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August 17, 2016

James C. Duff, Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Impeachable Offenses of U.S. District Court Judge Helen "Ginger" Berrigan

Dear Mr. Duff:

Enclosed, please find the original plus one copy of a petition that requests an investigation into potentially impeachable offenses committed by the Hon. Helen "Ginger" Berrigan, U.S. District Judge for the Eastern District of Louisiana, during her adjudication in a series of cases from 1995 to 2001 with Administrators of the Tulane Educational Fund as Defendant and I as Plaintiff.

The petition outlines the actions of a Federal judge who knowingly ignored laws specifically intended to prohibit the type of conduct in which she willfully engaged. Her professional behavior was prejudicial to the administration of justice, violated the trust and confidence placed in her by the public, and irreparably damaged the integrity of the judiciary.

Yours truly,

Carl Bernofsky
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Encl: CD with PDF file of petition

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**GROUNDS FOR IMPEACHING HELEN "GINGER" BERRIGAN, JUDGE, FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA**

I, Carl Bernofsky, hereby submit to the United States Judicial Conference *via* the Administrative Office of the U.S. Courts, substantial and credible information that the Honorable Helen "Ginger" Berrigan, United States District Court Judge for the Eastern District of Louisiana, engaged in acts that constitute grounds for an impeachment investigation.

The information provided asserts that Judge Berrigan:

1. Engaged in a pattern of conduct inconsistent with her constitutional duty to faithfully execute the laws.

2. Showed a reckless disregard for U.S. recusal statutes.

3. Violated canons of judicial conduct and codes of judicial ethics.

4. Filed a false and deceptive public record.

5. Brought the court and her office into disgrace and disrepute, and damaged public confidence in the administration of justice.

6. Obstructed justice by not disclosing her association with Defendant in cases over which she presided.

7. Deprived litigant of his constitutional right to a due-process hearing on the merits before an impartial tribunal.

8. Maintained extrajudicial contact with, and accepted a perquisite from Defendant (paid summer teaching assignment in Greece) while presiding over a case in which Defendant was a party.

9. Obstructed justice and abused her judicial authority by suppressing Plaintiff's crucial, material evidence refuting Defendant's claims for justifying its actions against Plaintiff.

10. Obstructed justice by complying with Defendant to deny Plaintiff a paid-up health benefit to which he was medically eligible (cancer) and entitled.

## BACKGROUND

### Judge Berrigan's Affiliation with Tulane University

In 1990, Judge Berrigan, then an attorney in private practice, was appointed to the Board of Directors of Tulane University's Amistad Research Center, a position she occupied through 1997.[1] Her gratitude to the university appears to originate from her service at the Amistad Research Center, where she worked with fellow board member and its later president, Dr. Andrea Green Jefferson, whose husband, Congressman William J. Jefferson (D-New Orleans) recommended her for a district judgeship in New Orleans. In 1993, she was nominated for that position by President Bill Clinton. Congressman Jefferson and Senator John Breaux (D-La.) jointly introduced her to the Senate Judiciary Committee.[2]

On April 14, 1994, Judge Berrigan's oath of office was administered by the Hon. Morey Sear, Chief Judge, U.S. District Court for the Eastern District of Louisiana, and member of the Board of Directors of the Tulane University Medical Center.[3] The following year, Tulane University named Judge Berrigan to an adjunct professorship.[4]

At all times relevant to the Plaintiff's litigation against Tulane University, Judge Berrigan was Adjunct Associate Professor of Law at Tulane, and she taught the course, "Trial Advocacy" during the 1995-96 academic year.[4] During the entire course of Plaintiff's litigation against Defendant, Judge Berrigan maintained a professional association with Tulane through her continued participation in the Law School's Judicial Externship Program,[5] and as a substitute instructor for the course, "Federal Practice & Procedure: Trials,"[6] taught in 1998 by then 76-year-old Eastern District Court Judge (ret.) and Adjunct Professor, Charles Schwartz, Jr.[7] In

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[1] *Almanac of the Federal Judiciary, 1997,* Vol. 1, 5th Circuit, p. 3.

[2] Bruce Alpert, "Judicial Nominee Sailing Along," *The Times-Picayune*, New Orleans, January 28, 1994, p. A-9.

[3] *Amistad Reports,* Vol. 8, No 2, September, 1994.

[4] *Tulane Law School Catalog, 1995-1996*, p. 104.

[5] *Tulane Law School Catalog, 1996-97*, p. 107; *1997-98*, p. 103; *1998-2000*, p. 103.

[6] http://www.tulanelink.com/legal/recuse_98b.htm

[7] *Tulane Law School Catalog, 1998-2000,* p. 55.

2000, Judge Berrigan received $5,500 from Tulane to teach a three-week seminar course held on the Greek Isle of Thessaloniki,[8] a tourist destination.

## Judge Berrigan's Obligation to Disclose

Inasmuch as Judge Berrigan had given no notification to the contrary, Plaintiff tacitly assumed that she was obeying all laws and complying with the canons of judicial behavior that regulate conflict-of-interest matters. Her failure to inform Plaintiff of her association with Defendant before even sitting in his case may be construed as a lie. The withholding and later concealment of such information violates an implicit covenant of trust, the breach of which irrevocably damages confidence in the judicial process and constitutes grounds for impeachment.

## Cases to which Plaintiff's Allegations Apply

Petitioner was Plaintiff in a series of lawsuits captioned as *Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund*, filed in United States District Court for the Eastern District of Louisiana, the Honorable Judge Helen "Ginger" Berrigan presiding. The cases were: Civil Action No. 95-0358 ("Discriminatory Discharge"), No. 98-1792 ("Retaliation"), and No. 98-2102 ("Defamation"). The latter two were "combined" by Judge Berrigan. These cases were subsequently appealed to the Fifth Circuit and U.S. Supreme Court. Note that Civil Action No. 98-1792 was originally filed as Case No. 98.6317 ("Denial of Disability Benefits") in Civil District Court for the Parish of Orleans, State of Louisiana, but removed by Defendant to Federal Court where it could be tried by Judge Berrigan. In addition to the above lawsuits, Plaintiff independently appealed to the Fifth Circuit *(Case No. 99-30614)* and U.S. Supreme Court *(Case No. 99-372)* with *Petitions for Writ of Mandamus* that sought to recuse Judge Berrigan. Except for isolated examples of particularly egregious conduct, no attempt is made here to re-litigate the issues dealt with in the above-captioned cases.

## Exhibits and Documents

These are not physically attached to this petition. The Plaintiff's printed copies of exhibits and documents referred to here were destroyed by Hurricane Katrina in 2005 and may be retrieved from the courts, their other recipients, and in some cases their authors. Prior to 2005, however, many of these documents had been carefully transcribed and posted on the Plaintiff's

[8] *Financial Disclosure Report for Calendar Year 2000,* Judge Helen G. Berrigan.

website *(tulanelink.com)* from which they are accessible, some in PDF format. Wherever practicable, they are referenced here with links to that website for ready retrieval of their content.

**Judge Berrigan's Management of the "Recusal Issue"**

Judge Berrigan, in her letter of June 21, 1999 to Charles Fulbruge III, Clerk of Court, Fifth Circuit Court of Appeals in response to Plaintiff's *Petition for Mandamus*, displays an underlying animosity toward the Plaintiff:[9]

1) Concerning Plaintiff's new counsel, Judge Berrigan is untruthful when she claims: "... Dr. Bernofsky did advertise in various outlets, including the Internet, seeking new counsel."[9] In fact, Plaintiff never advertised for new counsel in any manner whatsoever.

Plaintiff did, however, create an early version of his online petition that urges Congress to amend the recusal law to prohibit judges who hold faculty positions at academic institutions from adjudicating lawsuits in which those institutions are a party.[10] This petition may have been among those "critiques," Judge Berrigan said were, "sent to me by various lawyers in town although I have not sought them out myself."[9]

2) Judge Berrigan appears confused when she states that: "the only basis for recusal ... is either actual impartiality or the appearance of impartiality."[9] Plaintiff believes she meant to say the opposite of what she wrote.

3) Judge Berrigan's tone is condescending and entirely disingenuous when she declares: "... I do not harbor any ill will toward Dr. Bernofsky," and "... he genuinely perceives [his problems to be] caused by the bias and fault of others..." revealing her conviction that his "difficult life transitions" were not "caused by the bias and fault of others, including myself."[9]

4) Perhaps most important is the manner in which Judge Berrigan was able to dissuade Plaintiff's attorneys from pursuing the recusal issue. After Plaintiff's original counsel failed to secure Judge Berrigan's recusal,[11] the attorney abruptly withdrew from the case,[12] fearing reprisals that might negatively impact his law practice if he persisted in "fighting the judge."

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[9] http://www.tulanelink.com/legal/mand_resp_99a.htm

[10] http://www.tulanelink.com/tulanelink/petition_16a.htm

[11] http://www.tulanelink.com/legal/recuse_98a.htm

[12] http://www.tulanelink.com/legal/withdraw_98a.htm

New counsel agreed to take Plaintiff's case, but only with the provision that he would not continue to seek recusal. Judge Berrigan wrote: "I was hopeful at that point that **the recusal issue would be laid to rest.**"[9] She then reminded Plaintiff's new counsel that he is "someone who had litigated ... cases **in our section of Court.**"[9] (Bold emphasis added..)

Plaintiff continued to seek Judge Berrigan's recusal independently, and went on to file a *Complaint of Judicial Misconduct*,[13] followed by a *Petition for Writ of Mandamus* to the Fifth Circuit Court of Appeals[14] and the U.S. Supreme Court,[15] respectively, filed *pro se*. These efforts ultimately proved fruitless.

## Misrepresenting a Credential in a Public Record

The 1997 and earlier editions of the *Almanac of the Federal Judiciary* lists Judge Berrigan's affiliation with Tulane University's Amistad Research Center as "1990-present".[16] However, following Plaintiff's motion that sought her recusal from his lawsuits against Tulane, Judge Berrigan amended this credential in the 1998 edition of the *Almanac of the Federal Judiciary* to indicate that her official relationship with Tulane University's Amistad Research Center had ended in 1994.[17] Plaintiff's first lawsuit against Tulane had been filed January 31, 1995, and the amended credential appears intended to conceal Judge Berrigan's service on the Board of Directors of one of Tulane University's research centers while she simultaneously adjudicated Plaintiff's lawsuits against that institution.

18 U.S.C. § 1001(a):

> "... whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme or device a material fact;

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[13] http://www.tulanelink.com/legal/misconduct_99a.htm

[14] http://www.tulanelink.com/legal/mandamus_99a.htm

[15] http://www.tulanelink.com/legal/supreme_99a.htm

[16] http://www.tulanelink.com/pdf/rep_mand_99-372.pdf at A-10.

[17] http://www.tulanelink.com/pdf/rep_mand_99-372.pdf at A-11.

(2) makes any materially false, fictitious or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry; shall be fined under this title, imprisoned not more that 5 years ... or both."

## Consequences of Judge Berrigan's Partisanship

A. Non-Disclosure

Judge Berrigan's failure to disclose her association with Defendant deprived Plaintiff of the opportunity to bring this fact to the attention of the Appellate and U.S. Supreme Courts. Had Judge Berrigan's strong appearance of impropriety been timely addressed, her impartiality might reasonably have been questioned and affected the outcome of the appellate process.

Plaintiff complained that deceptive and untruthful statements were employed by Tulane during oral arguments before the Appellate Court. When these falsehoods were pointed out in a brief that requested a rehearing, the Appellate Court declined to rehear the case. Had the Appellate Court been aware of Judge Berrigan's association with Defendant and her willful concealment of this association, it may have been more inclined to examine those strongly disputed material facts. The U.S. Supreme Court may also have been more receptive to the petitions for *certiorari* had it been apprised that the Judge was disqualified under 28 U.S.C. § 455(a) and § 455(b)(5)(i) at the time she made her rulings and entered judgment in favor of Defendant.

B. Rejection of Contested Material Evidence

In connection with the above proceedings, Judge Berrigan not only repeatedly dismissed documentary evidence and sworn testimony that refuted Defendant's claims, she broadly credited Defendant's positions, labeling them as "undisputed." These judgments, which reflected bias and lack of objectivity, suggested influence from an extrajudicial source and led Plaintiff to search for and ultimately discover the association that linked Judge Berrigan to the Defendant.

An egregious example of Judge Berrigan's abuse of authority was her ready acceptance of Defendant's pretext for terminating Plaintiff. Documentation had thoroughly substantiated that Plaintiff had received notice of a new $250,000 grant award from the Air Force 10 weeks before he was terminated. The grant was officially accepted by Tulane and not returned to the Air Force until eight months after Plaintiff was terminated. Nevertheless, Tulane falsely claimed that

Plaintiff had no grant funds with which to support his research, leading Judge Berrigan to state: "...Bernofsky was not qualified because of his lack of extramural funding..."[18] and "...all undisputed facts support the simple explanation that Bernofsky was terminated for his inability to meet his salary needs..."[19] The Judge's ruling was published as follows:

> Former research professor at medical school asserted race and age discrimination and state law claims in connection with denial of tenure and ultimate termination for **failure to obtain grant funding**. *Bernofsky v. Tulane University Medical School*, 962 F.Supp. 895 (E.D.La. 1997) at 895. (Bold emphasis added).

Once it had became abundantly evident that Plaintiff had indeed been awarded a new $250,000 grant from the Air Force, and that Defendant Tulane University had lied about this in order to create a pretext for terminating the Plaintiff, Judge Berrigan cancelled the scheduled trial[20] and subsequently ruled by Summary Judgment in favor of the Defendant. Scientific and lay descriptions of Plaintiff's new Air Force grant can be accessed from his website.[21] Plaintiff's funding history has been summarized.[22]

C. Denial of Restraining Order and Injunction

In 1995, Judge Berrigan denied Plaintiff's motions for a restraining order and injunction to prevent Tulane from removing the contents of Plaintiff's laboratories. Tulane subsequently locked Plaintiff out of his laboratories and seized all equipment, supplies and experimental work in progress. One significant item was a $250,000 Electron Paramagnetic Resonance Spectrometer that Plaintiff obtained with an earlier grant.[23] It was transferred from the Medical Center to a department on another campus. Ultimately, Tulane redistributed all of the equipment and supplies, including Plaintiff's personally-purchased equipment and possessions, and proceeded to demolish all unfinished scientific work of the previous five years that was in process of being completed.

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[18] Civil Action No. 95-358, Apr. 15, 1997, *Order and Reasons*, at 18.

[19] *Ibid.*, at 28.

[20] http://www.tulanelink.com/legal/pretrial_00a.htm

[21] http://www.tulanelink.com/tulanelink/monitor_00a.htm

[22] http://www.tulanelink.com/tulanelink/finances_00a.htm

[23] www.tulanelink.com/tulanelink/EPR_box.htm

D. Blockage of a Strategic Goal as a Disservice to the Public

Tulane was intent on destroying Plaintiff's research program even as Plaintiff was desperately attempting to salvage the products of years of unfinished work that was still located within the confines of his laboratories. At the time that Tulane locked Plaintiff's laboratories, preliminary work had been published,[24] and a number of projects were in progress.

The objective of the Air Force grant was to determine the mechanism by which a common environmental pollutant causes cancer in laboratory mice. Plaintiff's laboratory had developed a unique method that could be used in living cells to examine the free radical events that were believed to be involved in this process. When Tulane decided to confiscate the contents of Plaintiff's laboratories, leading ultimately to the destruction of Plaintiff's research materials, it was assisted by Judge Berrigan's Order to dismiss Plaintiff's motions for a temporary restraining order and injunction. In effect, Judge Berrigan gave Defendant the opportunity to deprive an established scientist of his profession when he was on the threshold of putting into practice a major new approach in the field of cancer research that had just been funded by the United States Air Force. Scientific and lay descriptions of Plaintiff's Air Force grant can be accessed from his website.[25]

E. Denial of Disability Benefit

Judge Berrigan's bias against Plaintiff is illustrated by her dismissal[26] of Plaintiff's lawsuit against Tulane and its insurer, Teachers Insurance and Annuity Association,[27] which Plaintiff filed after Tulane blocked his claim to a disability benefit for an aggressive cancer he developed during the protracted period of abuse he suffered at the hands of a hostile new department chairman determined to destroy Plaintiff's research program and replace him with one of his own appointees. Tulane's basis for denying the disability claim was that Plaintiff's cancer was not physically established until after he received a letter of termination.[28]

Plaintiff's oncologist was clear about one of the contributing factors to his illness:

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[24] http://www.tulanelink.com/tulanelink/curriculum_98a.htm Pub. Nos. 59 & 60.

[25] http://www.tulanelink.com/tulanelink/monitor_00a.htm

[26] http://www.tulanelink.com/legal/outcome_98b.htm

[27] http://www.tulanelink.com/legal/complain_98b.htm

[28] http://www.tulanelink.com/tulanelink/disability_98a.htm

"In correlating the most difficult two and a half years that Dr. Bernofsky has endured and the development of his malignancy, I believe that there is evidence to ascribe the appearance of this lymphoma to that stress."

Milton W. Seiler, M.D, Oct. 11, 1995.[29]

**Summary of Efforts to Recuse Judge Helen "Ginger" Berrigan**

The following table begins with the recognition in 1998 of Judge Berrigan's affiliation with Tulane University. Plaintiff's first lawsuit, *Civil Action No. 95-0358,* had been filed January 31, 1995. http://www.tulanelink.com/legal/complain_95c.htm Defendant was granted Summary Judgment April 15, 1997. http://www.tulanelink.com/legal/ordreas_97a.htm

In Re: *Carl Bernofsky v. Administrators of the Tulane Educational Fund*,
Case No. 98-CV-1792 c/w 98-CV-2102
U.S. District Court for the Eastern District of Louisiana

| Date | Description |
|---|---|
| 10/15/98 | Plaintiff files motion to recuse Judge Berrigan. http://www.tulanelink.com/legal/recuse_98a.htm |
| 11/09/98 | Memorandum by Defendant in opposition to Plaintiff's motion to recuse Judge Berrigan. *(Bernofsky v. Tulane, Docket Item #22)* |
| 11/23/98 | Judge Berrigan denies motion for her recusal. http://www.tulanelink.com/legal/recuse_98b.htm |
| 12/28/98 | Plaintiff appeals Judge Berrigan's refusal to recuse herself. |
| 02/02/99 | U.S. Court of Appeals dismisses appeal challenging Judge Berrigan's refusal to recuse herself. (*5th Circuit Case No. 98-31417*) |
| 02/08/99 | Plaintiff's attorney files motion to withdraw from his case. http://www.tulanelink.com/legal/withdraw_98a.htm |
| 02/11/99 | Plaintiff files *Complaint of Judicial Misconduct* against Judge Berrigan in U.S. Court of Appeals (5th Circuit) for failing to disclose her association with Defendant. http://www.tulanelink.com/legal/misconduct_99a.htm |
| 02/11/99 | Plaintiff sends letter to Judge Berrigan, stating that her deadline leaves insufficient time to acquire new counsel to replace the attorney who withdrew. Letter is docketed as a motion. |

[29] http://www.tulanelink.com/pdf/seiler_letter_11oct1995.pdf

| Date | Description |
|---|---|
| 02/12/99 | Judge Berrigan gives Plaintiff an additional 20 days to name new counsel. |
| 02/19/99 | Appellate Court assigns Docket No. 99-05-372-0118 to *Complaint of Judicial Misconduct*. Rules call for complaint to be reviewed by Fifth Circuit Chief Judge Carolyn Dineen King. |
| 02/23/99 | Fifth Circuit Chief Judge Carolyn Dineen King signs Order dismissing Plaintiff's *Complaint of Judicial Misconduct*. Docketed March 1, 1999. http://www.tulanelink.com/legal/order_99a.htm |
| 03/08/99 | Plaintiff requests a six-month extension of trial deadlines to accommodate the calendar of his pending new counsel. |
| 03/10/99 | Judge Berrigan grants an extension, with dates to be determined at a conference held April 8, 1999. |
| 03/12/99 | Plaintiff files an appeal of the Court Order dismissing his *Complaint of Judicial Misconduct*. The Fifth Circuit sets an April 1st deadline for Judge Berrigan's response. http://www.tulanelink.com/legal/misconduct_99b.htm |
| 04/06/99 | Plaintiff signs contract with new counsel to represent him in Civil Action No. 98-CV-1792 c/w 98-CV-2102 ("Retaliation/Defamation") lawsuit. |
| 04/08/99 | At preliminary conference, Judge Berrigan sets Jan. 18, 2000 as trial date for Plaintiff's "Retaliation/Defamation" lawsuit. |
| 04/26/99 | The Judicial Council of the Fifth Circuit affirms the dismissal of Plaintiff's *Complaint of Judicial Misconduct*. Signed by Judge E. Grady Jolly, 04/19/99. http://www.tulanelink.com/legal/review_99a.htm |
| 05/10/99 | Plaintiff urges U.S. senators to draft legislation that would make it illegal for university adjunct professors who are also judges to preside in civil cases in which the university is a defendant. Two senators express their support. http://www.tulanelink.com/tulanelink/senate_99a.htm |
| 06/14/99 | Plaintiff, *pro se*, files *Petition for Writ of Mandamus* with Fifth Circuit Court of Appeals. *(In Re: Carl Bernofsky, No. 99-30614)* http://www.tulanelink.com/legal/mandamus_99a.htm |
| 06/21/99 | Judge Berrigan responds to the *Petition for Writ of Mandamus*. http://www.tulanelink.com/legal/mand_resp_99a.htm |
| 06/24/99 | Plaintiff replies to Judge Berrigan's response of 6/21/99. http://www.tulanelink.com/legal/mand_repl_99a.htm |

| Date | Description |
|---|---|
| 06/28/99 | Tulane files a response opposing the *Petition for Writ of Mandamus*. |
| 07/06/99 | *Petition for Writ of Mandamus* "DENIED" by Fifth Circuit Court of Appeals without opinion or explanation. |
| 08/30/99 | Plaintiff, *pro se*, files *Petition for Writ of Mandamus* in U.S. Supreme Court to recuse Judge Berrigan. *(Case No. 99-372)* http://www.tulanelink.com/legal/supreme_99a.htm |
| 09/16/99 | Statement by Judge Berrigan of intention not to file a response in U.S. Supreme Court. *(Case No. 99-372)* |
| 09/28/99 | Tulane files a brief in U.S. Supreme Court opposing the *Writ of Mandamus* to recuse Judge Berrigan. *(Case No. 99-372)* |
| 10/08/99 | Plaintiff, *pro se*, files a reply brief in U.S. Supreme Court refuting claims made by Tulane in its brief in opposition to mandamus. *(Case No. 99-372)* http://www.tulanelink.com/legal/supreme_99b.htm |
| 11/01/99 | U.S. Supreme Court denies Plaintiff's *Petition for Writ of Mandamus* to recuse Judge Berrigan. *(Case No. 99-372)* Soon thereafter, Judge Berrigan accepts a Tulane summer 2000 teaching assignment in Greece for which she is paid $5,500. http://www.tulanelink.com/tulanelink/impeach_00a.htm |
| 01/04/00 | At a pretrial conference, Judge Berrigan postpones the trial of *Bernofsky v. Tulane*, which had long been scheduled for Jan. 18, 2000. The *Pre-Trial Order* is not entered on the docket or incorporated into the record. Another conference is scheduled for Jan. 20, 2000 to select a “new trial date”. *(Civil Action No. 98-1792 c/w 98-2102)* http://www.tulanelink.com/legal/pretrial_00a.htm |
| 01/05/00 | At an unscheduled conference, Judge Berrigan ordered a 6-month delay (to May 15, 2000) of the trial of *Bernofsky v. Tulane*, thereby providing the Defendant with a second opportunity to request summary judgment. |
| 03/14/00 | Tulane files its *Motion for Summary Judgment*. |
| 03/15/00 | Plaintiff discovers that Judge Berrigan has accepted a Tulane summer teaching assignment in Greece. http://www.tulanelink.com/tulanelink/impeach_00a.htm |
| 03/28/00 | Plaintiff files memo in opposition to Tulane's *Motion for Summary Judgment*. |
| 04/04/00 | Plaintiff sends letter to Judge Berrigan requesting recusal because of her Tulane summer teaching assignment in Greece. The request is ignored. http://www.tulanelink.com/tulanelink/berriganletter_00a.htm |

| Date | Description |
|---|---|
| 04/18/00 | Judge Berrigan grants Tulane's *Motion for Summary Judgment* and dismisses Plaintiff's lawsuit. (*Civil Action No. 98-1792 c/w 98-2102)* http://www.tulanelink.com/legal/ordreas_00a.htm |
| 04/19/00 | Plaintiff learns that Tulane paid Judge Berrigan $5,500 for her Tulane summer teaching assignment in Greece. http://www.tulanelink.com/tulanelink/impeach_00a.htm |
| 05/02/00 | Plaintiff submits a motion for Judge Berrigan's recusal and a new trial. http://www.tulanelink.com/legal/reconsider_00a.htm |
| 05/31/00 | Judge Berrigan denies Plaintiff's motion for recusal and a new trial, and taxes Plaintiff for Tulane's legal costs. |
| 09/06/00 | Plaintiff files an appeal to the U.S. Fifth Circuit Court of Appeals. *(Case No. 00-30704)* http://www.tulanelink.com/legal/appeal_00a.htm |
| 11/03/00 | Tulane files a response brief to the U.S. Fifth Circuit Court of Appeals. *(Case No. 00-30704)* |
| 12/07/00 | Plaintiff files a reply brief to the U.S. Fifth Circuit Court of Appeals. *(Case No. 00-30704)* http://www.tulanelink.com/legal/reply_00a.htm |
| 01/23/01 | Plaintiff files an *Ethical Conduct Complaint* with Louisiana Attorney Disciplinary Board against Tulane's attorney, G. Phillip Shuler, Esq. http://www.tulanelink.com/legal/misconduct_01a.htm |
| 02/22/01 | Fifth Circuit Court of Appeals schedules oral argument for April 3, 2001. Attorney Victor R. Farrugia will stand for the Plaintiff, and attorney G. Phillip Shuler for the Defendant. *(Case No. 00-30704)* http://www.tulanelink.com/legal/misconduct_01a.htm |
| 04/10/01 | Appellate panel affirms judgment of District Court, with Chief Judge Carolyn Dineen King dissenting. The supportive opinion of Judge King opens door for a rehearing *en banc*. *(Case No. 00-30704)* http://www.tulanelink.com/legal/judgment_01a.htm |
| 04/24/01 | Plaintiff submits *Petition for Rehearing en banc* to the U.S. Fifth Circuit Court of Appeals. *(Case No. 00-30704)* http://www.tulanelink.com/legal/appeal_01a.htm |
| 05/14/01 | *Petition for Rehearing en banc* to the U.S. Fifth Circuit Court of Appeals is denied. *(Case No. 00-30704)* http://www.tulanelink.com/tulanelink/more_051401_box.htm |

| Date | Description |
|---|---|
| 08/09/01 | Plaintiff files a *Petition for Certiorari* in U.S. Supreme Court. *(Case No. 01-249)* http://www.tulanelink.com/legal/supreme_01a.htm |
| 10/09/01 | Tulane's *Brief in Opposition* filed in U.S. Supreme Court. *(Case No. 01-249)* |
| 10/19/01 | Plaintiff's *Reply to Brief in Opposition* filed in U.S. Supreme Court. *(Case No. 01-249)* http://www.tulanelink.com/legal/supreme_01b.htm |
| 11/13/01 | U.S. Supreme Court denies *Petition for Certiorari*. *(Case No. 01-249)*<br>The Rule of Law Succumbs to Politics:<br>http://www.tulanelink.com/tulanelink/denial_box.htm<br>Friends in High Places:<br>http://www.tulanelink.com/tulanelink/highplaces_01a.htm |

## ARGUMENT

In the matters that were brought before her, captioned as *Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund*, the Honorable Helen "Ginger" Berrigan, Judge of the United States District Court for the Eastern District of Louisiana, repeatedly dismissed opportunities to recuse herself despite the strong appearance of impropriety created by her association with Defendant university. Impeachment is justified on grounds that the judge insisted on presiding under circumstances that were clearly disqualifying, and that she willfully concealed and later misrepresented her long-term relationship with Defendant, with which she continued to be materially associated. Impeachment is appropriate because the District Court indisputably abused its discretion, and the higher courts failed to provide relief through the appellate process.

A. <u>Abuse of Judicial Authority</u>

Plaintiff's due process and equal protection rights under the Fifth and Fourteenth Amendments were severely abridged in his civil suits against Tulane University.

Article V, United States Constitution in pertinent part provides:

> No person ... shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Impeachment is justified on the grounds that Judge Berrigan willfully concealed and later misrepresented her long-term association with Defendant and that this concealment obstructed justice, abridged Plaintiff's due process rights under the Fifth and Fourteenth Amendments and prevented Plaintiff from receiving a valid *de novo* review in Appellate Court, which was unaware of the strong appearance of impropriety in the court below.

Plaintiff invokes Fifth Amendment protection because of its applicability to federal jurisdiction:

> [D]ue process under the Fifth Amendment, along with the other guarantees of the Bill of Rights, when applied by federal courts, does serve as the basic

> protection of the citizen against **unjust federal action**. *Crain v. United States*, 162 U.S. 625 (1896), 16 S.Ct. 952, 40 L.Ed. 1097. ... In such cases, there is neither an intervening state court system nor an intervening state constitution. It is, therefore, the Court's view that Fifth Amendment due process must be given an even broader connotation than Fourteenth Amendment due process. *United States v. Townsend*, 151 F.Supp. 378 (D.C.D.C. 1957), at 387. (Bold emphasis added).

A federal judge who is closely associated with a party in a proceeding cannot convincingly try the case in a manner that will win the public's confidence in the integrity and fairness of the federal judicial system or provide to the litigants the blessing of "Equal Justice Under Law". It is well-settled that disqualification from a case is the appropriate course of action for a district judge whose impartiality might reasonably be questioned.

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986), at 712. (References deleted).

Although it is appropriate for higher courts to review a judge's wrongful refusal to disqualify himself, modern appellate courts do not appear eager to reprove judges who are wayward in this duty.

> This court has long taken the position that there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself.' *In Re: International Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980), at 926 citing *Rosen v. Sugarman*, 357 F.2d 794, 797 (2nd Cir. 1966).

No party should be required to submit to a presiding judge who has a prejudicial bent of mind, expecting that there will be another opportunity for justice after final judgment has been rendered. Rather, appellate courts should assist in avoiding such needless and judicially inefficient ordeals.

> [D]ue process . . . [requires] that a judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. **No person should be required to stand trial before a judge with a 'bent of mind.'** *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (1989), at 166 citing *Berger v. United States*, 255 U.S. 22, 33, 41

S.Ct. 230, 233, 65 L.Ed. 481 (1921); Wolfram, *Modern Legal Ethics* § 17.5.5 Independence and Neutrality, p. 989 (1986). (Bold emphasis added).

B. Obligation to Disclose

According to Shaman, *et al.*, and the case law cited to support his determination, "...it is the obligation of a judge to disclose all facts that might be grounds for disqualification."[30]

Further, Canon 3C of the *Code of Judicial Conduct* of the American Bar Association, which was codified, with modifications, as 28 U.S.C. § 455 and extensively reviewed by Abramson,[31] states, in part, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned... ."

Under Canon 3 of the *Code of Judicial Conduct*, Judge Berrigan had a duty to disclose her association with Tulane before sitting in any case in which Tulane was a defendant. However, from January 31, 1995 onward, Judge Berrigan continually violated this Canon with respect to the Plaintiff's lawsuits against Tulane University when she sat and failed to make any disclosure. More significantly, as a member of the Board of Directors of a Tulane research center during the time she ruled and entered judgment in favor of Tulane, Judge Berrigan was specifically disqualified pursuant to U.S.C. 28 § 455(b)(5)(i).

Judge Berrigan's actions infringed the ethical principle, elaborated by Shaman, *et al.* and supported by case law that, "It is not the duty of the parties to search out disqualifying facts about the judge ... it is the judge's obligation to disclose all possibly disqualifying facts."[32]

Quoting Justice Scalia in *Liteky*:

> [T]wo paragraphs of the [most recent] revision [of § 455] brought into § 455 elements of general 'bias and prejudice' recusal that had previously been addressed only by § 144. Specifically, paragraph (b)(1) entirely duplicated the grounds of recusal set forth in § 144 ('bias or prejudice'), but (1) made them applicable to *all* justices, judges and magistrates (and not just district judges), and (2) **placed the obligation to identify the existence of those grounds**

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[30] *Judicial Conduct and Ethics*, 2 Ed., Shaman, J.M., Lubet, S., Alfini, J.J.; Michie Law Pub., Charlottesville, VA (1995), p. 146.

[31] *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 2 Ed., Abramson, L.W., American Judicature Soc., Chicago, IL (1992), pp. 1-48.

[32] See Shaman, *et al.*, Op. Cit., Footnote 1, p. 146.

**upon the judge himself**, rather than requiring recusal only in response to a party affidavit. *Liteky v. U.S.*, 510 U.S. 540 (1994) at 548, 114 S.Ct. 1147, 127 L.Ed.2d 474. (Bold emphasis added).

C. Recusal Statutes

Title 28, United States Code, Section 455(a) states:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, U.S.C., Section 455(b)(5)(i) in pertinent part states:

He shall also disqualify himself ... where he ... is a party to the proceeding, or an officer, director or trustee of a party.

To maintain the integrity of the federal judicial system, the court must be concerned whether the parties in a lawsuit received fair and impartial treatment of their claims. At the risk of undermining the public's confidence in the judicial process, the welfare of the parties must have priority over other considerations should a violation of § 455(a) occur. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Liljeberg*, 486 U.S. 847, at 870 quoting *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-467, 72 S.Ct. 813, 8P22-823, 96 L.Ed. 1068 (1952). (Frankfurter, J., in chambers).

Judge Berrigan was an adjunct professor at Tulane's Law School and was actively engaged in teaching during the time she was adjudicating Plaintiff's lawsuits against Tulane. The district court judge was also serving on the advisory board of one of Tulane's research centers. This relationship existed under the cloak of non-disclosure and in open defiance of recusal laws and canons of judicial ethics. Thus, Judge Berrigan's conduct has cast a long shadow upon the court, undermining the public's faith in the integrity and fairness of the judicial system. The just and proper consequence of such misconduct is impeachment.

D. Canons of Judicial Conduct

The Judicial Conference of the United States directs judges who are associated with a university ***not*** to sit in cases in which that university is a party. This is clearly expressed in the following canon in the *Guide* that is distributed to every district court judge by the Administrative Office of the United States Courts:

> A judge who teaches at a law school should recuse from all cases involving that educational institution as party. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors. Similar factors govern recusal of judges serving on a university advisory board. *Guide to Judiciary Policies and Procedures*, 1999 Ed., Vol. II, Chap. V, §3.4-3(a), at V-39.

Judge Berrigan taught at the defendant educational institution and also served on one of its advisory boards. The double violation of this canon alone should have sufficed to attract the attention of the higher courts to which Plaintiff appealed. Such failure of the judiciary to enforce its own regulations raises a red flag and justifies legislative discipline in the form of impeachment.

E. Willful Misrepresentation

Judge Berrigan's failure to disclose her material and continuing association with Defendant over the course of five-and-one-half years as presiding judge, coupled with the alteration of her curriculum vitae and omission of her adjunct professorship from the *Almanac of the Federal Judiciary*, constitutes a willful misrepresentation designed to thwart discovery of her association with Defendant. This violation of 28 U.S.C. § 455 goes beyond mere negligence or harmless error and suggests that Judge Berrigan had an interest in the outcome of the proceedings, conceivably derived from a sense of loyalty to the University and/or the expectation of future perquisites. Nonetheless, her personal agenda should not be allowed to become an impediment to the cause of justice. Judge Berrigan's partisanship toward Tulane University infringed on Plaintiff's Fifth and Fourteenth Amendment rights to due process and equal protection.

> [T]here are two predicates for a 'wilful violation' of a rule of judicial conduct established by [the Supreme Court of Oregon], each of which is necessary for there to be a wilful violation: (1) that the judge must intend 'to cause a result or take an action contrary to the applicable rule' of judicial conduct, and (2) that the judge must be 'aware' of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule. *In Re: Schenck,* 870 P.2d 185 (Or. 1994), at 193.

Once the facts of her association with Defendant were discovered by Plaintiff and brought to her attention, Judge Berrigan responded, "There is no basis for the Plaintiff's suggestion that [my] impartiality might reasonably be questioned by virtue of these ... circumstances..." *Bernofsky v. Tulane*, Civil Action No. 98-1792, Minute Entry, Nov. 23, 1998.

Judge Berrigan's disregard of disclosure principles are aggravated by the fact that she attempted to conceal the extent of her association with Defendant by altering her curriculum vitae to create the appearance that her membership on the board of Defendant's research center ended before Plaintiff's first lawsuit was filed on January 31, 1995. Such willful violations of judicial conduct are especially serious. With reference to *Schenck*, Shaman, *et al.* wrote:

> [A] judge will be subject to discipline (as distinct from reversal on appeal) for incorrectly failing to disqualify himself only where the failure was willful. The test is an objective one, and therefore a willful failure to disqualify may be present even though a judge states on the record that he does not believe disqualification is necessary. This approach has the advantage of requiring judges to look to an external standard in addition to their subjective feelings to decide if disqualification is necessary. It thus takes into account that **disqualification is required if there is an appearance of partiality to the reasonable observer, and it precludes a judge from avoiding recusal merely by avowing his or her impartiality.** *In Re: Schenck, Id.* at 189, 193-195 (Bold emphasis added).[33]

F. Judges as Professors

With regard to writing, lecturing, and teaching, Shaman, *et al.* concluded:

> [J]udges' personal and professional services must be dignified and, of course, must denote respect for and compliance with the law, these being the same restrictions that apply to all of a judge's extra-judicial activities whether compensated or not.
>
> Teaching requires that judges adhere to the same guidelines as apply to occasional or ad hoc lecturing, and also that the judge be sensitive to the nature of the institution at which she teaches. **Thus judges should not sit in cases where the educational institution is a party.** (Footnotes deleted, bold emphasis added).[34]

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[33] *Judicial Conduct and Ethics*, 2 Ed., Shaman, J.M., Lubet, S., Alfini, J.J.; Michie Law Pub., Charlottesville, VA (1995), p. 97.

[34] *Ibid*., pp. 240-241.

G. Prejudice in Favor of Defendant

At two junctures in Plaintiff's lawsuits against Tulane, one involving summary judgment and the other recusal, Judge Berrigan articulated decisions that she later reversed by rulings that favored Defendant after "subsequent research."[35] The collective evidence and questionable nature of the "subsequent research" that lead to these reversals are consistent with the view that Judge Berrigan relied upon hearsay information acquired outside of the proceedings and displayed an unequivocal partiality that rendered fair judgment impossible.

Judge Berrigan's duties as an adjunct faculty member periodically brought her into professional and social contact with Tulane administrators, other professors, and students. Thus, there was no barrier to her private, non-judicial association with the University. Judge Berrigan's contact with the Defendant also subjected her to the receipt of extrajudicial information that could include misinformation, rumor, and innuendo. Judge Berrigan has admitted to receiving information about Plaintiff from unnamed "lawyers in town, although I have not sought them out myself."[35]

Assigned to assist Judge Berrigan in Plaintiff's cases against Tulane were two Magistrate Judges: Hon. Joseph C. Wilkinson, Jr., and Hon. Lance M. Africk. Both had close ties to Tulane University and withheld their disqualifying relationships from Plaintiff.[36] Their association with the Defendant was not discovered until 1998, at which time Plaintiff sought their recusal, and both then recused themselves from Plaintiff's second case against Defendant, *Civil Action No. 98-CV-1792 c/w 98-CV-2102* ("Retaliation/Defamation"). Nevertheless, the damage to Plaintiff had already been done in *Civil Action No. 95-0358* ("Discriminatory Discharge").

H. Prejudgment and Predisposition

In her response to Plaintiff's petition to the Fifth Circuit for mandamus, Judge Berrigan stated:

> [Dr. Bernofsky] has gone through some very difficult life transitions in recent years, some of which he genuinely perceives to [be] caused by the bias and fault of others, including myself. I regret that he continues to have that perception.[35]

[35] http://www.tulanelink.com/legal/mand_resp_99a.htm

[36] http://www.tulanelink.com/tulanelink/conflict_98a.htm

The Judge's condescending assessment of Plaintiff's psychological state of mind is subjective and prejudicial. More importantly, her implication that Plaintiff's difficulties *are not the "fault of others"* reveals that she had already formed an opinion in this matter seven months before the initially-scheduled trial date of January 18, 2000, and before the completion of discovery or the taking of a single deposition.

> "[A]djudicative decisions . . . should be free of bias or prejudice. Thus an adjudicative decision maker should be disqualified if he or she has prejudged disputed adjudicative issues." *Valley et al. v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), at 1053. Moreover, "Prejudgment as to the facts . . . or reason to believe such exists, if fairly supported, would, in the Court's view, satisfy Section 144." *Bradley v. School Board of City of Richmond, Virginia*, 324 F.Supp. 439 (E.D. Va. 1971), at 445.

The basic requirement of constitutional due process is a fair and impartial tribunal, and the Supreme Court has consistently enforced this basic procedural right.

> The problem of a procedural defect arises when decision makers have prejudged the facts to such an extent that their minds are 'irrevocably closed' before actual adjudication. *Valley*, at 1052 citing *Baran v. Port of Beaumont Navigation District of Jefferson County,* 57 F.3d, 436 (5th Cir. 1995), at 446.
>
> Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. **If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial.** Section 144, Title 28, U.S. Code. *Knapp v. Kinsey,* 232 F.2d 458, (6th Cir. 1956), at 465. Rehearing denied 235 F.2d 129, cert. denied 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86. (Bold emphasis added).

Judge Berrigan's predisposition and bent of mind, as revealed by her actions and writing, clearly satisfy the requirement for disqualification.

## I. Pervasive Bias and Prejudice

Justice Scalia, joined by U.S. Supreme Court Justices Rehnquist, O'Connor, Thomas, and Ginsburg, expressed in *Liteky* the majority opinion that:

> A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' requiring recusal because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear

> inability to render fair judgment. (That explains what some courts have called the 'pervasive bias exception' to the extrajudicial source doctrine. See, *e.g.*, *Davis v. Board of School Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (CA5 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).) *Liteky v. U.S.*, 510 U.S. 540 (1994), at 551.

In *Liteky*, Justices Kennedy, Blackmun, Stevens, and Souter challenged the extrajudicial source rule, arguing that undue emphasis should not be placed on the source of the contested mindset in determining whether disqualification is mandated by § 455(a).

> The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of law is the impartiality of its judges in fact and appearance. ... The relevant consideration under § 455(a) is the appearance of partiality, see *Liljeberg*, [*Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)], at 860, 108 S.Ct., at 2202-03, not where it originated or how it was disclosed. *Liteky*, *Id.* at 558.

Justice Kennedy further expressed the opinion that the standard for disqualification under § 455(a) during the course of a judicial proceeding is too severe under *Liteky* and should be modulated to allow its intended protection.

> The [Supreme] Court holds that opinions arising during the course of judicial proceedings require disqualification under § 455(a) only if they 'display a deep seated favoritism or antagonism that would make fair judgment impossible.' (Reference deleted). That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts. *Liteky v. U.S.*, 510 U.S. 540 (1994), at 563.

> Section 455(a) . . . guarantee[s] not only that a partisan judge will not sit, but also that no reasonable person would have that suspicion. See *Liljeberg*, at 860. *Liteky*, *Id.* at 567.

Notwithstanding the dichotomy of opinion over the extrajudicial source rule, it is clear that Judge Berrigan's long-standing, working relationship with Tulane University, and her duties as adjunct professor that brought her into contact with university administrators and faculty, satisfy the standard of a genuine extrajudicial source factor. Yet, even if this argument is discarded, the extraordinary circumstances of her prior rulings in *Bernofsky v. Tulane University Medical School* would re-qualify it on the basis of the "pervasive bias exception." And even if

that argument were discarded, it is still virtually impossible for Judge Berrigan to escape the appearance of partiality posed by the facts presented in the present document.

It may be noted that some courts now admit prior rulings to be considered in cases where bias and prejudice are suspected.

> Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, **but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias.** *United States v. Antar*, 53 F.3d 568 (3d Cir.1995) at 574; *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir.1994); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) at 162; *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir.1992). *In Re: Antar*, 71 F.3d 97 (3rd Cir. 1995), at 101. (Bold emphasis added).

J. Determination of Impartiality

According to 28 U.S.C. § 455(a), recusal is required whenever there exists a genuine question concerning a judge's impartiality.

It may be argued that the determination of the judge concerned should be afforded great weight and should not be disturbed unless clearly erroneous. However, in the matter here under review, it is clear that Judge Berrigan engaged in actions that, in the aggregate, constitute serious and erroneous abuse of judicial discretion.

Judge Berrigan's claim of impartiality is contradicted by the facts of her working relationship with Defendant and her willful concealment of these facts. Additionally, Judge Berrigan's predisposition toward Defendant and against Plaintiff as revealed by prior rulings, and her "empathy" toward Plaintiff because he blames others for his "difficult life transitions" when he is the victim, demonstrates a pervasive bias that is so extreme as to indicate a clear inability to render fair judgment. These circumstances require recusal. *Liteky v. U.S.*, 510 U.S. 540 (1994).

The U. S. Supreme Court has made it clear that 'a fair trial in a fair tribunal is a basic requirement of due process,' in administrative adjudicatory proceedings as well as in courts. *Michigan Dept. of Soc. Servs. v. Shalala,* 859 F.Supp. 1113, 1123 (W.D.Mich.1994) (quoting *Withrow v. Larkin*, 421 U.S. 35, 36, 95 S.Ct. 1456, 1459, 43 L.Ed.2d 712 (1975)).

Thus, as stated by Justice Kennedy in his concurring opinion in a Supreme Court case construing the analogous federal statute on judicial disqualification, '[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a

disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source.' *Liteky v. U.S.*, 510 U.S. 540, 563, 114 S.Ct. 1147, 1161, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring). This is because, as our court of appeals has declared, **'[l]itigants ought not have to face a judge where there is a reasonable question of impartiality . . . .'** *Alexander v. Primerica Holdings, Inc.*, 10 F.3d. 155, 162 (3d Cir.1993). *D.B. v. Ocean Tp. Bd. of Educ.*, 985 F.Supp 457 (D.N.J. 1997), at 540. (Bold emphasis added).

Furthermore, no member of the judiciary should have ultimate authority over what constitutes his or her own conflict of interest.

> **No longer is a judge's introspective estimate of his own ability impartially to hear a case the determinate of disqualification under § 455. The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge.** *Roberts v. Bailar,* 625 F.2d 125, (6th Cir. 1980), at 129. On remand, 538 F.supp 424. (References deleted, bold emphasis added).

The sentiments expressed in *Roberts v. Bailar*, *Id.*, are generally reinforced in *Liteky v. U.S.*, 510 U.S. 540 (1994).

In the final analysis, a reasonable person ***would*** question the impartiality of any judge who was an adjunct faculty member at a defendant university and had a continuing association with that university during even part of the time the case was before him or her. U.S. Senator John Breaux indicated that he would be receptive toward legislation: "...establishing a presumption of conflict of interest and automatic recusal for judges... [who are] ...adjunct professors presiding as judges over civil cases in which the school at which that professor teaches is named as a defendant."[37] Inquiring further into this situation, U.S. Senator Mary L. Landrieu has "...taken the liberty of contacting the appropriate officials, here in Washington, to request a report."[38]

The concern expressed by these legislators over the issue of recusal for adjunct faculty judges is clear. Indisputably, Louisiana's duly-elected U.S. senators are reasonable people.

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[37] http://www.tulanelink.com/pdf/pet_mand_99-372.pdf at A-10-A-11

[38] *Ibid.*, at A-12

## CONCLUSION

Built into our Constitution is a system of checks and balances whereby each branch of government exercises some form of regulatory control over the others. The judicial branch, however, is unique in that it is primarily self-regulating. The other branches have little control over the judiciary except through impeachment.

As practiced by the judicial branch, self-regulation is a frequent cause of concern because of its failure to prevent abuse of judicial authority. The origin of this failure appears to lie in an organizational culture of permissiveness toward impropriety and a reluctance for self-discipline. This state of affairs has apparently arisen from a growing desire of the judiciary for autonomy and self-perpetuation, whereby a dedication to self-protection has replaced the commitment to self-criticism and self-correction. All of these elements come into play in the cause here under consideration.

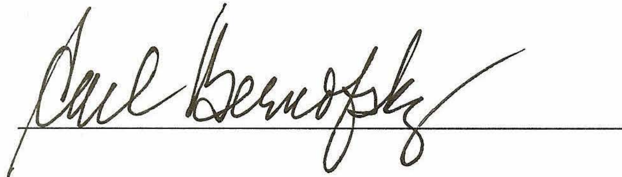
Helen "Ginger" Berrigan, Judge, U.S. District Court for the Eastern District of Louisiana engaged in unethical conduct by willfully choosing to sit in a case under circumstances prohibited by existing law, and by not disclosing her association with the Defendant to the Plaintiff. She violated canons of the Judicial Conference by presiding under conditions that are specifically forbidden; she repeatedly failed to observe the recusal statute of the U.S. Code; she violated Plaintiff's constitutional right to a due-process hearing by an impartial tribunal; and she demonstrated abuse of judicial discretion in her handling of motions and evidence. Such misconduct degrades the court, damages the public trust in the judiciary, and deserves appropriate disciplinary action.

Despite the prima facie evidence of Judge Berrigan's misconduct and wrongdoing, the higher courts have thus far uniformly closed ranks behind the Judge and dismissed all appeals with minimal or no opinion. This is a clear example of the judicial branch's unwillingness or inability to recognize or discipline a judge when egregious acts of misconduct are brought to its attention. The failure of the judiciary to enforce the laws that regulate its own activities is a compelling reason for the legislative branch of government to investigate, for possible impeachment, those judges who disregard these laws .

For the purpose of a judicial impeachment hearing, Judge Berrigan's indiscretions and maladministration of justice may be construed as a "high crime and misdemeanor." In this regard, guidance is provided by the remark made before the American Bar Association in 1913 by William Taft, who served the United States as both President and Chief Justice of the Supreme Court:

Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness or recklessness in his judicial action, or in the use of his official influence for ulterior purposes. By the liberal interpretation of the term "high misdemeanor" which the Senate has given, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit.[39]

Respectfully Submitted,



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[39] Merrill E. Otis, *A Proposed Tribunal: Is it Constitutional?*, 7 U. Kan. City L. Rev., 3, 22 (1938). Quoted in: Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 Regent U. L. Rev., 111, 143 (1998).