Statement of

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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*

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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(e). 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.

[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).

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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..

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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
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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.
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