CITIZENS' FORUM ON JUDICIAL ACCOUNTABILITY
Washington, D.C.

May 15, 2008

Hello. I'm Carl Bernofsky, and it's my pleasure to have this opportunity to present my case to the Citizens' Forum on Judicial Accountability. I thank Zena Crenshaw and her colleagues for arranging this conference and for inviting me to speak.

At her confirmation hearings for a federal judgeship in 1994, Helen Ginger Berrigan was asked a question that is asked of all judicial nominees:

> "Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern."

Her response was:

> "I would fully disclose to all parties in the case of any facts that might constitute a conflict. I would refer the conflict issue to another judge if it cannot be resolved with parties."

That is what Berrigan said on January 27, 1994 – before she was confirmed as United States District Court Judge for the Eastern District of Louisiana.

As you will see, her statement – made under oath – stands in stark contrast to her behavior when she was faced with a real-life conflict of interest. What I will show today is (i) what that conflict of interest was, (ii) how it resulted in a cruel and unnecessary destruction of a career, and (iii) what steps I am taking to prevent judges like Berrigan from getting away with such reprehensible and ultimately unlawful behavior.

First, let me briefly describe my underlying case. I am a former professor of biochemistry who was employed by Tulane University School of Medicine for nearly 20 years, and before that by the Mayo Graduate School of Medicine for 7-1/2 years.

My problems at Tulane began when a new chairman took over our department. Unknown to me until it was too late, he had targeted three of the senior professors for replacement. He accomplished this through harassment, intimidation and interference. Research was obstructed, coworkers driven off, and we were gradually relieved of teaching duties, committee assignments, and laboratory space.

The first professor was forced into early retirement. The second presented Tulane with a lawsuit and wound up settling by transferring to another department. I was third on the list.

Unaware of what was going on, I continued to go about my activities. I had recently discovered the adenine nucleotide free radical and was busy determining its structure. I had half-a-million dollars in present and pending research funds, and had just used half the money to buy an electron paramagnetic resonance spectrometer to measure free radicals. The machine was already on order when the new chairman arrived.

He refused to allow the equipment to be installed in the department, but I managed to get it installed at a remote location after a year of considerable effort. Even then, he did everything possible to prevent my access to it, causing me to lose one of my grants which depended on its use.

This was representative of the treatment to which I was subjected, and which finally ended with my being fired on the false pretense that I did not have sufficient grant funds to support my work. Ironically, I had just received a $250,000 grant from the Air Force to study the role of free radicals in carcinogenesis, and the award made the front page of "The Monitor," a Tulane newspaper.

I filed a lawsuit against Tulane, which was adjudicated by Judge Ginger Berrigan. For the purposes of its defense, Tulane maintained that I did not have that grant, and that is what Judge Berrigan wrote in her summary judgment against me that was subsequently published. Meanwhile, Tulane's Office of Grants and Contracts had received the first payment, which they held on to for six months before returning the grant to the Air Force for non-performance of the research.

In all, I filed four lawsuits against Tulane. The primary lawsuit was for discriminatory discharge. The second was for the denial of disability benefits, and the others were for defamation and retaliation, respectively. Two of the lawsuits that were filed in state court were removed by Tulane to federal court, where they would be heard by Judge Berrigan, who in each case refused a trial by jury and ruled, or threatened to rule by summary judgment in Tulane's favor despite serious disputes of material issues that remained.

By the time I filed my first lawsuit, the new chairman's harassment and the frustration of dealing with him while trying to work had taken a severe toll on my health. I succumbed to an aggressive form of cancer that required an equally aggressive form of chemotherapy and radiation which left me disabled for many months. I mention this because it leads to an example of Tulane's malicious conduct.

I had an insurance policy with TIAA, the Teachers Insurance and Annuity Association, for disability benefits into which I had paid premiums for nearly 20 years, and I was still under contract with Tulane when I was diagnosed. When I applied for disability benefits, Tulane stepped in and conspired with the insurer to deny my claim. I sued TIAA and Tulane in state court because insurance is regulated by the state. Nevertheless, Tulane succeeded in removing the case to federal court where it was heard by Judge Berrigan. When it was clear that she would rule in Tulane's favor to deny me disability benefits, my attorneys withdrew the case. Tulane had

no financial interest in the outcome because TIAA would have paid the benefits. Clearly, Tulane's motives were vindictive and intended to send a message to others who might challenge them in court.

By the time I filed the third lawsuit, my wife discovered the nature of Judge Berrigan's conflict of interest in these cases. She had searched for information using Google, and one of the first items that turned up was the Tulane Law School directory which showed that Berrigan was an adjunct associate professor who taught a course in Trial Advocacy.

Furthermore, Judge Berrigan had been a member of the Board of Directors of Tulane's Amistad Research Center since 1990. She served with fellow board member and later president, Dr. Andrea Jefferson, whose husband, Congressman William Jefferson, nominated her for the federal judgeship in 1993.

These revelations about Judge Berrigan's association with Tulane not only explained the actions she took in favor of the university, it created an opportunity to recuse her from the remaining lawsuits and possibly to have my case remanded back to another judge for a trial on the merits.

Despite the new information, the judge refused to disqualify herself saying, in essence, that her association with Tulane did not keep her from rendering impartial judgments in the case.

That response brought about an unexpected reaction on the part of my attorneys. They told me that because the judge was biased, my case was a lost cause. They explained that if they continued to fight the judge, their livelihood could be endangered because they would never be able to win another case in New Orleans. They withdrew from the case, and the judge issued a deadline in which to find another attorney.

It was clear to me that, if lawyers are afraid to go against a corrupt judge, then that was something I would have to do myself. I learned that I could file a complaint of judicial misconduct against the judge, and I did.

My complaint of judicial misconduct was dismissed on the basis that it was related to the merits of the case, and that my attorney's motion for Judge Berrigan's recusal was unsuccessful. I appealed to the Judicial Council of the Appellate Court to reconsider my complaint, but that too was rejected.

As a pro se, I then filed a Petition for a Writ of Mandamus to the Fifth Circuit Court of Appeals to recuse Judge Ginger Berrigan. The petition for mandamus was promptly "DENIED" by the Court of Appeals, without an opinion or explanation.

By then, I had located an attorney to represent me in the two cases that were still before the court, but I did not involve him with in any way my Writ of Mandamus. I sent the Writ of Mandamus to the U.S. Supreme Court, and when Tulane responded I followed up with a reply to its objections. However, the Supreme Court refused to hear the case.

About that time, two new facts came to our attention. The first was that Tulane paid Judge Berrigan $5,500 to teach a one-credit seminar course during the summer in the Greek city of Thessaloniki. Second, Tulane had paid Supreme Court Justice Antonin Scalia for five previous years to teach similar summer courses at tourist destinations in Italy and elsewhere in Europe. The significance of the latter is that Justice Scalia oversees the Federal Fifth Circuit where federal cases against Tulane are heard, and when my case for discriminatory discharge came before the U.S. Supreme court, he was among those who voted to deny a hearing.

Armed with the evidence of Tulane's payment to Judge Berrigan, my new attorney sought to disqualify her from the remaining two lawsuits. These involved defamation of character and Tulane's interference with future employment, and had been joined into a single case. The judge refused to budge, and an appeal to the higher court also was unsuccessful.

In that appeal, one of the appellate judges dissented from the majority, although that did not change the outcome or help us with our request for an en banc hearing that would involve all of the appellate judges. The dissenting judge did offer some encouragement by recognizing that there was a problem.

In her dissent, Chief Judge Carolyn King remarked:

> "With respect, I disagree with the panel majority on the matter of Judge Berrigan's recusal. A reasonable person would view the summer teaching assignment in Greece that Tulane Law School offered to Judge Berrigan, along with $5,500 to cover her expenses, as something of a plum. She accepted that assignment in the midst of this litigation against the Administrators of the Tulane Educational Fund, indeed on the eve of her decision to grant summary judgment in favor of the Fund. Under the circumstances (and with a record devoid of any evidence of attenuation in the relationship between the Fund and the Law School), I think that a reasonable person might question her impartiality. I would reverse the judgment and remand with instructions to send the case to another judge."

In the end, all four lawsuits were lost; the three petitions to the U.S. Supreme Court were rejected; and Judge Berrigan required me to pay Tulane's legal costs.

This experience, which stretched for seven years, left me determined to prevent the injustice that occurs when adjunct professor judges sit in cases that involve their university employers. I embarked on a campaign to publicize the problem and find a way to correct it.

There are rules of ethics and much case law on how conflicts of interest should be resolved.

According to law professors Jeffrey Shaman, Steven Lubet and James Alfini:

> "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."

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

Further, Canon 3C of the Code of Judicial Conduct, adopted in 1990 by the American Bar Association states, in part:

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned...."

Thus, Judge Berrigan had a duty to disclose her association with Tulane before sitting in any case in which the university was a defendant.

Moving beyond disclosure are rules established by the Judicial Conference of the United States, which is the highest policy-making arm of the federal judiciary. Its rules governing judicial conduct are embodied in a volume entitled, "Guide to Judiciary Policies and Procedures."

In Vol. II, Chap. V (reissued 6/15/99) it states:

§ 4.1 (b) "It is permissible for judges to teach in law schools. However ... the judge should not participate in any case in which the school or its employees are parties."

Further,

§ 3.4-3(a) "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."

Thus, under the rules established by the Judicial Conference, Judge Berrigan had a duty to recuse herself from any case in which Tulane was a defendant. Yet, she continually violated this regulation when she presided in my lawsuits against Tulane and refused to recuse.

With all these rules and regulations, one might ask: how could Judge Berrigan justify presiding in my cases? The short answer is that such abuse of judicial authority occurs because of the absence of any effective mechanism of judicial accountability. In other words, there is no means of enforcing the codes of conduct, and complaints about their violation are heard only by other judges who routinely dismiss them.

The U.S. Constitution gives Congress the power to regulate the functioning of the courts and to define what constitutes acceptable behavior of judges. Thus, we have the federal recusal statute, U.S. Code Title 28 § 455, which states, in paragraph (a):

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

Clearly, Judge Berrigan's impartiality might reasonably be questioned in cases that involve Tulane University, but that in itself is not specific enough to be actionable.

The recusal statute proceeds to other paragraphs that give specific instances in which a judge must recuse himself or herself, and here is where I propose the inclusion of language that would make it illegal for a judge who is an adjunct professor, or who sits on a university board, from sitting in cases in which that university is a party.

For many years, I have been trying to get Congress to add such language to the recusal statute. It would simply involve adding the following phrase to paragraph (b)(5)(v):

> "Serves as an instructor or on an advisory board of an educational institution that is a party to the proceeding."

On four different occasions, I sent letters to every congressman who was a member of the House or Senate Committee on the Judiciary and never received even one word of acknowledgment. The failure to respond speaks volumes on how out-of-touch our legislators are to the needs of citizens, and how afraid they are to impose even a modicum of new accountability on the judiciary.

Nevertheless, I do not intend to give up. I am in the midst of a petition campaign, and I invite everyone who hears or sees this message to look at my petition and lend support to this cause by adding their signature.

Just go to my Web site, www.tulanelink.com, and click on the link at the top that says, "Support Tulanelink's Petition," and you will be taken there. And, finally, if you have any comments questions about my Web site or what I have said here, you can reach me by email at tulanelink@aol.com.

Thank you.