to *Caperton*. According to a September 2009 report from the Washington Supreme Court Task Force on the Code of Judicial Conduct, a minority of the task force would have adopted the 2007 ABA Model Code for Rule 1.2 of the Code of Judicial Conduct on Promoting Confidence in the Judiciary; based in part on *Caperton*, the version of the rule preferred by the minority would direct judges to avoid not just impropriety, but the "appearance of impropriety." See<http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committe/Final%20CJC%20%20Task%20Force%20Report%20Sept%2009.pdf> (accessed October 28, 2009). The proposed new Washington State Code of Judicial Conduct also addresses disqualification of a judge on the basis of monetary campaign support in excess of the statutory direct contribution limits. See proposed Rule 2.11(A)(4) and comment [7], <http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=141> (accessed November 2, 2009).

The Chief Justice of the Supreme Court of Ohio informed me that Ohio's high court discussed *Caperton* formally once and decided not to take any action; Ohio's justices, like myself, are interested to see whether other states find reform necessary.

[4] See <http://nevadajudiciary.us/index.php/viewdocumentsandforms/Commission-Files/Nevada-Judicial-Conduct-Code-Commission/Supplemental-Report/> (accessed November 2, 2009).

a judge who is presiding in the case."[5] But thus far, my research has not revealed that any state supreme court has read *Caperton* even to *potentially* require evidentiary hearings or a vote of the full Court. It is worth further noting that the United States Supreme Court appears not to have amended its own recusal process—which comports with our own historical practice—in the wake of *Caperton*.[6]

Along these lines, I again note the comments, published by Michigan Lawyers Weekly, of Wayne County Assistant Prosecuting Attorney Timothy Baughman concerning *Caperton*:

> *Caperton* is a case about standards and not about the identity of the decision-maker. . . .
>
> * * *
>
> Nothing in *Caperton* requires that the decision on a recusal motion be reviewed by another justice or body of justices. For the Michigan Supreme Court [to continue] to follow the practice of the U.S. Supreme Court is perfectly permissible, so long as a system of "objective rules" exists. [*'Caperton' was about recusal standards, not decision maker*, Michigan Lawyers Weekly, June 22, 2009, p 7.]

For these reasons, my study of *Caperton* convinces me that it does not require any changes to our recusal rules. Accordingly, I reiterate my support for alternative A in this file,

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[5] See <http://www.wicourts.gov/supreme/petitions_audio.htm> (accessed October 29, 2009), rule petitions 08-16, 08-25, 09-10 and 09-11. The originating petition, 08-16, appears to have been filed before *Caperton* was decided, but the Court accepted an amendment the petition in light of *Caperton*. See <http://www.wicourts.gov/supreme/docs/0816petitionamend.pdf> (accessed October 29, 2009).

[6] The primary difference between our practice and that of SCOTUS is the fact that a party who wishes to challenge a Michigan Supreme Court justice's recusal decision has another level of recourse; he may appeal that decision to SCOTUS. Thus I find it particularly noteworthy that SCOTUS has not concluded that due process requires unchallenged SCOTUS justices to bless or reverse an individual SCOTUS justice's recusal decision although there is no higher body to which the movant may appeal the decision. Clearly SCOTUS continues to believe that individual justices are generally competent to decide motions for their recusal.

which effectively codifies our historical recusal practice and does not require a vote of the Court under any circumstances.

APPENDIX A

MEMORANDUM

TO: The Justices
cc: Corbin Davis & Mike Schmedlen

FROM: Justice Robert P. Young, Jr.

RE: ADM 2009-04, Disqualification

DATE: November 19, 2009

Before issuing an order adopting the rule on disqualification, the members of this Court should seriously consider the following amendments to MCR 2.003. They are designed primarily to assure minimal due process and to clarify the procedures used when this Court reviews as an appellate body a Justice's decision to deny a motion for recusal. I will discuss in turn my reasons for proposing each of the amendments. I provide at the conclusion of this memo the entire rule as voted on November 5, 2009, containing all of my proposed amendments in redline.

PROPOSED DUE PROCESS AMENDMENTS

- As discussed at our last ADM conference, I believe that the timing requirement for filing disqualification motions in the Supreme Court requires more precision than the language contained in Justice Hathaway's proposal specified. (This is the subject matter of my "friendly amendment" offered before our vote on Justice Hathaway's proposal.) I have split the "Time for Filing" subsection into four parts (subsections (D)(1) through (D)(4)). There is proposed one subsection for procedures respectively in the trial court, the Court of Appeals, and this Court, and a fourth subsection concerning the effect of an untimely motion. Consistent

with my proposal at conference, I have specified that the appellant must file a motion for disqualification with the application if the appellant knows the basis for disqualification at that point and that the appellee must file a motion for disqualification within 28 days of the application if the appellee then knows the basis for disqualification. That way, we are aware of potential grounds for disqualification before acting on the application for leave to appeal. I would also retain the previous language concerning the effect of an untimely proposal and specify that a judge shall not consider a motion made after a case has already been decided. (I previously provided Justice Hathaway with language similar to this proposal, but she has not responded; this language is slightly revised from that that I supplied to her right after the last ADM conference.)

- I would clarify that, when the rule refers to an appeal on disqualification being decided by "the *entire* Court," this includes the challenged justice. This is already implied in the plain text of the current rule – "[t]he entire Court shall then decide the motion for disqualification de novo" – and so my revisions would merely clarify the rule as enacted. These clarifications are contained in subsection (D)(6)(b). If this proposal is repudiated, and a targeted justice is ineligible to hear *any* appeal on a motion for disqualification, there is the possibility, when multiple justices are targeted, that an appeal on disqualification will run afoul of the quorum requirement of MCL 600.211(3), requiring "a majority of justices...for hearing cases and transacting business."
- I continue strongly to support Justice Markman's demand for transparency in the disqualification process. A disqualification matter to be decided under the new

rule as an appeal to the entire Court is not one on the merits and thus is not subject to the same kind of confidentiality that attends our merit discussions of pending appeals. Accordingly, I would expressly require that any appeal to the entire Court on a motion for disqualification be heard and decided in an open session of this Court. This procedure is contained in subsection (D)(6)(b)(ii).

- The removal of a sitting Justice against his or her will is a serious matter trenching upon the right to execute the duties of office to which the Justice was elected as well as an infringement on the right of electors who placed the Justice in office. Heretofore, only an appeal to the Supreme Court of the United States could reverse a Justice's determination regarding a motion to disqualify. In interposing itself in this decision as an appellate body, this Court must afford the targeted Justice no fewer rights than he enjoyed in such an appeal to the Supreme Court of the United States on a denial of a motion to disqualify. I would clarify that a justice subject to a motion for disqualification is entitled to basic due process rights: that the appeal is limited to the grounds stated in the motion for recusal and that the justice be allowed to retain counsel in the matter and submit a brief in response to the motion for disqualification. The procedural requirements for filing such a brief are consistent with the filing of reply briefs in the Court of Appeals and this Court. These proposals are contained in subsections (D)(6)(b)(i) and (ii).
- If due process means anything – particularly in the disqualification setting where this issue is pivotal – a targeted Justice is most assuredly entitled to an *impartial*

arbiter.[1] Where personal and political biases could affect the decision-making of members of this Court in the new disqualification appeal process, I cannot imagine that due process demands less than the right to challenge such potential biases of the decision-makers in this appellate procedure. Therefore, I would amend the rule to ensue that this cardinal due process right is preserved, such that a targeted justice facing an appellate review of his refusal to disqualify can challenge the potential biases of other members of this Court. The substance of this rule is consistent with Justice Markman's failed motion at the last ADM discussion. However, I have provided specific procedural requirements for a judge to challenge the decision-maker in such an appeal. This is contained in subsection (D)(6)(b)(iii).

- Due process also demands an adequate opportunity for a challenged justice to be heard.[2] Sometimes, this will entail an evidentiary hearing. I have therefore proposed a procedure for this Court taking evidence, contained in subsection (D)(6)(b)(ii).
- I continue to be concerned with the First Amendment implications of our new recusal rules. I propose amending subsection (C)(2)(b) to provide that "A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002)." This is consistent with Justice Cavanagh's previous recommended revision. Moreover, to keep our court rules

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[1] "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

[2] "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v State of Michigan*, 396 Mich 192, 205 (1976) (internal quotation omitted).

in accordance with the *White* decision, I have specified that campaign speech shall not be the basis for recusal under the "appearance of impropriety" standard in the former subsection (C)(1)(b)(ii), which I propose to be renumbered (C)(1)(c).

- I would clarify when *Caperton* requires a justice's disqualification by using further language consistent with the decision. This is contained in subsection (C)(1)(b).
- I would clarify the procedure by which a justice may challenge another justice's participation in a particular case. I propose amending subsection (B) expressly to allow a justice to raise another justice's participation in a case, and the procedure required to challenge another justice's participation is parallel with the procedure required of a party and is provided in subsection (D)(3). The obligation to challenge arises when a justice becomes aware of the basis for disqualification <u>in a particular case</u>.
- I would specify that a judge may not be subject to disqualification simply because the parties agree among themselves that the judge should be disqualified. I propose adding a new subsection (B)(2)(c) to address this situation.
- Finally, while I do not object to changing the term "remittal" to "waiver" in the new subsection (E), I believe the language in the current rule provides more protection for the parties and a more structured procedural mechanism than the provision as revised. In particular, the previous language specified that parties may not waive a judge's participation in the face of personal bias or prejudice and that the waiver must be made out of the presence of the judge. I cannot think of a single justification for asking parties to waive a judge's *actual* bias and believe that the draftsman of the revised provision inadvertently omitted this

language from the current rule in attempting to restate it. Therefore, I would retain the current language in the rule.

I have indicated in redline my proposed amendments to the rule. The baseline language in subsection (D)(1) is the language that Justice Hathaway initially proposed as the deadline for filing a motion for disqualification, but which was agreed to be reworked at our next ADM conference.

THE RULE VOTED ON WITH JUSTICE YOUNG'S PROPOSED AMENDMENTS

Rule 2.003 Disqualification of Judge

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it. Any justice on the Supreme Court may raise the issue of another justice's disqualification when grounds in a particular case become known.

(C) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has ~~either (i)~~ a serious risk of actual bias impacting the due process rights of a party when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election

campaign when the case was pending or imminent, as enunciated in *Caperton v Massey*, ___ US ___ (2009).

(c) The judge, based on objective and reasonable perceptions, ~~or (ii)~~ has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Recusal shall not be required under this section based on a judge's campaign speech.

(~~c~~d) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(~~d~~e) The judge has been consulted or employed as an attorney in the matter in controversy.

(~~e~~f) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(~~f~~g) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(~~g~~h) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than a de minimis interest that could be substantially affected by the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification Not Warranted.

(a) A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002)~~, so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action~~.

~~(b)~~(c) A judge shall not be subject to disqualification based solely on the agreement of the parties.

(D) Procedure.

(1) *Time for Filing in the Trial Courts*. ~~For motions in the trial court, t~~To avoid delaying trial and inconveniencing witnesses, if a party is aware of a basis for a motion to disqualify a judge before filing its initial pleading, the party must file a motion to disqualify with the initial pleading. Otherwise, the party must file a motion to disqualify ~~be filed~~ within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. ~~All motions in the Court of Appeals must be filed within 28 days of the disclosure to the parties of the judge's assignment to the case or within 28 days of the discovery of the grounds for disqualification, whichever is later. All motions in the Supreme Court must be filed within 28 days of the order granting leave or oral argument on the application for leave, or within 28 days of the discovery of the grounds for disqualification, whichever is later. Untimely motions in the trial court, Court of Appeals or Supreme Court may be granted for good cause shown.~~

(2) *Time for Filing in the Court of Appeals*. If a party is aware of a basis for a motion to disqualify a Court of Appeals judge assigned to adjudicate the appellant's case, the party must file a motion to disqualify within 14 days after receiving notice of the judges assigned to the appellant's case. Otherwise, a party must file a motion to disqualify within 14 days after the party discovers or should have discovered the basis for disqualification. If a party discovers the basis for disqualification within 14 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(3) *Time for Filing in the Supreme Court*. If an appellant is aware of a basis for a motion to disqualify a justice before the application for leave is filed, the appellant must file a motion to disqualify with the application. Otherwise, the appellant must file a motion to disqualify within 28 days after the appellant discovers or should have discovered the basis for disqualification. If an appellee is aware of a basis for a motion to disqualify a justice, the appellee must file a motion to disqualify within 28 days after the application is filed. Otherwise, an appellee must file a motion to disqualify within 28 days after the

appellee discovers or should have discovered the basis for disqualification. If any party discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

If a justice is aware of a basis of another justice's disqualification when an application for leave is filed, the justice must raise this question before the order to enter date. Otherwise, a justice must raise the issue of disqualification within 28 days after the justice discovers or should have discovered the basis for disqualification. If a justice discovers the basis for disqualification within 28 days before a scheduled oral argument or argument on the claim or application for leave to appeal, the issue must be raised forthwith.

~~(1)~~(4) *Effect of Untimely Motion.* If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted. No judge shall consider a motion filed after an order resolving the case has been entered.

(~~5~~2) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(~~6~~3) *Ruling.*

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself or another justice, the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court.

(i) The entire Court, including the justice who is the subject of the appeal and any other justice whose participation is challenged in the case, except a justice removed pursuant to subsection (iii), shall then decide the motion for disqualification de novo. In deciding the motion for disqualification, the Court shall be limited to the grounds raised in the motion itself. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. A justice may only be disqualified from a case upon the vote of a majority of all justices on the Court. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing, including that of the challenged justice.

(ii) Upon motion by the challenged justice, the Court shall conduct an evidentiary hearing, governed by the Michigan Court Rules and the Michigan Rules of Evidence, to determine any material facts necessary to the resolution of the motion for disqualification. Any appeal on the motion for disqualification decided by the entire Court, including any evidentiary hearing, must be made in an open session of the Court. The challenged justice may retain counsel and file a brief in response to the motion to appeal denial of disqualification. The responsive brief must be filed and served within 21 days after the party moving for disqualification appeals the justice's decision to deny the motion for disqualification.

~~(i)~~(iii) Any appeal on the motion for disqualification must be resolved by a neutral arbiter following the Michigan Court Rules and the Michigan Rules of Evidence. The justice may challenge the participation of any justice to hear an appeal on the motion for disqualification by indicating the basis for any such disqualification of any other justice sitting on the appeal. Such claim of disqualification of a justice is subject to the procedures contained in this rule and shall be resolved in accordance with the appropriate substantive rules for disqualification prior to any decision on the appeal of the original motion for disqualification.

(~~7~~4) If Disqualification Motion Is Granted.

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the

same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.

(E) Waiver of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record. ~~Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.~~

Statement of Justice Maura D. Corrigan, Michigan Supreme Court, to the House Subcommittee on Courts and Competition Policy

On December 10, 2009, the House Judiciary Subcommittee on Courts and Competition Policy examined judicial recusal procedures after *Caperton v A.T. Massey Coal Co, Inc.*[1] My offer to testify in person was rejected by a subcommittee staffer. Accordingly, I write to express my concerns regarding Michigan's new disqualification rule. That rule should not serve as a template for legislation. Further, I note that advocacy groups funded by George Soros are working in concert to prevent elected state judges from serving by advocating for changes to existing disqualification rules. The ultimate goal of these groups is to eliminate the popular election of judges in 39 states.[2]

Any cure should not be worse than the disease!

What is the problem before this subcommittee? *Caperton* poses no issue for federal courts. In federal courts, judges do not stand for election, so *Caperton* issues do not arise.

Regulation of disqualification in state courts is beyond the power of this subcommittee. In any event, the apparent objection to elected state judges is that they express their views and voters may, after *Republican Party of Minnesota v White*, 536 US 765 (2002), cast informed votes for state judges. It is decidedly not a problem that judges' views and philosophies are known to voters. As the majority in *Republican Party of Minnesota* explained, the due process guarantee of impartiality does not require issue neutrality, but party neutrality. Nonetheless, the remedies being proposed nationwide are twofold: (1) prevent elected judges from serving by disqualifying them, and (2) eliminate popular elections; only the elite can decide who is capable of judging. Imagine- here in the United States of America, a constitutional republic by virtue of the consent of the governed, citizens are deemed too unsophisticated and naïve to choose judges. I believe

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[1] *Caperton v A.T. Massey Coal Co, Inc*, ___ US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). *Caperton*, a 5-4 decision, held that a state supreme court justice was required to recuse himself from a case involving a corporate party whose chairman and CEO supported the justice's campaign both by directly donating the statutory maximum to the justice and by contributing $2.5 million to an independent group that targeted the justice's opponent during the electoral process because the sum of these contributions raised "a serious, objective risk of actual bias" on the part of the justice. *Id.* at ___, slip op at 16. I signed an amicus brief in that case, along with nine other current and former justices of the highest courts in their respective states, raising issues regarding the proper application of the due process clause.

[2] See also Norman L. Reimer, Executive Director of the National Association of Criminal Defense Lawyers, Statement before the House Subcommittee on Courts and Competition Policy, p 2, December 10, 2009 ("More than 89 percent of state judges stand for election in order to obtain or retain office.").

the effort to derail popular elections and eradicate popular choice is a real problem that should be addressed, but this is beyond the purview of the subcommittee.

My colleague Robert P. Young Jr. cogently explains why Michigan's new disqualification rule is facially unconstitutional. Our new rule goes much farther than any constitutional problems that *Caperton* addressed.[3] For example, nothing in *Caperton* remotely suggests that peer review of disqualification is a due process mandate.

The Michigan Supreme Court has left recusal decisions to each individual justice since statehood in 1837, just as the United States Supreme Court does. *Caperton* considered the standards for recusal, not the identity of the decision maker. Crucially, my research discloses that no other state court rule or statute requires the recusal of justices based on Michigan's new "appearance of impropriety" standard,[4] let alone permits other justices to force recusal under this amorphous standard. Michigan's new rule is an outlier among our sister states, one which is impossible to objectively apply and renders meaningless more specific criteria for recusal.

The debate about disqualification rules after *Caperton* is critically important to our republic. Regrettably, the discussion seems glaringly one-sided. It is being driven by a handful of well-funded interconnected national advocacy groups.[5] These national advocacy groups, including Justice at Stake and the Brennan Center for Law & Public Policy, describe themselves as nonpartisan organizations interested in "fair and independent courts." Both Justice at Stake and the Brennan Center have deep financial ties to George Soros, the creator of MoveOn.org, and the principal driver of this effort, Soros' main foundation, the Open Society Institute. Mr. Soros opposes judicial elections and apparently supports efforts to use existing judicial disqualification procedures to prevent popularly elected judges from serving. One recent law review article illustrates several ways in which the changes sought by Mr. Soros' groups can be brought about.[6]

The efforts to tilt the playing field on this issue and the staggering amounts of money being spent to advance this agenda should be acknowledged. Scrutiny of IRS Form 990s reveals that the Open Society Institute has spent at least $34 million to derail

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[3] See Justice Robert Young's Statement to the House Subcommittee on Courts and Competition Policy, circulated on December 8, 2009.

[4] Although Alabama uses the phrase "appearance of impropriety" in requiring recusal if a justice received certain substantial campaign contributions, what constitutes an appearance of impropriety under these circumstances is explicitly defined by statute; Alabama does not require recusal under a general subjective "appearance of impropriety" standard. See Ala Code 1975 §§ 12-24-1 and 12-24-2.

[5] See Transcript: The Frank Beckmann Show, Frank Beckmann's Interview with Attorney Colleen Pero, November 30, 2009, attached as Appendix A.

[6] See e.g., David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481 (2009).

judicial elections since 2000.[7] More than 40 different organizations that share Mr. Soros' opposition to judicial elections and support altering existing judicial disqualification rules have received millions of dollars from the Open Society Institute. Justice at Stake, for example, receives approximately 90% of its funding from Mr. Soros. To date, Justice at Stake has received between four and five million dollars from Mr. Soros. Similarly, the Fair Courts Project at the Brennan Center has accepted between four and five million dollars from Mr. Soros. Perhaps not surprisingly, both the Brennan Center and Justice at Stake have enthusiastically lauded the efforts of my colleagues who voted for Michigan's new disqualification rule.[8] More surprising is the extent to which these groups continue to frame the discussion. Professor Charles Geyh, a witness before this subcommittee, for example, cited a press release prepared by Justice at Stake to claim that the public supports changing existing recusal rules.[9]

Nearly every organization that Justice at Stake identifies as a partner has received funding from the Open Society Institute. It gave over four million dollars to the American Bar Association Standing Committee on Judicial Independence. The National Center for State Courts has received over one million dollars from the Open Society Institute to engage judicial leaders in Justice at Stake's mission. The cross-pollination of money also extends to regional and local groups. In the past year, since December 4, 2008, regional advocacy groups, including the Joyce Foundation, have donated $400,000 to the Brennan Center and $190,000 to Justice at Stake respectively.[10]

Simply stated, the Open Society Institute and Soros-sponsored advocacy groups are aggressively pushing their agenda across the country. When asked about Michigan's new disqualification rule during a recent interview, Michigan Congressman Peter Hoekstra acknowledged these groups' efforts beyond Michigan, stating that, "there are those who believe that what [George Soros is] doing is- what Soros and others and his

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[7] See <http://www.eri-nonprofit salaries.com/index.cfm?FuseAction=NPO.Form990&EIN=137029285&Year=2009> (accessed December 12, 2009).

[8] See Jonathan Blitzer, *Recusal Reform in Michigan*, July 31, 2009 ("With Justice Elizabeth Weaver leading the charge, the Michigan Supreme Court is poised to codify new standards for how and when judges must recuse themselves.") <http://www.brennancenter.org/blog/archives/recusal_reform_in_michigan/> (accessed December 12, 2009); see also Gavel Grab Blog, *Brandenburg on the Future of Recusal*, November 19, 2009 (where the executive director of Justice at Stake describes the new "tougher" recusal rules as a sign that Michigan is moving "forward instead of backward.") <http://www.gavelgrab.org/?cat=42> (accessed December 12, 2009).

[9] Charles G. Geyh, Indiana University Professor of Law, Statement before the House Subcommittee on Courts and Competition Policy, p 6, n 28, December 10, 2009.

[10] See Money and Politics Grants List <http://www.joycefdn.org/programs/moneypolitics/grantlist.aspx> (accessed December 12, 2009).

friends are trying to do in this case is to take – to make Michigan an example and then apply it to other states and ultimately target the [United States] Supreme Court to change the way that the Supreme Court decides cases." I share Congressman Hoekstra's concern. I also echo Professor Eugene Volokh's statement that the subcommittee should "tread cautiously, and not act unless there seems to be a serious problem."[11] Even if a serious problem had been identified in Michigan, our ill-conceived new state rule runs afoul of Professor Volokh's admonishment to craft "a sound solution that does more good than harm."[12]

Accordingly, I urge the Subcommittee to reject the ongoing efforts of Soros-sponsored advocacy groups to change existing judicial disqualification procedures in our country.

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[11] Eugene Volokh, UCLA Professor of Law, Statement before the House Subcommittee on Courts and Competition Policy, p 5, December 10, 2009

[12] *Id.*

Michigan Supreme Court
Justice Maura Corrigan
Research as of 12/18/09
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U.S. State Supreme Court Recusal Rules and Practices

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
ALABAMA	Canon 3C; Code of Ala § 12-24-1 and 12-24-2	The statutory provisions require recusal for campaign contributions above a specified amount absent waiver and state the legislative intent is to avoid an "appearance of impropriety." The statute contains objective thresholds regarding what constitutes such an appearance.	The clerk states that other justices could vote but that it has never happened. No written rule exists regarding this practice.
ALASKA	Canon 3E; AS 22.20.020	NO	The clerk indicates that AS 22.20.020 allows other justices to appoint a judge to review a justice's recusal declination but that it has never happened.
ARIZONA	Canon 3E(4)	NO	NO
ARKANSAS	Supreme Court Rule 6-4; Canon 2.11	NO	NO
CALIFORNIA	Canon 3E(4)	NO	NO
COLORADO	Canon 3(C); CRCP 97	NO	NO
CONNECTICUT	Code of Judicial Conduct Canon 3C; Conn. Practice Book 1-22	NO	NO
DELAWARE	Code of Judicial Conduct, Canon 3; Rule 2.11	NO	NO
FLORIDA	Code of Judicial Conduct, Canon 3E, [R Jud. Admin. 2.330 is for trial judges]	NO	NO
GEORGIA	OGCA, sect. 15-1-8; Code of Judicial Conduct Canon 3E	NO	NO
HAWAII	Code of Judicial Conduct; Rule 2.11	NO	NO
IDAHO	Canon 3E [Court Rule 40(d) doesn't apply to justices]	NO	NO
ILLINOIS	Supreme Court Rule 63 (IL Code of Judicial Conduct Canon 3)	NO	NO
INDIANA	IN Code of Judicial Conduct Rule 2.11	NO	NO
IOWA	IA R 51.Canon 3(C)	NO	NO
KANSAS	KS Rules Relating to Judicial Conduct Rule 2.11	NO	NO
KENTUCKY	SCR 4.300 KY Code of Judicial Conduct, Canon 3(E); KRS 26A.015 (statute)	NO	NO

U.S. State Supreme Court Recusal Rules and Practices

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
LOUSIANA	Code of Judicial Conduct Canon 3(C); Code of Civ Pro, art. 151, 152, 159; Code of Crim Pro 671, 672; Supreme Court Rules Part L, Rule XXXVI (Civ Pro and Crim Pro rules are enacted by the Legislature)	NO	YES. If challenged justice decides not to recuse, remaining justices vote. Code of Civ Pro art. 159; Code of Crim Pro art. 679
MAINE	Maine Code of Judicial Conduct Canon 3(E)	NO	NO
MARYLAND	Md Rule 16-813, Maryland Code of Judicial Conduct Canon 3(D)	NO	NO
MASSACHUSETTS	Supreme Judicial Court Rule 3:09, Mass Code of Judicial Conduct, Canon 3(E)	NO	NO
MINNESOTA	52 Minn Statutes Annotated, Code of Jud.Conduct, Canon 3(D)	NO	NO
MISSISSIPPI	Miss R App Pro 48(B) for trial judges, and Miss R App Pro 48(C) for disqualifiation of justices or judges of appellate courts	NO	YES. Miss R App Pro 48(C)(a)(iii).
MISSOURI	Supreme Court Rule 2.03, Canon 3(E)	NO	YES. Clerk said that other justices could vote based on the court's unwritten policy for handling recusals, but the clerk was unaware of any time in which justices actually voted on the recusal of a co-equal justice.
MONTANA	Mont CA § 3-1-803; Mont CJC Rule 2.12	NO	NO
NEBRASKA	Neb CR § 5-203(E)	NO	NO
NEVADA	Nev RS 1.225	NO	YES. Nev RS 1.225.
NEW HAMPSHIRE	NH Sup Ct R 38-3(E)	NO	NO
NEW JERSEY	NJ CR 1:12-1	NO	NO
NEW MEXICO	NM Const art 6, § 18; NM CR 21-400	NO	NO
NEW YORK	NY CR 100.3(E)	NO	NO

U.S. State Supreme Court
Recusal Rules and Practices

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
NORTH CAROLINA	Judicial Canon 3C(1)	NO	NO. Other justices never vote on recusal. But a party aggrieved by a justice's refusal to recuse could bring it before the judicial standards commission. If the commission recommended removal or censure, that would go before the other justices. And the Chief Justice could remove the case from the S Ct to the COA. But the clerk never remembers that happening or there ever having been an issue.
NORTH DAKOTA	ND Code of Judicial Conduct Canon 3E(1)	NO	NO
OHIO	Ohio Code of Judicial Conduct 2.11; OH Const. Art. IV, sect 5(C)	NO	NO
OKLAHOMA	Code of Judicial Conduct Canon 3E (current)/ R. 2.11 (new proposed); Title 20 OK St. Sect. 1402	NO	Justices generally decide for themselves but in OK the Chief Justice's brother is the AG. In a few case involving the AG's office, the Chief Justice has asked a motion for DQ/recusal to be considered at the justices' conference. Also, when a (usually pro se) litigant asks for DQ of entire S Ct that of course is considered by full court.

U.S. State Supreme Court Recusal Rules and Practices

STATE	Recusal Rules/Statutes	Does rule require recusal for "appearance of impropriety"?	Do other justices vote?
OREGON	Code of Judicial Conduct JR 2-106; ORS 14.275, 14.210; ORAP 8.30	NO	YES. If a justice does not believe the motion to DQ is well taken, the justice shall refer the motion to the chief justice, who may rule on the motion or may refer the motion to the full court for a decision. ORAP 8.30. In practice, justices tend to DQ themselves liberally and this is not usually an issue. The S Ct did go through this process ("went through the motions") of bringing a DQ motion before the full court where a pro se litigant filed a completely baseless motion to DQ a justice.
PENNSYLVANIA	Code of Judicial Conduct Canon 3C; Conn. Practice Book 1-22	NO	NO.
RHODE ISLAND	RI Code of Judicial Conduct Canon 3(E)	NO	NO. Although the challenged justice may choose to dicuss it with the Court. The clerk had never heard of the Court disagreeing with a challenged justice's decision or of a vote by the unchallenged justices.
SOUTH CAROLINA	SC Code §§ 14-1-130, 14-3-50; SC Code of Judicial Conduct Canon 3(E)	NO	NO. Although the challenged justice could seek input from the Court. Maybe the Court could act if they disagreed with the justice's decision, but the Clerk had never seen this happen.
SOUTH DAKOTA	SD Code 15-12-37; Code of Judicial Conduct 3(E)	NO	NO
TENNESSEE	TN Const art VI, § 11; TN R Sup Ct 10-3(E)	NO	NO, according to the rules. As yet unable to get phone confirmation re: whether might be an informal practice.

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9 WJR-AM - THE FRANK BECKMAN SHOW
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11 November 30, 2009
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13 INTERVIEW WITH COLLEEN PERO
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15 CD transcribed by Gail R. Stevens, CSR-3123
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1 November 30, 2009
2 The Frank Beckman Show - Interview with Colleen Pero
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6 FB: Hello Colleen.
7 CP: Good morning, Frank. How are you doing, sir?
8 FB: I'm all right. Now, this change here in Michigan rules
9 by the Supreme Court, it's unique to Michigan, isn't it?
10 CP: Well, the particular changes that were passed by the
11 Supreme Court earlier this month do seem to be particular
12 to Michigan. However, this kind of push we've seen
13 across -- in other states around the country.
14 FB: In fact, Wisconsin recently considered the same sort of
15 change, didn't they?
16 CP: Yes, they did last -- about three weeks ago the
17 Wisconsin Supreme Court considered a rule that was put
18 forward by the League of Women Voters there suggesting
19 that any judge who received $1,000 would have to recuse
20 themself from that -- from hearing a case involving that
21 party even though the law allows people to give up to
22 $10,000.
23 FB: Now, would that include judges who receive money from
24 trial lawyers?
25 CP: Yes, it would.

1 FB: Oh, so every Justice would be basically recused from
2 hearing a case given that kind of strict rule but that
3 was immediately turned down by the justices. But here's
4 what strikes me as interesting is that you say there
5 seems to be a move afoot throughout the country to make
6 rules changes like the one we saw here in Michigan which
7 would suggest to me that there is some sort of concerted
8 effort driven by whom?
9 CP: Well, in my research I found that the people that are
10 trying to drastically change the judiciary in America is
11 none other than George Soros who brought us the
12 MoveOn.org organization.
13 FB: How is he doing this?
14 CP: Well, it all started back in 2000, he was a very big
15 supporter of the Gore campaign and when Gore lost, he
16 realized how important judiciaries can be at the state
17 and federal levels and he started pumping millions of
18 dollars into organizations that were flying under
19 nonpartisan colors saying we need to change the way the
20 judiciary operates in the United States. Now, he did
21 this under the guise of reform but what's so curious is
22 this, at the same time he was spending millions of
23 dollars saying the judiciary needed to be reformed. From
24 a campaign finance standpoint he spent $27 million trying
25 to defeat George Bush through a series of 527s. So I

1 think the bottom line is he thinks it's okay to have lots
2 of money in the game so long as it's his money
3 representing his ideas.
4 FB: And he's setting all the rules. Now, what kind of
5 groups has he set up or is he supporting to affect this
6 change?
7 CP: Well, I think -- I would consider as sort of the
8 quarterback of this attempt to change the judiciary is
9 Justice at Stake. This actually was started at the -- at
10 Georgetown at -- through a grant from George Soros
11 Foundation, the Open Society Institute. I think he's put
12 in, oh, probably 4 or $5 million into this organization.
13 They receive almost all of their funding from him. Their
14 top -- their top leadership has always been comprised of
15 democratic political operatives. In fact, the first
16 three that were starting this were all members of the
17 Clinton/Gore administration and later worked on the Gore
18 campaign.
19 FB: Clearly nonpartisan.
20 CP: Ah, yeah, very much so, very much so. In fact, one
21 was -- did a long stint with the SEIU and that brings us
22 up-to-date there.
23 FB: All right. So the -- so Justice at Stake is the -- is
24 the main movement in all of this but --
25 CP: I think so and because when you look at all of the

1 organizations to which he has given money, and I've
2 actually documented at least forty at this point, many of
3 their grants specifically say this is to work with the
4 Justice at Stake program.
5 FB: All right, offshoots of that, the Brennan Center for
6 Justice, who are they?
7 CP: Now, the Brennan Center is at NYU Law and they have a
8 program there which is called Fair Courts Campaign and
9 that also has received, oh, 4 or $5 million from Soros.
10 They're a partner at Justice at Stake and what's curious
11 is this, when you look across the country whenever
12 there's an election that involves a conservative jurist,
13 I would say a judicial conservative, a rule of law judge,
14 you see these two organizations' names appear and they
15 appear in odd kinds of ways. They suddenly appear if the
16 conservative jurist is winning, they say, well, we
17 shouldn't be having elections because, you know, it just
18 has special interests involved, there's corporate people
19 getting involved and all of these. Oddly enough, they
20 never seem to mention trial lawyers but -- and so you see
21 these people hop up there and if you win the election
22 then they say, well, we shouldn't have elections but, you
23 know, maybe we should go to recusal, we should change the
24 way in which people hear the cases.
25 FB: Ala, the new Michigan rule.

1 CP: Exactly.
2 FB: Yeah. Now, were they directly involved in challenging
3 the Michigan rules on recusal?
4 CP: No, you know what I can't say that they were directly
5 involved because there are some on the Court who tried to
6 put this forward awhile back but what I can say is this,
7 that he's funded this organization pushing similar rules
8 elsewhere and that the organizations which hails this as
9 a major step forward were Justice at Stake, The
10 Constitution Society which has received $10 million from
11 Soros, The Michigan Campaign Finance Network and the
12 Brennan Center. So all of the organizations that are
13 hailing this as a major step forward have all received
14 money from George Soros' Open Society Institute.
15 FB: All right. And the American Constitution Society for
16 Law and Policy you point out has among its supporters
17 here in Michigan -- you've got John Conyers, Carl Levin,
18 Mark Brewer but also Chief Justice Marilyn Kelly who
19 voted for this change.
20 CP: That's right. And, in fact, last year during the --
21 during the Taylor campaign for reelection it was The
22 American Constitution Society, their Michigan Chapter
23 held a forum here in Michigan, at Michigan State,
24 nonpartisan of course, at which Chief -- now Chief
25 Justice Marilyn Kelly spoke and blasted the conservative

1 jurists from the Michigan Supreme Court, of course all
2 coinciding with the Taylor reelection campaign. This
3 took place in October, 2008.
4 FB: What is the point of all of this, Colleen? Why does --
5 what is Soros' ultimate goal here?
6 CP: I think his ultimate goal is this, he wants to take I
7 think the electorate, general citizens like you and me
8 out of the process of determining who our judges are. So
9 I think what he wants to do -- he has pushed merit
10 selection in so many states and of course we know what
11 merit selection is. This means that the elite choose
12 the -- choose the judges.
13 FB: The Bar Association, Trial Lawyers Association?
14 CP: The Bar Association which of course has received at
15 least $5 million from George Soros as well but yes, it's
16 set up by legislators or by the Bar Association and they
17 are the ones that get to choose the judges because, you
18 know, people like you and I, we're just not sophisticated
19 enough to understand the nuances of the judiciary and the
20 kinds of people we need there.
21 FB: Amazing. Colleen Pero, thanks so much, appreciate the
22 time.
23 CP: I'm glad to do it.
24 FB: Thank you. Talk to you again soon.
25 CP: Thank you so much.

** ** ** ** **

(Interview concluded.)

1 STATE OF MICHIGAN)
2) SS.
3 COUNTY OF MACOMB)
4
5 CERTIFICATE OF NOTARY PUBLIC
6 AND COURT REPORTER
7 I, Gail R. Stevens, Certified Court Reporter in
8 the State of Michigan, do hereby certify that the
9 foregoing pages 1 through 9, inclusive, comprise a full,
10 true, and correct transcript of the taped interview had
11 on November 30, 2009 on The Frank Beckmann Show on
12 WJR-AM.
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18
19
20 Gail R. Stevens, CSR 3123
Notary Public, Macomb County, MI
21 My Commission Expires: July 15, 2014
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Statement of Hon. Marilyn Kelly
Chief Justice, Michigan Supreme Court
to the House Committee on the Judiciary, Subcommittee on Courts and Competition Policy
on the Michigan Supreme Court's adoption of a recusal procedure
December 16, 2009

In adopting MCR 2.003, the Michigan Supreme Court has reduced to writing for the first time basic rules that govern when a justice should not participate in a case. In the past, the justices wrote rules on recusal but applied them only to other judges, not to themselves.

Some of us have long believed that the interests of the legal community and of the general public are best served if a Supreme Court recusal rule is put in written form. In that way all can see and understand a process up to now shrouded in mystery.

Curiously, until this year, it was generally unknown in the state that, when a motion to recuse was filed, only the justice at whom it was directed acted on it. The Court then issued an order that appeared to be an action of all the justices. Typically, no reason was given to the petitioner or the public if the request to recuse was denied. Also, if the motion was denied, no procedure existed to permit the party seeking a justice's recusal to obtain a vote of the other justices.

The Court has amended MCR 2.003 to remedy those deficiencies. Another important reason for the amendment is to insert the appearance of impropriety or a serious risk of actual bias among the existing grounds for recusal. Forty-seven states have such a provision in their judicial codes. Its addition in the Michigan rule is long overdue.

While the Court was considering possible amendments to MCR 2.003, the United States Supreme Court rendered its decision in the case of *Caperton v A.T. Massey Coal Co, Inc.*[1] The decision reversed an order of the West Virginia Supreme Court in which a justice there refused to recuse himself following a procedure similar to that used by the

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[1] ___US___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Since *Caperton* was decided, the Wisconsin Supreme Court amended its recusal rule in response. *See Wisconsin Supreme Court Rule Petitions 08-16, 08-25, 9-10, and 9-11* (acted upon October 28, 2009). Michigan is not the first state to react with a rule change.

Michigan Supreme Court. The Court found that the party seeking the justice's recusal had been deprived of his constitutional right to due process. This was in part because no objective consideration of the recusal motion was available to the petitioner. The Court observed that a justice's decision on his or her own recusal is inherently subjective; however, the due process clause requires an objective decision.[2]

We have read *Caperton* to mean that an independent inquiry into a challenged justice's refusal to recuse may be necessary to satisfy due process. With an independent inquiry an objective decision becomes possible. For that reason, we placed an independent inquiry into Michigan's revised rule by providing that the party requesting recusal may seek a vote on the motion by the entire court.

Those of us supporting the revised rule believe that the situation that gave rise to the *Caperton* case should not be allowed to take place in Michigan. That belief, together with the obvious need for increased clarity and understanding about our recusal procedures, caused us to fashion the revised rule as we did.

Three dissenting justices wrote lengthy statements opposing the revision. I quite agree with them that the rule must not be applied to curtail fundamental freedoms. I have not heard it suggested by any of the justices who favored the revision that it will be used "to prevent judicial candidates from speaking their minds" or to prevent "the voters [from electing] judges of their choosing." I know of nothing that would reasonably lead one to believe that the rule will be used to permit "duly elected justices [to deprive] their co-equal peers of their constitutionally protected interest in hearing cases." And it seems an outrageous stretch of credulity to suggest that "starting today, those contesting traffic tickets will enjoy greater constitutional protections than justices of this Court."

In suggesting that no precedent exists for a judge to be removed from a case against his or her will, the dissenting justices forget this: under existing Michigan

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[2] *Caperton, supra* at 2263.

court rules,[3] trial judges are removed from cases against their will in Michigan courts every day and have been for years. Unanswered in their statements is why trial judges should be subject to having their decisions not to recuse reversed by their peers while justices are insulated from the same scrutiny.[4]

As Justice Elizabeth Weaver has pointed out in her statement accompanying the revised rule, the decision to adopt this rule has been anything but "hasty," notwithstanding the assertions of certain justices. In fact, the rule has received the Court's constant vision and revision, particularly during the last year. The normal procedure for rule adoption has been followed, including public comment and public hearing.

No basis exists on which to ground the insinuation of certain dissenting justices that this rule will be used to remove a justice from a case for improper reasons. No facts have been shown to support this assertion. None exists. The fears of some dissenters that there will be "gamesmanship" and "politicization" in the Court's future handling of recusal motions find their source only in the imaginations of those justices. Predictions that the revised rule will engender further "acrimony" among the justices will be realized only to the extent the justices treat them as self-fulfilling prophesies.

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[3] MCR 2.003(C)(3). If the challenged judge denies the motion to recuse, in a court having two or more judges, the chief judge may reverse the decision and require recusal. In a single-judge court or if the challenged judge is the chief judge, the state court administrator may assign the decision to another judge who may overturn the refusal to recuse.

[4] Michigan is not the first to adopt a recusal rule that permits members of the supreme court to review the refusal of a fellow justice to step aside. See Mississippi Rule of Appellate Procedure 48C; Oregon Rule of Appellate Procedure 8.30; and Texas Rule of Appellate Procedure 16.3. Moreover, the American Bar Association Standing Committee on Judicial Independence has recommended that, when a supreme court justice denies a motion to disqualify, the decision should be reviewed by the rest of the court.

Moreover, it is a gross perversion of law to allege, as one dissenter has, that "In one administrative order [the recusal rule], the majority takes away the right of every citizen of Michigan to have his or her vote count." Rather, the accurate statement is that, with this rule, the Court permits the disqualification of a justice if that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and the Michigan Supreme Court can only be stronger for the state's revised recusal rule.

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December 15, 2009

Honorable Henry Johnson, Jr.
Chairman
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

Re: December 10, 2009 Hearing:
Examining the State of Judicial Recusals after Caperton v. Massey

Dear Chairman Johnson:

On behalf of the Brennan Center for Justice at NYU School of Law, I want to thank you and the Subcommittee on Courts and Competition Policy for inviting the Brennan Center to submit these comments on the important issue of recusal reform. We commend you for your attention to this issue, and applaud the Committee for convening this hearing and exercising Congress's crucial oversight role.

For the last several years, the Brennan Center has tracked recusal practices in the states and advocated for meaningful reform of judicial disqualification procedures. As the Honorable Thomas R. Phillips, retired chief justice of the Supreme Court of Texas, wrote in the foreword to our comprehensive 2008 report on recusal reform, "[i]n recent years, the need for viable judicial recusal systems has been exacerbated by the increasing politicization of both federal and state judicial selection. . . . Thus, now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment."[i]

The specific impetus for this hearing, the Supreme Court's landmark decision in *Caperton v. A.T. Massey Coal Company*, made clear that states should adopt recusal standards that deal with the influence of money in judicial elections. And several states have responded.[ii] But there are procedural reforms that apply beyond the context of campaign funding which should be adopted in state courts, and may be worth considering in federal courts.

Caperton laid bare the mounting threat to judicial independence in states with judicial elections, as escalating amounts of money and vitriol are poured into contests for state Supreme Court judgeships. In the 39 states that elect at least some of their judges, we have witnessed over the last decade an unprecedented surge in spending by special interest groups, state political parties, and judicial candidates themselves. Together, unfortunately, this confluence of money and politics has left the overwhelming impression that justice is for sale. Over the last decade, campaign fundraising more than doubled, from $85.4 million in 1989-1998 to $200.7 million in 1999-2008. Three of the last five Supreme Court election cycles topped $40 million in total fundraising. And all but two of the 21 states with contestable Supreme Court elections set fund-raising records in the last decade. The trends have been consistent, and they are troubling.

Against this backdrop, the Supreme Court in *Caperton* made clear that states would be well advised to require recusal even in situations that do not give rise to questions of constitutional significance. Writing for the majority, Justice Kennedy noted that "States may choose to 'adopt recusal standards more rigorous than due process requires.'"[iii] Numerous states have accepted Justice Kennedy's invitation, including:

- Nevada, where a commission has recommended disqualification in the event that a judge receives campaign contributions of $50,000 or more from a party appearing before the judge;[iv]
- Washington, where a Supreme Court task force has proposed a rule under which judges would be barred from hearing cases involving litigants who provided financial support for the judge (including contributions and independent expenditures) amounting to more than ten times the state's contribution limit;[v] and
- California, where a commission reporting to the state judicial council has called for disqualification when the contributions of a party appearing before the judge exceed specific threshold limits tied to the court in which a judge sits.[vi]

While useful proposals remain under consideration in these – and several other – states, in the first state to pass campaign-spending recusal rules after *Caperton*, Wisconsin, the high court is poised to codify a rule that will stand *Caperton* on its head.

After a public hearing on October 28, 2009, the Supreme Court of Wisconsin declined an opportunity to adopt effective judicial accountability standards. By a slim 4-3 vote, the court voted down two proposals that, like the ones described above, would have mandated recusal when a party's campaign spending surpassed a certain "trigger" threshold. The majority then preliminarily adopted, verbatim, proposals submitted by two interest groups – the Wisconsin Realtors Association and Wisconsin Manufacturers and Commerce – that have been among the biggest spenders in Wisconsin's judicial elections. (Indeed, the groups spent millions of dollars in 2007 and 2008 to elect two of the judges in the four-judge majority that endorsed their proposals.[vii]) The interest groups' proposals provide that campaign contributions and independent expenditures of any size, standing alone, can *never* require recusal.[viii]

The majority has attempted to justify the unfortunate recusal rule by arguing that it is necessary to protect the First Amendment rights of judicial candidates and their supporters.[ix] But, by creating a presumptive safe harbor in which campaign spending never prompts recusal, the majority's rule flies in the face of unambiguous Supreme Court precedent.

In its 2002 decision in *Republican Party of Minnesota v. White*, the Supreme Court made clear that the First Amendment provides robust protections for judges or judicial candidates insofar as they are campaigning for judicial office. But the Court has never suggested, much less held, that a judicial candidate's free speech rights trump due process requirements once that candidate has taken the bench. Nor has the Court otherwise restricted how states may protect the impartiality of their courts through disqualification rules. To the contrary, as Justice Kennedy stated in *White*, states concerned that unfettered judicial campaign speech may undermine the real and perceived impartiality of the courts are free to adopt disqualification standards more rigorous than due process requires.[x]

A fundamental lesson of *Caperton* is that a rule under which campaign spending triggers recusal need not interfere with either the First Amendment speech of judicial candidates or the associational rights of candidates and their supporters. Rather, *Caperton* makes clear that when a campaign supporter appears in court before a judge she has supported, the First Amendment rights implicated during the campaign do not rest alone on the balance; they must be weighed against the opposing party's constitutional right to due process. That is, although the First Amendment protects the rights of judicial candidates to speak out on the issues of the day and the rights of contributors to associate with candidates they support, it does trump a non-supporter's right to a fair and impartial tribunal. The First Amendment does not entitle any party to choose what judge will hear her case.

In adopting its misguided rule, the majority of the Supreme Court of Wisconsin ignored this central holding of *Caperton*. Fortunately, the Supreme Court of another Midwestern state, Michigan, did not make the same error. Michigan's high court has recently codified a series of reforms that will have salutary effects if emulated in other states – and even within the federal judiciary.

In an order issued on November 25, 2009,[xi] Michigan's justices pointed the way to meaningful reform of disqualification practice. They did so by accomplishing three things.

First, Michigan's high court adopted a rule under which recusal is warranted when a judge's impartiality is called into question "based on objective and reasonable perceptions." This change brings Michigan into line with virtually every other jurisdiction in the nation, all of which have adopted a version of Rule 2.11(A) of the American Bar Association's Model Code of Judicial Ethics, which calls for disqualification when a "judge's impartiality might reasonably be questioned." A version of the ABA's standard has now been adopted in all but two states, and is codified in federal law as the relevant standard governing recusal of federal judges.[xii] Adopting the ABA's objective test for evaluating partiality was an important step forward for Michigan, but it does not offer an example to the other jurisdictions that already have such provisions. The same is not true of two additional reforms the Michigan adopted.

The second significant change adopted in Michigan is the requirement that all recusal decisions be rendered in writing. This simple requirement – that judges articulate their reasons for granting or denying requests to recuse – is hugely significant and long overdue.

It is critically important – for litigants, for the courts, and for the public at large – that disqualification decisions include transparent and reasoned decision-making. As explained in the Brennan Center's recusal report, a failure to explain recusal decisions "allows judges to avoid conscious grappling with the charges made against them" and "offends not only a basic tenet of legal process, but also a basic tenet of liberal democracy – that officials must give public reasons for their actions in order for those actions to be legitimate."[xiii]

Besides increasing transparency, written decisions enable meaningful review and assist other judges facing recusal requests. A failure to explain recusal decisions makes it far more difficult for those reviewing a disqualification decision to understand the underlying rationale or facts, thus threatening to render appellate review an empty, illusory exercise. Moreover, resolving disqualification requests without a written decision denies other judges, justices, and courts both precedent for use in other cases and the chance to build on such precedent in developing a more refined body of disqualification jurisprudence.

For requiring orders on recusal to be made in transparent, written orders, the Michigan Supreme Court deserves acclaim. Few other states have adopted a similar rule, which is also absent from the federal disqualification statute, 28 U.S.C. § 455. We urge other states to follow Michigan's lead, and this Committee may wish to explore whether requiring written recusal decisions makes sense in the federal court context.

The third and final change adopted by the Michigan Supreme Court, which allows for review of one justice's recusal decisions by the full court, is perhaps the most significant change the court adopted. It is also a policy that other jurisdictions should consider.

Allowing the full court to review a decision of an individual justice to deny a recusal request has provoked some controversy in Michigan,[xiv] but in fact, the procedure is routinely used in other courts. The high courts of states as diverse as Mississippi, Texas, and Oregon all have procedures in which a request to disqualify one justice may be referred to the entire court.[xv] More significantly, allowing for meaningful peer review of a justice's decision as to his or her own impartiality is a common sense measure that will increase public confidence in judicial impartiality. As an editorial in the *Detroit Free Press* explained after the rule was adopted, "There is no reason why it is in the public's interest for a justice accused of improper bias to be the sole judge of his or her own impartiality."[xvi]

Caperton makes clear that evaluating a judge's partiality under an objective, reasonable standard is vital to ensuring a fair process, even when an individual justice believes subjectively he or she can hear a case without bias. Michigan's rule will protect litigants in those cases where an individual jurist overlooks objective evidence of his or her own bias. By ensuring that no potentially biased justice sits on a case without the full court having an opportunity to render an objective "second opinion" on impartiality, the rule will increase the perception – and reality – of truly impartial justice.

Michigan's Supreme Court – by fostering increased transparency through mandatory written opinions and eliminating the risk of bias through review that applies an objective test of the threat to impartiality – provides a model clearly worthy of consideration by other state courts, and by this Committee.

* * *

To function effectively and ensure public confidence, the judiciary must keep the promise of dispensing fair and impartial justice. The articulation of clear, enforceable rules governing judicial disqualification is an important means for doing just that. The Brennan Center commends the Committee for its attention to this important issue and for its national leadership, and thanks the Committee for the opportunity to submit these comments.

Respectfully submitted,

J. Adam Skaggs
Counsel, Democracy Program

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[i] James Sample *et al.*, *Fair Courts: Setting Recusal Standards* 3 (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ ("*Setting Recusal Standards*").

[ii] *See generally* Brennan Center for Justice, Recusal Reform in the States: 2009 Trends and Initiatives (2009), available at http://tinyurl.com/ydakv2l.

[iii] 129 S. Ct. 2252, 2267 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

[iv] *See* David Kihara, *Panel Urges Trigger for Disqualification*, Las Vegas Review-Journal, July 21, 2009, *available at* http://www.lvrj.com/news/51297237.html. In smaller districts where candidates and special interest groups spend less money, proposed dollar thresholds vary based on percentages of the total sum spent on campaign efforts. *See* Memorandum from Jeffrey Stempel, William S. Boyd School of Law, to Nevada Judicial Code Commission (June 30, 2009) (on file with the Brennan Center for Justice).

[v] *See* Proposed New Washington State Code Of Judicial Conduct 22 (Washington State Supreme Court Code of Judicial Conduct Task Force Sept. 8, 2009), *available at* http://tiny.cc/X1EAc.

[vi] *See* Commission for Impartial Courts, Judicial Council of California, Final Report: Recommendation for Safeguarding Judicial Quality, Impartiality, and Accountability in California (draft), Aug. 2009, available at http://www.courtinfo.ca.gov/jc/tflists/documents/cic-finalreport.pdf. See also Timm Herdt, When is Justice for Sale, Ventura County Star, June 10, 2009, available at http://www.venturacountystar.com/news/2009/jun/10/when-is-justice-for-sale/.

[vii] *See, e.g.*, Press Release, Brennan Center for Justice, Buying Time – Michigan and Alabama Join Costly Wisconsin (Oct. 30, 2008), *available* at http://tiny.cc/YbNMi; James Sample, *Justice for Sale*, Wall Street Journal, March 22, 2009.

[viii] In a surprising development, the Supreme Court of Wisconsin revisited its newly adopted recusal rule in an administrative conference on December 7, 2009. After Justice David Prosser stated that he had concerns with some of the rule's specific language, the court withdrew its vote and rescinded the newly adopted rule. It is expected, however, that after the majority conducts limited "fine tuning" of the rule's language, a similar rule will be adopted soon after the New Year. *See* Alex De Grand, *Wisconsin Supreme Court withdraws earlier vote on recusal rules*, State Bar of Wisconsin, Dec. 7, 2009, *available at* http://tinyurl.com/ygq4748.

[ix] *See* Justice Patience Drake Roggensack, *Rule Upheld First Amendment Rights Of Voters*, Wisconsin State Journal, Dec. 5, 2009.

[x] 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

[xi] *See* Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 (Mich. S. Ct. 2009).

[xii] *See* 28 U.S.C. § 455.

[xiii] *Setting Recusal Standards* at 32 (footnote omitted).

[xiv] *See Amendment of Rule 2.003 of the Michigan Court Rules*, ADM File No. 2009-04 (Mich. S. Ct. 2009) (Corrigan, J., dissenting); *id.* (Young, J., dissenting); *see also* Mark Hornbeck, *Michigan Supreme Court Split on Judicial Disqualification*, Detroit News, Nov. 30, 2009.

[xv] *See* Miss. R. App. P. 48C; Tex. R. App. P. 16.3; Or. R. App. P. 8.30. While the U.S. Supreme Court does not follow the same process in resolving recusal complaints, full-court review of recusal requests is routine in the high courts of countries including England, Australia and South Africa. *See generally* R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 Wash. & Lee L. Rev. 1799 (2005).

[xvi] Detroit Free Press, Editorial: *Assuring Judicial Impartiality*, Dec. 6, 2009.

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December 3, 2009

House Judiciary Committee
Subcommittee on the Courts
2449 Rayburn HOB
Washington, DC 20515

Re: Judicial Recusals
Southern District of Florida (Miami)
Judges Martinez, Moreno

Dear Mr. Chairman and Honorable Committee:

The conduct of Judges Martinez, Moreno, the Eleventh Circuit Court of Appeals and its judicial council tarnishes the judiciary and creates an inference that judges are dishonest. Despite a remand from the Supreme Court, the eleventh circuit and its judicial council proved that established procedures, appellate remedies and judicial discipline are fantasies.

Continued hearings into the judiciary will result in a congressional determination that the judiciary's publicly stated reforms regarding judicial misconduct are, in practice, illusory and insincere. For example, the Judicial Conference Committee on Judicial Conduct and Disability employs a paralegal with no discernable law degree investigating allegations of judicial misconduct and interpreting its rules. It refused to acknowledge whether the Eleventh Circuit Judicial Council complied with its reforms. *See* Letter from Andy Ramirez, Chairman, Friends of the Border Patrol to the Hon. James Sensenbrenner, House Judiciary Committee (October 9, 2009). *See also* http://www.andyramirez.com/judicialcomplaints.htm

Ultimately, Congress will embrace Thomas Jefferson's solution—a constitutional amendment requiring term limits. *See infra* p. 5.

From 2002-2008, I represented my brother, retired Customs and Border Protection Officer Eugene Cavicchi, in employment discrimination and retaliation cases in Miami. Eugene is a graduate of Boston Latin, Holy Cross, and an Honors Exchange student in Paris, France. He is State Department certified in French.

On March 4, 2004, at the conclusion of a hearing and in my presence, one deciding judge, United States Judge Magistrate Klein, invited the opposing assistant United States attorney [hereinafter AUSA], Laura Bonn, into chambers. I was not invited. Later, both ridiculously claimed that she was there only to view pictures of his judicial investiture. Former AUSA Bonn refused to produce discovery and later admitted that she had, in effect, fabricated her defense. The courts did not hold her accountable.

In 2003, Eugene was assaulted and battered in the workplace by a civilian associate of other civilians who were bribing the office with free food in exchange for preferential treatment. Although the assailant had been successfully prosecuted by the Miami-Dade state attorney, AUSA Carole Fernandez, Bonn's successor, disingenuously argued against Miami-Dade, the record and claimed it was an "alleged assault." Chief Judge Moreno did nothing.

In 2005, after five years of retaliation for filing an EEO complaint, Eugene retired early, after 23 years of dedicated service. Miami Port Director Jose Ramirez abruptly ordered him to deliver inter-office mail, a GS-3 position. Ramirez, on the other hand, had received three promotions after he admitted to tampering with evidence and "placing" marijuana in a black couple's luggage on a cruise ship.

In an earlier Judge Moreno-approved decision, US Magistrate Judge Gerber rebuked the agency and Ramirez and stated that, instead of repeatedly promoting Ramirez, it could have terminated him.[1] Chief Judge Moreno, however, now repudiated that decision and agency documents—it notified Ramirez that he "could not fulfill duties in a credible and effective manner." Judge Moreno claimed they were "bombastic insinuations and accusations."[2]

FULL-TIME SPORTS ANNOUNCER JUDGE JOSE E. MARTINEZ

"Super fan" Southern District of Florida Judge Jose E. Martinez broadcasts football, basketball, and baseball games for the University of Miami. The judge boasted that he has missed only three home football games since 1958 and only about three away games since 1984.[3] Full-time color commentator Judge Martinez stated, "I figured here I am, they feed me, they give me a good seat, and I was part of the thing, I didn't have to pay to go on the trips anymore."

I petitioned the Supreme Court for a writ of certiorari. In 2006, it vacated and remanded the judgment of the Eleventh Circuit Court of Appeals. On remand from the Supreme Court, and while the case was pending in the court of appeals, AUSA Bonn lied in order to have a third retaliation case assigned to Judge Martinez. She falsely claimed that the Supreme Court had remanded the case to the district court.

When the case was finally remanded from the court of appeals to the district court, it was assigned to a U.S. magistrate judge, who succeeded Judge Klein. Judge Martinez, however, ignored the procedural order of then Chief Judge Zloch and assigned the case to himself.

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[1] *See Cavicchi v. Chertoff*, 06-21406-civ-Moreno, Plaintiff's Motion for Summary Judgment; *Ramirez v. Snow*, at 22 n. 9, No. 01-0173-civ-Moreno/Garber (S.D. Fla. June 11, 2003).
[2] *Cavicchi v. Chertoff*, Docket Entry 100, pp. 13, 18.
[3] Mark D. Killian, *Judge Martinez spends his off time in the broadcast booth*, www.floridabar.org., December 7, 2007.

In 2007, I filed an uncontroverted declaration from former (Legacy Customs) Internal Affairs Resident Agent-in-Charge Mark Conrad, to whom AUSA Bonn admitted that she had, in effect, fabricated the defense. She withheld documents which proved her admission. I also informed Judge Martinez that there was a timely and critical outstanding discovery motion pending. Judge Martinez, however, pretended he could not understand English, declared the Conrad declaration "vague and conclusory," and denied the motion to compel discovery as "moot." Chief Judge Moreno and the Eleventh Circuit did nothing.

During litigation, Judge Martinez had been openly associating with a named hostile witness in the case, Thomas Winkowski, Director of Field Operations. On one occasion, Judge Martinez appeared at the defendant's sponsored event and gave the keynote address. I provided his chambers with pictures of him seated at a table with Winkowski. On another occasion, Judge Martinez appeared at the DHS headquarters and accepted an award.

Two filed recusal motions would have required Judge Martinez to explain his conduct. Rather than allowing Judge Martinez to respond, Chief Judge Moreno interfered and assigned the cases to himself. He ruled the motions "moot" and provided an alibi. He claimed that because of Judge Martinez's "recent heart surgery, he is unable at this time to rule on present motions." In truth, Judge Martinez was broadcasting on the radio.

I submit that, in order to protect Judge Martinez, former AUSA Bonn and the Miami United States Attorney's office, Chief Judge Moreno subverted the Local Rules regarding the random assignment of judges. Instead of requiring Judge Martinez to address the allegations, Chief Judge Moreno ignored and disobeyed the rule of law—the Southern District of Florida Local Rules regarding disqualification or illness, and manipulated the rules regarding the random assignment of judges. This is *per se* an appearance of impropriety. *See* Code of Conduct for United States Judges, Commentary Canon 2A, "Actual improprieties under this standard include violations of law, court rules or other provisions of this Code." If Martinez was too ill to rule, he was required to certify every case and refer his certification to the clerk under the blind random assignment procedure.

Judges Martinez and Moreno refuse to divulge whether there were other similarly reassigned cases, or whether Officer Cavicchi's cases were the only reassigned cases.

CHIEF JUDGE FEDERICO ANTONIO MORENO

In 1967, Justice Tom Clark retired from the Supreme Court when his son Ramsey was appointed attorney general in order to avoid a conflict of interest. Chief Judge Moreno, however, does not disclose to litigants that his daughter is an assistant United States attorney.

I submit that Chief Judge Moreno has eroded the keystone of our government—the separation of powers and its system of checks and balances. It appears that the

Department of Justice has a direct link to his home—his daughter, AUSA Cristina M. Moreno, is based in Washington, but designates the judge's home address, 1314 Castile Ave., Coral Gables as her contact address. Her failure to list a telephone number is a violation of the Florida Bar rules. AUSA Moreno has not responded to the Bar's initial request to list a telephone number. I can state with a reasonable degree of certainty that this is the judge's home address—the Federal Election Commission reports demonstrate that Mrs. M. Cristina Moreno listed the same address when she donated $2300.00 to the McCain campaign on January 30, 2008—her address does not appear on the Miami-Dade official tax records available on the Internet.

Chief Judge Moreno did not disclose that he is an adjunct professor of law with former AUSA Bonn in the litigation section of the University of Miami School of Law. It appears he may have lied to Attorney General Holder regarding his lack of knowledge of misconduct allegations regarding the Miami United States Attorney's office.

The Daily Business Review reported:

> Another issue that is a hot topic in the Southern District is prosecutorial misconduct. The U.S. attorney's office in Miami is currently under investigation ....
>
> [As] a result, **U.S. Attorney General Holder told judges to contact him personally if they learn of any misconduct.**
>
> 'He gave out his phone number, and some judges have taken him up on that in other districts,' **Moreno said. 'I have not had any issues in front of me, but certainly if I did I probably think I could resolve them in my courtroom, but I can't speak for other judges.'**[4]

AUSA Bonn's successor, AUSA Carole Fernandez, proffered a back-dated, unsigned letter, typed in grammatically correct English and attributed it to an immigrant who does not read or write literate English. The unsigned letter was addressed to Port Director Ramirez. It purported to be a complaint against Officer Cavicchi. Although a successor agency attorney discovered the unsigned letter in the files of former agency attorney Francesca Alvaro, Fernandez claimed the letter was given in hand to a CBP Officer who was not even assigned to the location when her version of events allegedly occurred—he claimed he saw the letter for the first time several years later, when he received a notice of deposition.

I submit that Chief Judge Moreno, in order to protect government attorneys from facing potential criminal liability regarding the fabrication of that letter, claimed that the government did not use the document. Chief Judge Moreno refused to address the allegations of the fabricated document by denying a request for a hearing on a motion to order the government to identify the chain of custody of the document before the

[4] John Pacenti, Daily Business Review, Justice Watch, *Chief federal judge exhibits humor, demands decorum*, July 27, 2009 at 3.

government even filed an opposition. Ignoring my motion for summary judgment, the judge explained away the government's proffer of the fabricated document by stating, "Neither of these are [sic] at all relied upon by Defendant in Defendant's Motion for Summary Judgment." *Cavicchi v. Chertoff*, 06-21406-civ-Moreno, D.E. 100 at 18-19.

In effect, Chief Judge Moreno ruled that it is permissible to fabricate a document, suborn and tamper with a witness and, when caught, rely on him to claim DOJ did not use it. Chief Judge Moreno's statement to the press is clearly false and undermines public confidence in the judiciary.

Chief Judge Moreno "thinks 'courthouses should be like 'secular temples,' to inspire respect in the community just as cathedrals were built on a grand scale to capture the feeling of a divine presence."[5] Moreno said, "when you're a judge you rule your own fiefdom, as Chief you are accountable for the whole kingdom." *Id.* Thomas Jefferson wrote:

> [T]he great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them.[6]
>
> [A] better remedy I think, and indeed the best I can devise would be to give future commissions to judges for six years (the Senatorial term) with a re-appointmentability by the president with the approbation of *both* houses.
>
> [F]or the judiciary perversions of the constitution will forever be protected under the pretext of errors of judgment, which by principle are exempt from punishment. Impeachment therefore, is a bugbear which they fear not at all. But they would be under some awe of the canvas of their conduct which would be open to both houses regularly every 6th year....
>
> [T]he machine, as it is, will, I believe, last my time, and those coming after will know how to repair it to their own minds.[7]

Respectfully submitted,
/s/John Cavicchi
John Cavicchi

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[5] Gabriel Pinella, *Chief Judge Federico Moreno--A Story of Success Fueled by Passion*, Broward Bar Inaugural Newsletter, Winter 2008

[6] Thomas Jefferson, *The Works of Thomas Jefferson*, Federal Edition (New York and London, G.P. Putnam's Sons, 1904-5). Vol 12, Chapter: *TO JUDGE SPENCER ROANE*, March 9, 1821. Accessed from http://oll.libertyfund.org/title/808/88417 on 2008-07-04

[7] Thomas Jefferson, *The Works of Thomas Jefferson*, Federal Edition (New York and London, G.P. Putnam's Sons, 1904-5). Vol 12, Chapter: *TO JAMES PLEASANTS*, December 6, 1821. Accessed from http://oll.libertyfund.org/title/808/88424 on 2008-07-04

TIMOTHY A. BAUGHMAN
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To the U.S. House Judiciary Subcommittee on Courts and Competition Policy

Representative Howard Coble, ranking member
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Washington, D.C. 20515

Bob Goodlatte
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Dear Members of the Committee:

It is my understanding that on December 10, 2009, the House Subcommittee on Courts and Competition Policy convened a hearing on "Examining the State of Judicial Recusals After Caperton v A.T. Massey Coal Co." I practice in Michigan, where our state supreme court has, by rule, taken the State down a profoundly mistaken path. I write to discourage the Committee from using the Michigan experience as an example, other than as a cautionary one. I apologize in advance for the length of my remarks.

My principal concern here is with the notion, embraced by a four-justice majority of the seven member Michigan Supreme Court, that there exists some constitutional basis for a rule or statute that permits Justices on the Court to oust another Justice or Justices from sitting in a particular case. I will not here belabor the points I have made with regard to the Michigan rule. Suffice it to say that there is nothing in the Michigan Constitution which gives to equal-level justices on the state's highest court the authority to oust other justices from a case. In Michigan, then, absent a constitutional amendment, the enactment of new Michigan Rule 2.003 that allows justices to oust other justices from a case is an exercise of power without authority, anathema to a constitutional democracy—and the policy behind such a practice is misguided as well.

I have heard the view expressed that Congress ought to enact a statute providing for a similar rule in the United States Supreme Court, so that, if a Justice denies a recusal motion, the motion would be referred to the remaining Justices, who, by majority vote, could oust the challenge Justice (or Justices) from a case. As with Michigan, one must ask, by what authority? In Michigan, the wound on the court is self-inflicted, as the four-justice majority itself promulgated the rule. In the United States Supreme Court the matter of recusal has rested with the individual Justice from the founding and has not been changed since the Caperton decision, likely because the Justices understand they have no authority to oust a co-equal member of the body from hearing a case. And certainly Congress has no constitutional authority to force such a procedure on the Court. After all, the Court is not a subordinate body to Congress, but the head of a separate and coequal branch of government. Proper respect for the principle of separation of powers[1] and the institution of the Court requires that Congress avoid attempting to do by statute what the Michigan Supreme Court has done—and without authority—by rule.

Justices on the Supreme Court are not "fungible," as are judges of the lower courts, which indicates no disrespect of those lower-court judges. If a district judge recuses, another district judge takes his or her place, and the district court in all of its fullness sits. If a circuit judge recuses, another circuit judge takes his or her place, and the circuit court in all of its fullness sits. The district court sits by way of individual judges, and the circuit court in three-judge panels, and the identity of the individual judge or the makeup of the three-judge panel is legally inconsequential. They constitute the district court and the circuit court for that case. But no one may replace a Supreme

[1] See, for example, Bassett, "Recusal and the Supreme Court," 56 Hastings L J 657 (2005).

Court Justice (which is also true in Michigan, though indications are that some current justices fail to understand this). It would take a constitutional amendment—which would be ill-advised—to allow "replacement" of a Supreme Court Justice with someone who is *not* a Supreme Court Justice. In this circumstance, it would *not* be the Supreme Court that sits in its fullness, but some hybrid. This cannot be accomplished without constitutional amendment, and so, on a recusal, the Court is "short" a Justice.

This itself counsels restraint with recusals by members of the Supreme Court. As Justice Scalia has noted, recusal by a Justice dramatically changes the Court: "...granting the motion is (insofar as the outcome of the particular case is concerned) *effectively the same as casting a vote against the petitioner*. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all" (*Cheney v. U.S. Dist. Court for Dist. of Columbia,* 541 U.S. 913, 915-916, 124 S.Ct. 1391, 1394 (2004), opinion of Justice Scalia in chambers, emphasis supplied). Justice Holmes once said that "an ounce of history is worth a pound of logic." With regard to the procedure for recusal, both history and logic support the continued practice of each Justice individually deciding questions of his or her disqualification.

And beyond the question of authority to mandate a process by which Justices could oust fellow Justices from a case, the standard employed by the federal statute—that a judge must recuse if his or her impartiality might "reasonably be questioned" (in Michigan the majority has adopted an "appearance of impropriety" standard)— is flawed for the reasons so well stated by Professor Eugene Volokh in his testimony to the Committee. For example, it is unquestioned in the justice system that a judge who has authored a ruling in one case may, if sitting later on a higher court, consider precisely that same issue in a different case, though to the general public this might seem a circumstance where impartiality might "reasonably be questioned." As Professor Volokh notes, such a test promises more than it can or should deliver, and, if applied according to the public conception of the words employed, would result in a far more recusals than presently occur, and far more than *should* occur.

There is, in fact, no systemic problem that needs a solution (nor was there in Michigan). It is quite possible that we have become far more squeemish than we ought, and that at least some of those who seek such rules have a political motive, or seek an advantage by gaining the ability to manipulate the makeup of a court of last resort. Let me close with a few examples from history:

- Chief Justice John Marshall authored *Marbury v Madison*. That litigation arose when Secretary of State John Marshall left Marbury's commission in his desk when he left the Adams administration. Marshall did not recuse.

- Chief Justice Chase devised the Greenback Legislation as Secretary of the Treasury, and was on the Court when it considered the Legal Tender Cases. He did not recuse.

- Justice Oliver Wendell Holmes was on the Supreme Court when it considered decisions of the Massachusetts Supreme Court rendered when he sat on that court. He did not recuse (see e.g. Worcester v. Worcester Consolidated Street R. Co., 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905), Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084 (1903); Glidden v. Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798 (1903)).

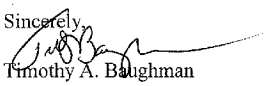
- Senator Black wrote the Fair Labor Standards Act and guided it through Congress. He was on the Court when its constitutionality was considered. He did not recuse (*United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941)).

And there are other similar examples involving Justice Jackson, among others.

These justices (and their colleagues, who did not raise the matter) were not ethically challenged. There is no systemic problem in the federal system that needs a solution, and, the federal judiciary being a separate and coequal branch of government, its members should be afforded the respect and independence demanded by our system of government. Congress should avoid the path that Michigan has taken. There is much more that could be said, but let me end by saying that particularly when considering members of courts of last resort, a refusal to credit jurists with the ability to follow their oath and recuse when appropriate is unseemly to the administration of justice.

I thank you all for your attention.

Sincerely,



Timothy A. Baughman
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Congress of the United States
House of Representatives
Washington, D.C. 20515

January 30, 2004

The Chief Justice
The Supreme Court of the United States
Washington, DC 20543

Dear Chief Justice Rehnquist:

In a letter this week to Senator Leahy regarding Supreme Court recusal practices, you said that "there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself."[1] We are writing to ask that you consider whether the Supreme Court should develop a formal procedure for reviewing the recusal decisions of Supreme Court justices.

We make this request because it appears that Justice Antonin Scalia is following a different standard than the lower courts in deciding recusal questions. The federal statute requiring a judge to recuse himself "in any proceeding where his impartiality might reasonably be questioned" applies to Supreme Court justices and other federal judges alike.[2] Yet Justice Scalia's decision not to recuse himself in *In re: Cheney* appears to conflict with the recusal standards articulated by the Eighth Circuit Court of Appeals in *United States v. Tucker,* a similar case involving a federal judge who was friends with President Clinton and First Lady Hillary Rodham Clinton.[3] We do not believe that one standard should apply to judges who are friends of the Clintons and another standard should apply to judges who are friends of Mr. Cheney.

United States v. Tucker

The Eighth Circuit's decision in *United States v. Tucker* concerned Independent Counsel Kenneth Starr's prosecution of tax fraud and other charges against then–Arkansas Governor Jim Guy Tucker. This case that grew out of the investigation of the "Whitewater" matter. In 1995, United States District Judge Henry Woods found that the Office of Independent Counsel lacked jurisdiction to prosecute the case. Independent Counsel Starr then appealed this decision and requested that the court assign the case to a judge other than Judge Woods.[4]

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[1]Letter from Chief Justice William Rehnquist to Senator Patrick Leahy (Jan. 26, 2004).

[2]28 U.S.C. § 455.

[3]*United States v. Jim Guy Tucker*, 78 F.3d 1313 (8th Cir. 1996).

[4]*See id.*

Mr. Starr argued that reassignment was necessary because there was "an unmistakable appearance of bias by Judge Woods."[5] His argument, based "primarily on newspaper articles,"[6] was that Judge Woods was a friend of Hillary Rodham Clinton and President Clinton. Mr. Starr cited in his brief an article in which the judge said he had come to admire Mrs. Clinton when she was an attorney on a special committee.[7] Mr. Starr also relied on an article that reported that the judge had spent a night at the White House.[8]

With respect to the allegation of bias, Judge Woods stated, "I have no connection with Tucker, and the Clintons, in my opinion, are not involved in this matter."[9] Mr. Starr, on the other hand, argued that an actual connection between the Clintons and the case was not critical to a finding of the need for reassignment: "The public perception is that the genesis of this Whitewater investigation — and everything that occurs in this investigation — is regarding President Clinton. . . . Whether or not the facts of a particular case are directly connected to President Clinton, a reasonable observer would question the impartiality of Judge Woods in matters where this independent counsel is a party."[10]

The Eighth Circuit Court of Appeals granted Independent Counsel Starr's request to reassign the case in order to preserve "the appearance of impartiality."[11] The court stated that it had the power to reassign a case under 28 U.S.C. § 2106, "including . . . where, in the language of 28 U.S.C. § 455(a) . . . the district judge's 'impartiality might reasonably be questioned.'"[12] Noting that 28 U.S.C. § 455(a) concerns the appearance of bias and does not require a showing of actual bias,[13] the court found:

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[5] *Whitewater Prosecutor Says Judge Should Be Removed from Tucker Case*, Associated Press (Oct. 12, 1995) (quoting Independent Counsel Starr's brief to the court).

[6] *United States v. Tucker*, *supra* note 3, at 1322–23.

[7] *Id.* at 1323 (describing article cited by Independent Counsel Starr).

[8] *Id.* (describing article cited by Independent Counsel Starr).

[9] *Whitewater Prosecutor Says Judge Should Be Removed from Tucker Case*, *supra* note 5.

[10] *Id.*

[11] *United States v. Tucker*, *supra* note 3, at 1322.

[12] *Id.* at 1323–24.

[13] *Id.* at 1324.

> Judge Woods's link with the Clintons and the Clintons' connection to Tucker have been widely reported in the press. Moreover, as the Independent Counsel has noted, 'this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton.' . . . Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons, and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.[14]

In re: Cheney

Under the standards applied in *United States v. Tucker*, Justice Scalia's relationship with Vice President Cheney would seem to raise similar concerns about "the appearance of impartiality." According to recent news accounts that have not been denied by Justice Scalia, he and Vice President Cheney went on a duck hunting trip together at a private camp at the beginning of this year.[15] This trip occurred just a few months before the Supreme Court will hear arguments in the case *In re: Cheney*, a case in which the Vice President himself is a party.[16]

There are close parallels between the *Tucker* case and *In re: Cheney*. Just as the *Tucker* court found that case would involve matters concerning the Clintons, *In re: Cheney* will involve matters concerning Vice President Cheney. Indeed, the underlying controversy in *In re: Cheney* involves the Vice President's assertion that task forces that he heads, such as the energy task force, should be allowed to operate in secret.

Moreover, just as the *Tucker* court found that the case before it was high profile, the *Cheney* case is high profile. And the reported connection between Justice Scalia and the Vice President — a vacation together — appears at least as strong as the reported connections between the Clintons and Judge Woods at issue in the *Tucker* case.

There are cases where a judge's friendship with an individual has not been sufficient grounds for recusal. For example, *Baker v. City of Detroit* involved an allegation of race-based discrimination on the part of the Detroit Police Department.[17] The plaintiffs in this case filed a motion to disqualify the judge under 28 U.S.C. § 455(a) on the basis of the judge's friendship with the Mayor of Detroit, and the court denied the motion. But in *Baker* the Mayor was a nominal party. In the case of *In re: Cheney*, there can be no question that the Vice President

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[14] *Id.* at 1324–25.

[15] *Trip with Cheney Put Ethics Spotlight on Scalia*, Los Angeles Times (Jan. 17, 2004).

[16] *See* 157 L. Ed. 2d 793, *cert. granted.*

[17] 458 F. Supp. 374 (E.D. Mich. 1978).

plays a far more central role. It is no exaggeration to say that the prestige and power of the Vice President are directly at stake in *In re: Cheney*.

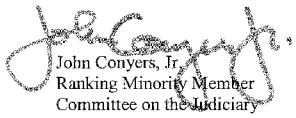
Conclusion

Justice Scalia has stated, "I do not think my impartiality could reasonably be questioned."[18] We want to make it clear in this letter that we are not questioning the impartiality or integrity of Justice Scalia. In fact, it may be that Justice Scalia has reached the correct conclusion and that Independent Counsel Starr and the *Tucker* court reached the wrong one. But we do believe that public trust in the Supreme Court could erode if recusal decisions appear arbitrary and inconsistent with recusal standards applied to lower court judges.

For these reasons, we urge you to examine the merits of establishing a procedure for formal review of recusal decisions by Supreme Court justices. We believe such a system would help assure that consistent standards are applied to these important matters.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform



John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

[18] *Trip with Cheney Put Ethics Spotlight on Scalia, supra* note 15.