Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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

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

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

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

Introduction

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

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

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

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

Due Process and the Right to a Fair and Impartial Judge

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

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

Judicial Campaigns and the Politics of Crime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ensuring Impartiality Through Recusal Reform

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

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

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

- Motions seeking recusal of a judge should be assigned to a different judge.

- Judges should be required to disclose on the record any information that the judge believes the parties might considerer relevant to the question of recusal.

- Recusal should be mandatory in any criminal case that will raise an issue about which the judge promised to be "tough." Mandatory recusal (disqualification) offers the additional benefit of giving judicial candidates cover to avoid "tough on crime" rhetoric and

promises. In addition, such a policy diminishes the risk that political considerations will taint judicial decisions; that is, the rule shields judges seeking re-election from political attacks for making legally correct but politically unpopular decisions.

- Attorneys should be allowed a single peremptory challenge to excuse a judge who appears biased. Some version of this rule is in effect in several states, including California, New Mexico, Arizona and Minnesota. This approach avoids the time-consuming and costly distraction of litigating a recusal motion.

More specifically, Congress can affirmatively support national reform efforts by focusing attention on the correlation between judicial election considerations and judicial decision-making. While there are scholarly publications that analyze this nexus and support the conclusion that impending election considerations may affect judicial outcomes,[4] particularly in the context of capital cases, it is time to undertake a comprehensive study of this phenomenon. This committee should authorize funding for a research grant, to be administered by the State Justice Institute or a similar entity, to study the relationship between judicial campaign speech and judicial conduct in criminal proceedings. If such a study confirms the hypothesis that seems self-evident to those charged with upholding constitutional principles in the nation's criminal courtrooms, it will provide enormous impetus for reform.

In conclusion, viewed through the prism of the *Caperton* decision, the 39 states with elected judges should reconsider or reform their own recusal standards to elevate the judicial election process, deter potential sources of judicial bias, and protect the accused's right to a "fair trial in a fair tribunal." *In re Murchison,* 349 U.S. at 136. After all, it is not just the criminally accused, but the entire community whose confidence in our nation's judicial system is placed at risk when the impartiality of a tribunal is in doubt.

[4] See Richard R.W. Brooks and Stephen Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. Crim. L. & Criminology 609 (2002) (analyzing the relationship between judicial sentencing patterns, and the election of judges and finding judge-specific effects related to whether the defendant was sentenced to death and the proximity of a judicial election.