

JUDICIAL ETHICS AND TRANSPARENCY: THE LIMITS OF EXISTING STATUTES AND RULES

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTEENTH CONGRESS FIRST SESSION

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JUDICIAL ETHICS AND TRANSPARENCY: THE LIMITS OF EXISTING STATUTES AND RULES

Tuesday, October 26, 2021

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 2:04 p.m., in Room 2141, Rayburn House Office Building, Hon. Henry C. “Hank” Johnson, Jr. [Chair of the Subcommittee] presiding.

Present: Representatives Johnson of Georgia, Nadler, Jones, Lieu, Stanton, Lofgren, Cohen, Ross, Johnson of Louisiana, Massie, Bishop, Fischbach, Fitzgerald, and Bentz.

Staff Present: David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian; Atarah McCoy, Staff Assistant; Merrick Nelson, Digital Director; Matt Robinson, Counsel; Rosalind Jackson, Professional Staff Member/Legislative Assistant; Betsy Ferguson, Minority Senior Counsel; Ken David, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will come to order. Without objection, the Chair is authorized to declare a recess of the Subcommittee at this time. We welcome everyone to today’s hearing on Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your office and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself any time you seek recognition.

I would also ask all Members with direct questions to Mr. Hedtler-Gaudette, who is on our first panel of Witnesses to please identify yourself when asking a question. Also, if you use any kind

of visual aid during your remarks or while you are asking questions to Mr. Hedtler-Gaudette, please describe that visual.

Finally, I would like to add that Professor Greene must leave by 4:45 p.m., so please prioritize your questions to Professor Greene to the extent necessary. I will now recognize myself for an opening statement.

Good afternoon, and welcome, Witnesses, to today's hearing. I didn't have a chance to greet you all personally before the hearing, but please accept this as my humble offer. We are here today to explore and to consider disturbing facts that have been brought to light by recent reporting about the failure of Federal judges to recuse themselves in cases where they or their family held a financial interest. We will also examine how the laws and rules currently on the books have fallen short and failed to prevent the circumstances exposed in that reporting. Central to our discussion today will be the appearance of impropriety and the appearance of impartiality, which is an essential component of our constitutional system of justice. Justice John Marshall Harlan, the great dissenter, said that, quote, "the appearance of evenhanded justice is at the core of due process," end quote.

Appearances matter. It is in the appearance of impartiality that Americans find faith in their courts and trust in their democracy. That is one reason why the recent reports from *The Wall Street Journal* exposing numerous instances where judges' decisions have appeared to be biased or partial, or improperly influenced by their financial interests are so disheartening. The damage has been done. Federal judges did not follow the law. We do not know whether any judge specifically acted to benefit his or her ownership interest, but the appearance of impropriety has already tainted their judgments. Notwithstanding any actual undue influence, the fact that the 130-plus judges profiled in *The Journal* appear as if they might have acted with their pecuniary interest in mind is enough to shake the public's confidence in the United States Judiciary. This is especially frustrating because the judges at the center of this expose failed to meet the very modest demands placed on them by their lifetime tenure in the Federal courts.

The Executive and Legislative Branches are subject to expensive and frequent financial reporting requirements, as well as strict ethical rules on matters on which they have a financial interest. For judges, the bar is much lower. Judges need only disclose limited information about their finances once a year, and then recuse themselves from any cases in which they have a financial interest. The recusal is critical, and the recusal is where these judges broke the law. The Supreme Court has described the statutory requirement for judicial recusal as, quote, "steps necessary to maintain public confidence in the impartiality of the Judiciary," end quote. Yet, what *The Journal* has shown us are judges deciding cases while being part owners of the parties in front of them, trading, and profiting on trades of shares of those parties. In at least one instance, making a ruling in favor of those parties which was later overturned on appeal. These failures to recuse were not isolated cases, nor were they limited to individual judges.

The Journal reported on 131 Federal Judges participating in 685 cases in which they had a financial interest, 61 judges actively

traded stocks in the companies before them while their cases were pending. Fully one-fifth of the judges who had disclosed their financial interest decided a case in which that interest was implicated, one-fifth. These concerns were not limited to the lower courts.

The Supreme Court is not bound by a code ethics to protect its Members from the appearance of impropriety, which was the subject of legislation I introduced last Congress, and which I plan on reintroducing soon.

Today, we learn more about what Congress can do to make sure that Members of our Judiciary take the steps necessary to avoid violating the recusal statute and the troubling appearances of impropriety that result.

I am proud to join my esteemed colleague, Ms. Ross, in introducing the Courthouse Ethics and Transparency Act, which would address head on many of these lapses in regulations surfaced by *The Journal's* reporting. These reforms are critical to maintaining the public's confidence in the decisions and in the authority of the courts. That brings us to our distinguished panelists. Our first panel is comprised of experts and advocates in the fields of judicial ethics, and transparency, and constitutional law, who will enlighten us on the legal and constitutional issues involved in restoring and maintaining the strength of the Federal Judiciary, particularly the public's perception of judges' legitimacy and impartiality.

We will then be joined by a member of the Federal Judiciary, and a leader in the Judicial Conference, the body that is responsible for guiding and assisting judges in the satisfaction of their statutory responsibilities.

Thank you, and I look forward to your testimony. It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from California, Mr. Issa, for his opening statement.

Mr. ISSA. Thank you, Mr. Chair.

It is somewhat less frequent than I would like for Members here on the dais to be in total agreement. Perhaps it is not surprising that we are in total agreement about what another branch of government should do. Just a few years ago, we came to an agreement on a bipartisan and bicameral basis on what came to be known as the STOCK Act. The fact is, we recognized that the ownership, either by ourselves or our family members, and or the trading needed to be not only eventually disclosed, but disclosed publicly in real time. That disclosure has given the public an opportunity to have greater confidence that what a Member is doing is, in fact, consistent with what they own and vice versa, that trades made on what might be inside information, are, in fact, discovered in a reasonable period of time.

The public believes that which is made public is, in fact, that which keeps of private from inappropriately dealing. That is what we are discussing here today. It is likely to be, as the Chair said, a subject of real legislation to bind the article III, the third branch, to substantially the same rules as the other two branches are bound to. Some might say that the independence of the Judiciary would be tarnished, or, in some way, limited by the Congress mandating these rules for article III.

Nothing could be further from the truth. The reality is that the judicial branch has not done for itself, it does so at the peril of its

legitimacy. The regaining of the legitimacy by the Federal court system requires not only that the judges, but all the other key staff, just as in the House, just as in the Senate, just as in the Executive Branch that have access to inside information and might very well trade on it, be open and transparent. Anything less, I believe will, in fact, affect us adversely.

There is a statement that we all heard, and we heard the Chair announce it, that it is the requirement of a judge to recuse himself. I disagree with that standard. I disagree with that standard vehemently. It is, in fact, the judge's responsibility to do so. If the judge does not do so, it is the right of the American people to insist, based on public disclosure, that the questioning of a judge be done proactively, in real time, in a way that would, in fact, allow what could be a long, expensive, laborious, and even capital decision to be made by an independent judge. You cannot unring a bell, and you cannot get an impartial hearing by a judge, even if it is done a second time there is considerable damage.

So, Mr. Chair, I applaud you for holding this hearing. I am obviously predicting that we will act, and that it is likely that we will act consistent with the STOCK Act and other transparency rules that the other branches live under. I thank the Chair again for holding this hearing and agree completely with his opening statement.

I yield back

Mr. JOHNSON of Georgia. I thank the gentleman from California for his remarks.

Next, I will recognize the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Mr. Chair Johnson, and Ranking Member Issa for holding this important hearing today.

The Federal Judiciary is a pillar of our Nation's government, an institution nearly synonymous with withholding the rule of law. Congress, as a coequal branch, conducts oversight of the courts with hearings such as this one. It is with the following goal in mind: To promote and protect this vital institution to safeguard judicial independence and maintain public confidence in our courts.

Our Federal Judiciary is the envy of the world. Congress has a clear interest in ensuring that this hard-earned reputation is maintained. Today's hearing is a necessary part of that process. As mentioned by the Chair and Ranking Member, an investigation by a team of journalists at the *The Wall Street Journal* found that at least 131 Federal Judges appeared to have unlawfully and unethically failed to recuse themselves from cases which they and their families had a financial interest.

Many judges even actively traded shares in the companies that were appearing before them as litigants. What *The Journal* uncovered appears to constitute a massive failure of not just individual judges, but of the entire system that is ostensibly in place to prevent this unlawful conduct.

Troublingly, many judges simply refuse to comment on their apparent violations of the recusal of ethics laws. Others blame their clerks, their conflict checking software, or even the litigants themselves. Other judges, however, were clearly aghast that they missed

the financial conflict of interest and welcomed the opportunity to try to make things right.

One judge put it best when he said, "I just blew it. I regret any question that I have created an appearance of impropriety or a conflict of interest." He should be credited for his candor, because it reflects exactly the kind of integrity and clear sightedness that makes for an exceptional judge.

With a problem that seems to be this widespread, it would be wrong to single out any one judge. To its credit, the administrator of the courts said that it took the matter seriously. It is clear that the safeguards in place to prevent this kind of misconduct are simply not up to the task. I hope the revelations uncovered by *The Wall Street Journal's* reporting will spark a thorough reexamine of these safeguards, especially since some of the weaknesses in the current system were already well-known.

Two years ago, this Subcommittee held a hearing on judicial ethics and transparency that seems to have foretold many of the problems that *The Wall Street Journal's* reporting has brought to light. At that hearing, our distinguished Witnesses told us that Congress should require the judge's financial disclosure forms which are necessary to detect potential conflicts of interest be made publicly available in a searchable online database.

Our Witnesses recommended that judges should be required to make the recusals publicly available, along with their reasons for recusing. Our Witnesses told us that attorneys were afraid to ask the judge to recuse themselves and recommended that a recused motion should be decided by a different judge or panel of judges. Our Witnesses told us that the judiciary's decisions regarding ethics and recusal must be made transparently and fairly.

Our Witnesses also made clear that Congress has an obligation to act when the judiciary self-regulating efforts fall short. Last Congress I joined Chair Johnson and Representative Quigley in introducing the 21st Century Courts Act which included a range of reforms to the laws governing judicial ethics, recusal, and transparency.

Many of the provisions in our bill drew from the Judiciary ROOM Act which Ranking Member Issa championed when he was Chair of the Subcommittee, and was passed by this Committee overwhelmingly. *The Wall Street Journal's* investigation and other events have made clear that those reforms are not only sorely overdue, but that they must be strengthened.

I am hopeful that that today's distinguished Witnesses will provide us with excellent suggestions on what reforms to include in an updated version of the 21st Century Courts Act which we plan on reintroducing soon.

I look forward to their testimony. I yield back the balance of my time.

Mr. JOHNSON of Georgia. I thank the gentleman from New York.

We will now turn to our Witnesses for our testimony. We will have two panels of Witnesses at today's hearing. The first is a panel of experts on judicial ethics and constitutional law. The second is a Member of the Judiciary. I will now introduce the first panel of Witnesses, but not before I remind Members that the guidance from the attending physician states that face coverings are re-

quired for all meetings in an enclosed space, such as Committee hearings, except when you are recognized to speak. I would ask my colleagues to comply with that rule.

I will turn now to introducing the Witnesses.

Professor Renee Knake Jefferson, holds the Larry Doherty Chair in Legal Ethics at the University of Houston Law Center. Professor Jefferson has been recognized both in the United States and abroad as an expert on professional responsibility and legal ethics. She regularly assists in legal matters involving judicial ethics and has testified before the Texas Supreme Court of review on this issue.

Professor Jefferson earned her B.A. in communications from North Park college in Chicago, Illinois, and a J.D. from the University of Chicago Law School. Welcome, Professor Jefferson.

Dylan Hedtler-Gaudette is a government affairs manager at Project on Government Oversight where he champions good government policy solutions, such as judicial ethics and transparency. Mr. Hedtler-Gaudette is an expert on both judicial ethics and institutional reform. His work is frequently cited in popular nationwide news outlets. Mr. Hedtler-Gaudette has his undergraduate degree in political science and economics from the University of Southern Maine, and his master's in international relations from Northeastern University. Welcome, Mr. Hedtler-Gaudette.

Professor Thomas Morgan teaches professional responsibility and antitrust law at George Washington Law School. Professor Morgan has published numerous articles on professional responsibility and legal ethics. Before teaching at GW Law, Professor Morgan served as Dean the Emory University School of Law, and as a President of the Association of American Law Schools. Professor Morgan has his B.A. from Northwestern University, and J.D. from the University of Chicago. Welcome Professor Morgan.

Professor Jamal Greene is the Dwight Professor of Law at Columbia Law School. He specializes in constitutional law, constitutional theory, and the Federal courts. Professor Greene authored a book released earlier this year and has written numerous law review articles and publications such as the *Harvard Law Review* and *Columbia Law Review*. His nonacademic work has been featured in many national publications.

Before joining academia, Professor Greene served as a law clerk to Judge Guido Calabresi on the Second U.S. Circuit Court of Appeals, and to Judge John Paul—Justice John Paul Stevens on the United States Supreme Court. Professor Greene has a B.A. from Harvard College and a J.D. from Yale Law School. Welcome, Professor Greene.

Before proceeding with your testimony, I hereby remind each Witness that all your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. 1001, which may result in the imposition of a fine or imprisonment of up to five years or both, should one suffer a conviction. Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time, there is a timing light on your table. When the light switches from Greene to yellow, you

have one minute to conclude your testimony. When the light turns red, it means that your five minutes have expired.

Professor Jefferson, you may begin.

STATEMENT OF RENEE KNAKE JEFFERSON

Ms. JEFFERSON. Chair Johnson, Ranking Member Issa, and Members of this Subcommittee, thank you for the invitation to testify. I am a law professor from the University of Houston, where I hold the Doherty Chair in Legal Ethics. I have written numerous books and articles on the topic of judicial ethics. So, it is indeed my distinct honor to appear before you today. My goal is to make the case for a change in the culture of the Federal judiciary, shifting from a culture of silence to a culture of compliance.

My testimony has two parts: First, I will start by addressing the recent *Wall Street Journal* investigation documenting that Federal judges presided over hundreds of cases for almost a decade involving companies in which they or their family members own stock. This violation of Federal law 28 U.S.C. 455 is troubling indeed, but I actually believe that it is emblematic of a larger issue.

Second, I will turn to reforms. My written testimony contains a significant detail about the legislative history of section 455. The short story, Congress clearly intended to create a bright line rule mandating that a Federal judge recuse or step away from hearing a case if they have a financial in a party. So why are judges doing this if the law forbids it? We know from *The Wall Street Journal* reporting that many were unfamiliar with the rule, some believed it didn't apply to their financial holdings, others blamed a clerical error.

Viewed in isolation, each judge's response might be understandable, especially those who made an innocent mistake. Viewed in the aggregate, we can reach no other conclusion than the system is broken. That leads me to the second part of my testimony, reforms.

Let me highlight what I have submitted to you in my written statement.

First, consider the goals of recusal.

- (1) Recusal prevents actual bias against the parties in a proceeding so that it is fair.
- (2) Second, recusal protects against the appearance of bias, which preserves the public confidence in the Judiciary.

Now, section 455 is both under and over inclusive in accomplishing these goals, and that this bright line rule does risk disqualifying a judge who would not, by any objective standard, be biased because they hold a trivial amount of stock. It also doesn't encompass other financial interests that are likely or may very well sway a judge.

At a minimum, the law should be revised to cover any interest it depends on the financial situation of a party in the matter. Federal Judges should comply with the same reporting requirements that Members of Congress and other Federal officials do about their financial holdings.

Second, we shouldn't have to rely on journalists for the enforcement of judicial ethics. Although, certainly, we should welcome investigations like *The Wall Street Journal's* reporting. I believe the Federal Judiciary must itself lead in enforcing its own legal and ethical obligations. Congress can and should take steps to encourage and demand these accountabilities which brings me to my next point. A rule on the books is easily ignored if there is no consequence for its violation as is the case here.

Recusal decisions should be reviewed by other judges and transparent aggregated data about recusals made easily available to the public at no cost would be a powerful enforcement tool, so would a public list of judges who failed to comply with the law. Access to this sort of information, facilitates prevention through accountability and through education.

Finally, the culture of silence must be replaced with a culture of compliance. Federal judges are intimidating. Parties may be reluctant to request recusal. A March 2020 letter by this House Committee documented the power dynamic that thwarted sexual misconduct reporting within the Federal Judiciary. Those same power dynamics have fostered a culture of silence around judicial recusal.

Another vital step is to extend that culture of compliance to the United States Supreme Court. Because the court has declined to adopt an ethics code for itself, Congress should support legislation calling for it do so.

Thank you again for the opportunity to appear before you today. I welcome your questions.

[The statement of Ms. Jefferson follows:]

“Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”

*Hearing Before the House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet*

Tuesday, October 26, 2021

*Testimony of Renee Knake Jefferson
Doherty Chair in Legal Ethics & Professor of Law
University of Houston Law Center
jeffersonrk@uh.edu*

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for the invitation to testify before you today. My name is Renee Knake Jefferson. I hold the Doherty Chair in Legal Ethics and I am a Professor of Law at the University of Houston Law Center.

I want to begin by sharing some of my professional background with you, because it directly informs my testimony. In the course of my research, publications, teaching, and public service, I have studied judicial ethics for more than 15 years. I am an author of two casebooks published by leading legal academic presses which cover the ethical obligations of the judiciary, (1) *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* (West Academic 4th Edition 2020) and (2) *LEGAL ETHICS FOR THE REAL WORLD: BUILDING SKILLS THROUGH CASE STUDY* (Foundation Press 2018). I am also an author of the book *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* (New York University Press 2020), which profiles nine women shortlisted for the Court before Sandra Day O'Connor became the first female justice. I have written thirty scholarly articles on lawyer and judicial ethics including *Judicial Ethics in the #MeToo World*, published earlier this year by the *FORDHAM LAW REVIEW*. I have served as a Reporter for the American Bar Association Commission on the Future of Legal Services and am an elected member of the American Law Institute. I have testified successfully twice on behalf of judges facing discipline before the Texas Supreme Court. I also testified in 2018 before the Federal Judicial Committees on Codes of Conduct and Judicial Conduct & Disability regarding sexual harassment and other workplace misconduct.

Given this background, it is my distinct honor to appear before you. It is also, however, regrettable that I am here today—if the judicial ethics system were functioning as it should, there would be no need for my testimony or for this hearing.

Changing the Culture from Silence to Compliance

My goal today is to make the case for a cultural change within the federal judiciary. The primary source of the judiciary's authority and power is its reputation. A September 2021

nationwide poll found that approval of the Supreme Court declined to 49%.¹ The recently published *Wall Street Journal* investigation documenting that 131 federal judges presided over 685 cases from 2010-2018 involving companies in which they or their family members owned stock in violation of 28 U.S.C. § 455 is troubling, to be sure,² and may cause further decline in public approval.

If the purpose of judicial ethics is to ensure fairness for litigants, impartial judges, institutional legitimacy, and public confidence in the integrity of the courts, the federal law governing recusal for financial interests is both over- and under-inclusive in its scope. We are faced with judges who may or may not have, in fact, acted out of bias or prejudice in these cases. It appears in the *WSJ* reporting that at least some had no idea they held stock in a party before them and thus, presumably, were not influenced by their financial holding. Nevertheless, these judges violated a bright-line federal law, and I believe reform is needed for both the substance of that law and for the recusal process as a whole. I also believe that the *WSJ* investigation is emblematic of larger issues facing the federal judiciary regarding compliance with ethical obligations.

I begin first with a brief overview of the rules governing judicial recusal for financial and other conflicts of interest. I then offer recommendations for enhancing the effectiveness of judicial recusal and, potentially, to expand the reach of the ethics rules for the federal judiciary. I am mindful of concerns about judicial independence and separation of powers; as I explain below, the suggestions here all fall within the Constitution's authority. I conclude with a call for reforms to shift the federal judiciary from a culture of silence to a culture of compliance.

Recusal for Federal Judges

The purpose of recusal or disqualification is to remove a judge from a matter because the judge has, or appears to have, an interest in the proceeding that could compromise the judge's impartial and unbiased decision-making. Recusal, which may be voluntary or involuntary, achieves at least two goals. One, recusal prevents actual bias against the parties in a proceeding, so that an outcome is fair, even if not what an individual litigant desires. Two, recusal protects against the appearance of bias, which preserves institutional legitimacy and public confidence in the judiciary.

Federal judges are governed by both the Code of Conduct for United States Judges ("Code of Conduct")³ and federal statute 28 U.S.C. § 455 for determining recusal. The Code

¹ Poll Release, *New Marquette Law School Poll Finds Sharp Decline Since July in Public Opinion of the Supreme Court's Job Performance; Change is Driven by Partisan Differences*, Sept. 22, 2021, <https://law.marquette.edu/poll/2021/09/22/new-marquette-law-school-poll-finds-sharp-decline-since-july-in-public-opinion-of-the-supreme-courts-job-performance-change-is-driven-by-partisan-differences/>.

² See James V. Grimaldi, Coulter Jones, and Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL STREET JOURNAL, Sept. 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

³ See Canon 3(C), Code of Conduct for United States Judges, *United States Courts*, effective March 12, 2019, <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

of Conduct, first adopted in 1973,⁴ is based largely on a model code promulgated by the American Bar Association (“ABA”). The ABA adopted the first formal set of judicial rules in 1924 under the direction of Supreme Court Chief Justice (and former President) William Howard Taft. Because the Canons of Judicial Ethics were mostly aspirational,⁵ the ABA replaced them with the Model Code of Judicial Conduct in 1972 (“ABA Model Code”). The drafting committee, led by California Chief Justice Roger Traynor, included Supreme Court Justice Lewis Powell. It focused on creating enforceable rules (rather than aspirational standards) to address judicial misconduct, including disqualification.⁶ Notably, the ABA Model Code is less strict on recusal than the federal Code of Conduct. Rule 2.11(A) of the ABA Model Code requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” and provides a non-exclusive list of circumstances. Recusal is not required if the judge’s financial interest is “de minimis” and, in any event, parties may choose to waive it.⁷

Recusal Over Financial Interests Under 28 U.S.C. § 455

In 1974, in the wake of the Watergate scandal, Congress adopted more stringent requirements for the recusal of federal judges related to financial interests. According to 28 U.S.C. § 455, judges are required to “disqualify” or recuse when they “know” of a “financial interest in the subject matter in controversy” held personally or by a spouse or minor child living in the household.⁸ This same law requires that judges “inform” themselves about their “personal financial interests” as well as those of their spouses and minor children.⁹ A “financial interest” is defined as “ownership of a legal or equitable interest, however small” with exceptions for mutual funds not controlled by the judge and government securities as long as the outcome of the proceeding will not substantially affect the value.¹⁰ The statute expressly forbids waiver of the financial interest by the parties involved.¹¹ Four years later Congress approved the Ethics in Government Act of 1978, which obligates judges to file annual financial disclosure statements. This is essentially the only way a party or the public can find out whether a judge holds an ownership interest warranting recusal unless the judge voluntarily discloses.

The legislative history reveals that the bright-line rule requiring recusal for even the slightest financial interest was intentional. According to a letter written by the Department of Justice in support of the legislation: “Presently, 28 USC 455 requires a judge to disqualify himself in any case in which he has a ‘substantial interest.’ The existing provision has been the

⁴ ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 5–6, 1973, at 9–11 (1973), <https://www.uscourts.gov/file/1619/download>.

⁵ See, e.g., Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1925 (2010) (discussing one example of the aspirational nature of Canon 4, entitled “Avoidance of Impropriety,” which stated that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety” and a judge’s personal behavior “should be beyond reproach” (alteration in original) (quoting CANONS OF JUD. ETHICS Canon 4 (AM. BAR ASS’N 1924)).

⁶ See *id.* at 1928.

⁷ See ABA Model Code of Judicial Conduct Rule 2.11(C).

⁸ 28 U.S.C. § 455(b)(4).

⁹ 28 U.S.C. § 455(c).

¹⁰ 28 U.S.C. § 455(d)(4).

¹¹ See 28 U.S.C. § 455(e).

subject of differing interpretations and considerable misunderstanding. The bill would provide greater uniformity by eliminating the ‘substantial interest’ standard.”¹² As explained in a House of Representatives Report:

Under subsection (d) (4), a financial interest is defined as any legal or equitable interest, “however small”. Thus, uncertainty and ambiguity about what is a “substantial” interest is avoided. Moreover, decisions of the Supreme Court ... support the proposition that the judge’s direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process. ... While the ABA canon on disqualification would permit waiver [for a small financial interest], the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.¹³

The *WSJ* report is not the first to document the failure of federal judges to recuse when owning stock in a party. As just one example, a study of federal district court judicial recusal practices from 2009-2012 published by the NORTH CAROLINA LAW REVIEW in 2020 documented “over 200 instances where a judge owned stock in a party and still participated in the case.”¹⁴

Why Judges Violate 28 U.S.C. § 455

While designed to eliminate confusion and create uniformity, in practice the financial interest provision of 28 U.S.C. § 455 has gone ignored by many judges. I believe there are at least four reasons for this. First, the law contains no explicit penalty for noncompliance. A rule on the books is meaningless without enforcement, and this one thus suffers from the same criticism that “aspirations” are no substitute for clear commandments. Second, to the extent judges do comply, they do so without documenting the basis for recusal or publicizing their recusal decisions to the public or even among their judicial colleagues. This contributes to an unfortunate culture of silence. Third, perhaps because the rule bans even a de minimis financial interest, it has not been taken seriously. Finally, some judges seem to follow the more liberal approach from the ABA Model Code, even though their own Code of Conduct tracks 28 U.S.C. § 455.

According to the *WSJ*, fifty-six of the judges explained their failure to comply when contacted by reporters. (A significant number declined to comment at all.) Of those who did respond, some judges were entirely unfamiliar with the rule, some mistakenly believed the rule did not apply to their financial holdings, and some felt that because their judgment was not influenced by the holding it did not warrant recusal. Others blamed errors in the conflicts checking system, or minimized their role in a matter where they did have a financial interest as purely ministerial, even though the law contains no such exception.

¹² Letter from W. Vincent Rakestraw, Assistant Attorney General, to Roy L. Ash, Director, Office of Management and Budget, dated November 27, 1974.

¹³ House of Representatives Report No. 93-1453, 93rd Congress, 2d Session, “Judicial Disqualification,” October 9, 1974, authored by Mr. Kastenmeier from the Committee on the Judiciary, p. 7.

¹⁴ Benjamin B. Johnson & John Newby Parton, *Judges Breaking the Law: An Empirical Study of Financially Interested Judges Deciding Cases*, 99 N.C. L. REV. 1, 2 (2020).

Viewed in isolation, each judge's response might seem understandable, especially those who apparently adopted a system for tracking their financial interests but failed to recuse because of a clerical error. But viewed in the aggregate, it is difficult to reach any conclusion other than that the federal judiciary's recusal system for financial interests is broken.

Recommendations

This leads me to make several general observations, followed by specific recommendations for substantive and procedural reform.¹⁵

First, we should not have to rely on journalists for the enforcement of judicial ethics and conflicts of interest rules, although we should welcome such investigations. As one commentator has observed, “[t]he judiciary is most responsive, and perhaps only responsive, when there’s some kind of media attention.”¹⁶ I believe, instead, that the judiciary itself must lead in enforcing its own ethical and legal obligations. Congress should take steps to encourage and demand this accountability. Which brings me to the next point.

Second, a rule on the books is easily ignored when there is no consequence to its violation. Transparent, aggregated data about recusals, made easily available to the public at no cost, would be a powerful enforcement mechanism. Access to this sort of information facilitates prevention through accountability and education.

Third, the culture of silence should be replaced with a culture of compliance. Federal judges are intimidating. Parties may be reluctant to ask a judge about financial interest for fear of angering the judge, who will continue to preside over the case if a recusal motion is denied. Indeed, one of the research assistants for the NORTH CAROLINA LAW REVIEW study on federal district court recusal practices mentioned above “wished to remain unnamed so as to not risk upsetting any judges.”¹⁷ This anecdote echoes the same dynamic that explains the lack of reporting about sexual harassment and other workplace misconduct, with which I know this Subcommittee is well-aware.¹⁸ As a bipartisan letter written in March 2020 by members of the U.S. House Committee on the Judiciary observed in the context of sexual misconduct: “The power dynamics of the federal judiciary create an environment that, without appropriate procedures in place, unnecessarily place judicial

¹⁵ For additional helpful recommendations, see Russell Wheeler & Malia Reddick, *Judicial Disqualification Procedures: A Report on the Institute for the Advancement of the American Legal System Convening* (2017), <https://iaals.du.edu/publications/judicial-recusal-procedures>.

¹⁶ See Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN (Jan. 26, 2018, 12:35 PM), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html> (“Much of the known judicial action related to sexual misconduct was taken because of forces outside the established system, such as media coverage.”).

¹⁷ Johnson & Parton, *supra* note 14 at 1.

¹⁸ See, e.g., Renee Knake Jefferson, *Judicial Ethics in the #MeToo World*, 89 FORDHAM L. REV. 1197, 1199-1201 (2021) (describing the culture of silence and observing that the “internal process for handling complaints” about sexual harassment and other workplace misconduct “has not functioned to prevent [this behavior] and, indeed, seems to have enabled it”); Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 90 (2018) (“To the extent that the complaint process is supposed to give content to the rules ... the rules are effectively inaccessible to employees or, for that matter, other judges.”).

employees, clerks, and interns at risk and foster a culture of silence.”¹⁹ These same power dynamics have fostered a culture of silence about recusals.

Now for specific recommendations about the substance of 28 U.S.C § 455’s bright-line stance on financial interests and the process for recusal generally.

As for the substance of 28 U.S.C § 455, while a bright-line ban on any financial interest risks disqualifying a judge who would not, by any objective standard, be biased over holding a trivial amount of stock, it is difficult to draw the line where a particular amount would be too much. Maintaining the bright-line rule is, perhaps, the best option and removes any concern about implicit bias or failure to appreciate the influence of a financial interest. But the law should be updated to include other similar sorts of financial interests that are as or more likely to sway a judge. The law should cover other any interest that depends upon the financial situation of the party in a matter. The law should also be updated to include additional explicit exceptions beyond mutual funds, for example basic financial services like personal banking, a primary home mortgage, credit cards, home/auto insurance, etc.

As for the recusal process generally, a number of reforms should be taken:

- Recusal procedures should be clearly written, uniform across the federal judiciary, and publicly available.
- Financial disclosure requirements also should be uniform across the federal judiciary and publicly available. The current system of annual disclosures means that by the time information is publicly available, a case has often proceeded substantially and it may be too late for recusal to avert the harm. Filings should be on a quarterly basis, and easily accessible in an electronic, searchable format for litigants.
- The recusal process should involve review by one or more other judges if a judge declines to self-recuse upon request. For example, in the state of Texas, where I am a law professor, the rules of civil and appellate procedure provide that when a party makes a motion for recusal or disqualification the judge must step away from the case or refer the motion to be decided by a different judge (at the trial court level) or the entire court (at the appellate level).²⁰ The process should also allow for anonymous reporting of judges who fail to recuse.
- The recusal review process should have short time-limits to avoid undue delay of litigation and burden on the parties and the judges.
- The basis for a recusal decision, whether granted or denied, should be in writing. This provides due process to the parties, educates other members of the judiciary about when recusal is warranted, and deters judges from avoiding cases for reasons other than a valid basis for recusal. Explanation enforces accountability for the decision

¹⁹ Press Release, H. Comm. on the Judiciary, Nadler, Scanlon, Johnson and Sensenbrenner Call for U.S. Courts to Reform & Streamline Handling of Workplace Misconduct in the Courts (Mar. 6, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2856>.

²⁰ See Texas Rules of Civil Procedure, Rule 18a and Texas Rules of Appellate Procedure, Rule 16.3.

made. Allowing judges to rule on their own recusals with no oral or written explanation contributes to culture of silence.

- The replacement of recused judges should occur on a rotating basis designed to replicate the random assignment of a judge as best as possible. This will help avoid potential negative consequences of recusal, including misuse of the process by parties wishing to “judge-shop” or overly burdening a particular group of judges.²¹ (One way to prevent this might be to limit the number of recusal requests in a particular case.)
- Aggregate data on recusals should be collected and publicly available, along with a list of judges who fail to recuse in mandatory instances like holding stock in a party. Transparency is a powerful enforcement tool, both as a method for educating other judges and as a deterrent against noncompliance.

Another vital step for Congress to consider is to hold the Supreme Court of the United States similarly subject to a culture of compliance with ethics rules. The Code of Conduct for U.S. Judges applies to all but nine of the members of the federal judiciary—the justices of the Supreme Court. While 28 U.S.C. § 455(a) on its face applies to “[a]ny justice ... of the United States,” the Supreme Court has not followed it. Because the Supreme Court has declined to adopt a code for itself, this Subcommittee can and should support legislation calling for it to do so. Congress has authority under the U.S. Constitution²² to require the Supreme Court to adopt a code of ethics and to specify particular topics that must be covered, for example financial investments, personal bias, prior work on the matter in controversy, and other potential conflicts or influences.

Thank you for the opportunity to participate in today’s hearing. I welcome your questions.

²¹ See, e.g., James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L. J. 1163 (2015) (“Although recusals and disqualifications are often thought to increase the fairness of the judicial process, we show that they can also lead to a kind of biasing of the pool of judges that hear the cases of particular litigants.”).

²² Article III, Section 1 of the U.S. Constitution provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Further, Article I, Section 8, Clause 18 empowers Congress to make laws necessary and proper for “carrying into execution” all powers vested by the Constitution in the government of the United States. Going back to the Judiciary Act of 1789, this language has long been understood to give Congress the authority to determine matters related to the composition of the Supreme Court and the duties of the justices, for example the former practice of hearing lower court cases across the circuits known as “circuit-riding.”

Mr. JOHNSON of Georgia. Thank you, Professor Jefferson.
Mr. Hedtler-Gaudette, you may begin, sir, for five minutes.

STATEMENT OF DYLAN HEDTLER-GAUDETTE.

Mr. HEDTLER-GAUDETTE. Thank you, Mr. Chair. I have one quick request, please, if someone could orally let me know when I reach the point where the light would be switching to a different color. That is a wonderful invention, but it is not very useful for me. I want to make sure that I stay within the five-minute parameters.

Mr. JOHNSON of Georgia. I will. If you hold on a second, we will reset the clock. I will let you know when one minute is remaining.

Mr. HEDTLER-GAUDETTE. Thank you.

Mr. JOHNSON of Georgia. You may now begin.

Mr. HEDTLER-GAUDETTE. Thank you, Chair Johnson, Ranking Member Issa, and distinguished Members of the Committee. My name is Hedtler-Gaudette and I am the government affairs manager for the project on government oversight, more commonly known as POGO.

I want the first start by commending the Committee for holding this important hearing on this important topic. The north star of my testimony today will be the need to ensure the legitimacy, the independence, and the integrity of the Federal judiciary by promoting commonsense, reasonable reforms.

As one of three branches of government in our constitutional structure, it is absolutely essential that the Federal judiciary be accountable, transparent in practice, but also, that it be perceived to be accountable and transparent by the public. You see the courts have no army with which to enforce their rulings. They do not control key levers of power, such as the power of the purse, and the power to declare war. What they do have is their legal and moral authority. That authority is predicated on foundational public assumptions of impartiality, high ethical standards, and good judgment.

When any of these requisite characteristics are lacking, either in reality or in perception, the entire edifice of the judiciary and of the rule of law is fundamentally weakened. This is why it was so troubling to see a recent *Wall Street Journal* report in which we found out that more than 130 Federal judges had ruled on cases in which either they, or members of their family, had a financial interest, which represents a grave violation of existing laws around judicial disqualification, and also a grave violation of core principles contained within the canons of judicial ethics. Even more importantly, what these revelations did is they exacerbated and fed into pre-existing public perceptions about the fundamental corruption of the Federal Government, which includes the Federal courts.

I want to pause here for a moment to note that while these *Wall Street Journal* revelations are shocking, they were not especially new. For years now, we have seen reports coming out of the Judiciary about various kinds of misconduct, real and perceived, ranging from suspicious stock ownership and travel by Supreme Court Justices, to sexual harassment and other workplace maleficence being perpetrated by Federal judges across the country.

One of the key reasons why these instances keep cropping up is because the Judicial Branch on the whole is the least transparent

and least accountable branch of government. Take, for example, financial disclosures. It is extremely difficult and time-consuming to access financial disclosures that have been filed by Federal judges. Relatedly, Federal judges are not required to file periodic transaction reports when they engage in a securities transaction, such as a stock trade, despite the fact that Members of Congress and Executive Branch officials are required to file such reports.

These transparency and disclosure requirements are designed to promote high ethical standards, and prevent malfeasance, like insider trading on the part of individuals, within government, who have access to the types of nongovernmental information that the rest of us do not have. I think it is fair to say that Federal judges most certainly have access to this kind of information.

This lack of transparency and the impunity that flows from it represents an existential risk to the overall legitimacy of the judicial branch. As I mentioned at the outset of my testimony, it is that legitimacy that allows the courts to play the vital role that they must within our constitutional scheme. Each time a new report surfaces that calls into question the impartiality and the ethicality of a Federal judge, one more crippling blow has been dealt to that legitimacy.

Now, there are many ideas percolating out there about how to address these challenges. I want to focus on two relatively narrow ones here that would specifically address the issues raised by *The Wall Street Journal* report.

Mr. JOHNSON of Georgia. One minute.

Mr. HEDTLER-GAUDETTE. First, all Federal judges should be required to file periodic transaction reports when they engage in a securities transaction such as a stock trade.

Second, all financial disclosure documents filed by Federal judges should be posted online and made easily accessible to the public. These reforms would not be a silver bullet, they would not fix all the challenges plaguing the Federal judiciary, they would, however, make the courts more transparent. That enhanced transparency would allow judges themselves and people with business before the courts to spot potential conflicts of interest and pursue accountability avenues as appropriate.

Thank you for providing me space to share some thoughts today, and I look forward to answering your questions.

[The statement of Mr. Hedtler-Gaudette follows:]



**Testimony of Dylan Hedtler-Gaudette, Government Affairs Manager
Project On Government Oversight
before the House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
on “Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”
October 26, 2021**

Thank you, Chairman Johnson, Ranking Member Issa, and Members of the subcommittee for the opportunity to speak with you today about judicial ethics, financial conflicts of interest, and the public trust. My name is Dylan Hedtler-Gaudette and I am the Government Affairs Manager at the Project On Government Oversight.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. The federal judiciary is a core focus of this work. As such, I am here to urge Congress to enact legislation that would help bolster the federal judiciary by strengthening its ethical standing and safeguarding its indispensable role in our constitutional system of ordered liberty.

The Constitution Project at the Project On Government Oversight recently convened a task force comprised of academics, experts, and former judges to analyze and assess some of the issues plaguing the federal judiciary and how to solve them.¹ The culmination of that convening was a comprehensive report in which we set forth proposals aimed at addressing numerous challenges to the continued legitimacy of the courts, with a particular focus on strengthening public faith in the Supreme Court. I would urge the members of the House Judiciary Committee to read this report, which I have included as an accompaniment to this testimony.

The North Star of my testimony today will be the need to ensure the legitimacy, integrity, and independence of the federal judiciary. The courts are tasked with deciding some of the weightiest issues of the day, and the federal judges who make those decisions must be impartial arbiters of the law. When that impartiality is called into question, the rule of law is undermined. And since lifetime appointments mean federal judges and Supreme Court justices don't face the same accountability measures as elected officials, it's critical that they are — and that they are perceived to be — impartial. That is why a recent report from the *Wall Street Journal* is so troubling: It found that more than 130 federal judges had financial conflicts of interest that

¹ Task Force on Federal Judicial Selection, Project On Government Oversight, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, (July 8, 2021), <https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/>.

should have triggered recusals in cases they ruled on.²

It is imperative to emphasize that these issues are not new, but rather a reflection of a more fundamental problem: the federal judiciary is the least transparent, and therefore least accountable, branch of government. This characterization applies across a range of dimensions, and it requires systemic fixes.

Recommendations

There are a wide range of reforms worthy of consideration, but I will focus on a relatively narrow set of proposals that will help achieve the goal of promoting more accountability, transparency, and efficacy within the federal judiciary by strengthening its independence and integrity. It is vital to point out that enhancing accountability and transparency are meant to strengthen key features of the federal judiciary, most especially the decisional independence of federal judges and Supreme Court Justices.

These five proposals address longstanding problems in the judiciary by expanding financial disclosure requirements, requiring transparency in recusal decisions, and supporting the development of a code of ethics that will apply to the Justices of the Supreme Court, who also happen to be nine of the most powerful people in the nation.

1. Amend the Ethics in Government Act of 1978 to require all federal judges, including Justices of the Supreme Court, to file periodic transaction reports when they make securities transactions in excess of \$1,000.³ These reporting requirements should be modeled on those set forth for members of Congress and certain executive branch officials in the Stop Trading on Congressional Knowledge (STOCK) Act.⁴
2. Amend the Ethics in Government Act of 1978 to require all financial disclosure documents filed by federal judges to be posted online, including annual financial disclosures and periodic transaction reports (as required by recommendation 1 above).
3. Amend the Ethics in Government Act of 1978 to require more detailed disclosure and reporting from federal judges (including Justices of the Supreme Court) with regard to travel and gifts provided by third parties, including specifically requiring additional information about personal hospitality perks and the nature and details of events attended.
4. Amend 28 U.S.C. § 455 to require federal judges (including Justices of the Supreme Court) to provide explanations for recusal decisions publicly and in a timely manner.⁵
5. Direct the Supreme Court of the United States to draft and publish a code of ethics. Provide for a public notice and comment process.

² James Grimaldi, Coulter Jones, and Joe Palazzolo, "131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest," *Wall Street Journal*, September 28, 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

³ Ethics in Government Act of 1978, 5 U.S.C. (2010), <https://www.govinfo.gov/app/details/USCODE-2010-title5/USCODE-2010-title5-app-ethicsing>.

⁴ Stop Trading on Congressional Knowledge Act of 2012, Pub. Law No. 112-105, 126 Stat. 291 (2012), <https://www.govinfo.gov/app/details/STATUTE-126/STATUTE-126-Pg291>.

⁵ Disqualification of justice, judge, or magistrate judge, 28 U.S.C. § 455 (2011), <https://www.govinfo.gov/app/details/USCODE-2011-title28/USCODE-2011-title28-part1-chap21-sec455>.

There is and has been bipartisan support for each of these proposals. POGO recently worked with an expert task force, including two former state supreme court chief justices, a former federal circuit judge, and a leading scholar of the federal courts. Their report identifies improving financial and ethics rules as among the most important reforms for safeguarding the judiciary's legitimacy.⁶ These experts span the political spectrum, and their consensus around the need for these kinds of reforms is instructive.

In addition to broad-based support for these reforms in civil society, I want to highlight and commend bipartisan support in Congress, particularly from Ranking Member Issa (R-CA). A bill he introduced in the 115th Congress contained some of these ideas, including the creation of a code of ethics **that applies to Supreme Court Justices** and additional transparency around recusal decisions.⁷ Building on that proposal, the chairman of this sub-committee, Representative Hank Johnson (D-GA), introduced a bill in the 116th Congress that also integrated many of these reforms.⁸ And another member of the House Judiciary Committee, Representative David Cicilline (D-RI), led the House version of a bipartisan bill in the 116th Congress that would require more transparency in travel and gift arrangements for federal judges.⁹

It isn't just the House that has expressed bipartisan interest in and support for these proposals. Earlier this year, the chair and ranking member of the Senate Judiciary Committee sub-committee responsible for overseeing the federal judiciary, Senator Sheldon Whitehouse (D-RI) and Senator John Kennedy (R-LA), respectively, sent a letter to the Department of Justice and the U.S. Marshal Service regarding the Supreme Court, asking for documents relating to their travel and hospitality funded by third parties.¹⁰ In a similar vein, Senator Whitehouse and Senator Lindsey Graham (R-SC) sent a letter earlier this year to Chief Justice John Roberts calling on the federal judiciary to "strengthen judicial ethics standards."¹¹ Senator Whitehouse led the Senate version of the House bill to address opacity in judicial travel and who pays for it.¹² And Senator Kennedy introduced a bill that would essentially require Supreme Court Justices to file periodic transaction reports.¹³ The number and variety of solutions from across parties and chambers highlights the fact that the problem of judicial branch integrity is nonpartisan — and persistent.

⁶ Task Force on Federal Judicial Selection, *Above the Fray*, 15-18 [See note 1].

⁷ Judiciary Reforms, Organization and Operational Modernization Act of 2018, H.R. 6755, 115th Cong., § 201-202 (2018), <https://www.congress.gov/bills/115/congress-house-bill/6755/text>.

⁸ Twenty-First Century Courts Act, H.R. 6017, 116th Cong. (2020),

<https://www.congress.gov/bills/116/congress-house-bill/6017/text>.

⁹ Judicial Travel Accountability Act, H.R. 4715, 116th Cong. (2019),

<https://www.congress.gov/bills/116/congress-house-bill/4715/text?r=6&s=>

¹⁰ Madison Alder, "Senators Seek Justices' Travel Records in Bipartisan Letter," *Bloomberg Law*, June 8, 2021, <https://news.bloomberglaw.com/us-law-week/senators-seek-justices-travel-records-in-bipartisan-letter>.

¹¹ Office of Senator Sheldon Whitehouse, "Whitehouse, Graham Call on Federal Judiciary to Strengthen Judicial Ethics Standards," Press Release, February 2, 2021, <https://www.whitehouse.senate.gov/newsroom/record/whitehouse-graham-call-on-federal-judiciary-to-strengthen-judicial-ethics-standards>.

¹² Judicial Travel Accountability Act, S. 2632, 116th Cong. (2019), <https://www.congress.gov/bills/116/congress-senate-bill/2632/text?r=71&s=1>.

¹³ Supreme Court Transparency Act, S. 956, 117th Cong. (2021), <https://www.congress.gov/bills/117/congress-senate-bill/956/text>.

Expanding Financial Disclosure Requirements and Why It Matters

The recent *Wall Street Journal* investigation was not the first to uncover instances of judges failing to recuse in cases where they had financial conflicts.¹⁴ This ongoing problem underscores the insufficiency of current disclosure laws. The judiciary should, at a minimum, be brought up to the same level as Congress and the executive branch in terms of financial disclosure, transparency, and reporting rules. This can be effected by folding judges and justices into standard reporting mechanisms, modernizing the way disclosures are made available, and expanding the breadth and depth of information necessary to complete financial disclosures.

Congress currently requires federal judges, including Supreme Court Justices, to file annual financial disclosures per the Ethics in Government Act of 1978. However, these disclosures are filed in an arcane and byzantine process that requires no publicly available posting online of the documents. In contrast, financial disclosure documents for Congress and the executive branch are easily accessible and available online.¹⁵ If judicial financial disclosures were similarly available, it would be much easier for litigants and watchdogs to catch conflicts sooner, rather than watching cases including potential conflicts proceed through the courts while someone else takes on the painstaking and labor-intensive searches that the current system requires. While the onus is on judges to identify their own conflicts and act accordingly, greater transparency provides a second line of defense that is clearly needed.

Congress could help create that line of defense by amending the Ethics in Government Act of 1978 to require all financial disclosure documents filed by federal judges to be posted online, including annual financial disclosures and periodic transaction reports.

Another significant shortcoming of judicial financial disclosure and reporting is that federal judges and Supreme Court Justices do not have to comply with certain disclosure rules meant to expose and prevent insider trading. Members of Congress (as well as some of their staff) and certain segments of executive branch officials must comply with periodic transaction reporting requirements when they make securities transactions, such as stock trades.¹⁶ But while federal judges and Supreme Court Justices have similar levels of access to nonpublic information with which they could make insider trades, no such reporting rules apply to them. This discrepancy makes little sense.

Congress could address this imbalance by amending the Ethics in Government Act of 1978 to require all federal judges, including Justices of the Supreme Court, to file periodic transaction reports when they make securities transactions in excess of \$1,000.¹⁷ These reporting

¹⁴ Reity O'Brien, Kytja Weir, and Chris Young, "Federal Judges Plead Guilty," *Center for Public Integrity*, April 28, 2014, <https://publicintegrity.org/2014/04/28/14630/federal-judges-plead-guilty/>.

¹⁵ "Financial Disclosure Reports," *Clerk of the U.S. House of Representatives*, accessed October 12, 2021, <https://disclosures-clerk.house.gov/PublicDisclosure/FinancialDisclosure/>; "Financial Disclosures," *The White House*, accessed October 12, 2021, <https://www.whitehouse.gov/disclosures/financial-disclosures/>.

¹⁶ Jack Maskell, "The STOCK Act, Insider Trading, and Public Financial Reporting by Federal Officials," *Congressional Research Service*, R42495 (April 18, 2013), <https://sgp.fas.org/crs/misc/R42495.pdf>.

¹⁷ Ethics in Government Act of 1978 [see note 3].

requirements should be modeled on those set forth for members of Congress and certain executive branch officials in the Stop Trading on Congressional Knowledge (STOCK) Act.¹⁸

Finally, federal judges and Supreme Court Justices currently have insufficient restrictions and transparency requirements when it comes to travel perks and personal hospitality gifts from third parties, including stakeholders with cases and interests before the courts.¹⁹ As POGO has long noted, public appearances by the Justices that do not involve reimbursements or gifts can still color the public's perception of impartiality, and public disclosure and improved access to information about these extrajudicial engagements is critical.²⁰

Congress could undergird the public's faith in the judiciary by amending the Ethics in Government Act of 1978 to require more detailed disclosure and reporting from federal judges (including Justices of the Supreme Court) with regard to travel and gifts provided by third parties, including specifically requiring additional information about personal hospitality perks and the nature and details of events attended.

From time to time, security concerns will be offered as a reason why additional transparency and disclosures relating to financial information is inappropriate. And we agree that ensuring the physical safety and security of government officials — including federal judges — is a legitimate concern and an important matter. But the proposals we endorse here to support better accountability and transparency have little bearing on those safety issues. Furthermore, Congress can also pursue other legislative measures aimed at strengthening the safety and security of those who serve in the judiciary, including by providing for appropriate redactions within disclosure and reporting strictures.

Transparency in Recusal Decisions and Why It Matters

As our task force noted, “our Constitution and common law have shaped a jurisprudence in which the public has access to all criminal and civil judicial proceedings. Thus, another important facet of judging is communication with the public.”

However, this communication is lacking in one crucial area: judges are not required to provide any rationale or explanation for recusal decisions. The Justices provided these explanations around the turn of the twentieth century, but they have not done so since 1904.²¹

Recusals are where the rubber meets the road in terms of ensuring the most essential characteristic of the judicial process broadly and of judges specifically: impartiality. The only

¹⁸ Stop Trading on Congressional Knowledge Act of 2012, Pub. Law No. 112-105, 126 §291 (2012), <https://www.govinfo.gov/app/details/STATUTE-126/STATUTE-126-Pg291>.

¹⁹ Mark Berman and Christopher Ingraham, “Supreme Court justices Are rock stars. Who pays when the justices travel around the world?” *Washington Post*, February 19, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/what-supreme-court-justices-do-and-dont-disclose/>.

²⁰ Sarah Turberville, “Closing the Gap in Judicial Ethics,” *Project On Government Oversight*, January 29, 2019, <https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/>.

²¹ Gabe Roth, “Explaining the Unexplained Recusals at the Supreme Court,” *Fix the Court*, May 3, 2018, <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>.

way impartiality can be guaranteed is if those in the position to adjudicate cases are free of conflicts that would render their decisions corrupt, suspect, or otherwise illegitimate.

But as we have learned — through the *Wall Street Journal* report, along with the years and years of similar reporting that preceded it — the current system relies entirely on the flawed and imperfect assessment of the judges themselves to make recusal decisions, often resulting in glaring mistakes or intentional malfeasance.²² Due to the lack of accountability and transparency when it comes to recusal decisions, there is a lack of credibility when it comes to the impartiality of federal judges. It threatens the entire edifice of justice and the rule of law upon which our constitutional system is based.

It also represents a missed opportunity, especially for the Supreme Court, to give the public more insight into its decision-making and help build more explicit rules and norms for what situations merit recusal.²³

That's why we recommend Congress amend 28 U.S.C. § 455 to require federal judges (including Justices of the Supreme Court) to provide explanations for recusal decisions publicly and in a timely manner.²⁴

A Supreme Court Code of Ethics and Why It Matters

The Supreme Court does not have a formal code of ethics to which its members must adhere, even though all other federal judges have such a code, as do both Congress and the executive branch.²⁵ When delving into the question of why all other federal judges are accountable to a specific and publicly available code of ethics, while the Supreme Court is not, Chief Justice Roberts has said that Justices “do in fact consult the Code of Conduct in assessing their ethical obligations.”²⁶ However, episodes over the last two decades have made clear that the Supreme Court’s “consultation” of the Code is not sufficient.²⁷

In several notable instances, the conduct of a Supreme Court Justice clearly would have violated one or more of the Code’s canons of judicial conduct. Were Supreme Court Justices to be held to

²² Gabe Roth, “More Than 100 Federal Judges Failed to Recuse When They Owned Stock in a Litigant. What’s Their Excuse(s)?”, *Fix the Court*, September 30, 2021, <https://fixthecourt.com/2021/09/100-federal-judges-failed-recuse-owned-stock-litigant-whats-excuses/>.

²³ Task Force on Federal Judicial Selection, *Above the Fray*, 17-18 [see note 1].

²⁴ Disqualification of justice, judge, or magistrate judge, 28 U.S.C. § 455 [see note 5].

²⁵ “Code of Conduct for United States Judges,” *United States Courts*, last modified March 12, 2019, <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>; “Code of Official Conduct,” *U.S. House of Representatives Committee on Ethics*, February 26, 2021, <https://ethics.house.gov/publications/code-official-conduct>; “Standards of Conduct for Employees of the Executive Branch,” *U.S. Office of Government Ethics*, accessed October 12, 2021, https://www.oge.gov/web/oge/nsl/resources_standards-of-conduct.

²⁶ Chief Justice John Roberts, Supreme Court of the United States, *2011 Year-End Report on the Federal Judiciary*, (December 31, 2011), 4, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

²⁷ “Justice Ruth Bader Ginsburg Bashes Donald Trump, Calls Him ‘a Faker,’” *ABC News*, July 12, 2016, <https://abcnews.go.com/Politics/justice-ruth-bader-ginsburg-bashes-donald-trump-calls/story?id=40518233>; Eric Lipton, “Scalia Took Dozens of Trips Funded by Sponsors,” *New York Times*, February 26, 2016, <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html>.

the same ethical standard as all other federal judges, their conduct would have violated the Code, or, even more seriously, the Judicial Conduct and Disability Act of 1980.²⁸ As such, they could have been subject to censure or sanction of some kind.²⁹ However, since the Justices' adherence to the code is purely voluntary, there are no consequences when they violate the ethics rules that bind judges in lower courts. And this real and perceived "above the law" stance of the Supreme Court has a damaging effect on its legitimacy and integrity.

Creating a public code of ethics would show that the Supreme Court does not see itself as "above the law." It would instead provide the people whose laws it helps shape with an example of the Court's integrity. The perception of impartiality is just as important to the Court's legitimacy as actual impartiality. After all, as the saying goes: perception is reality. This reality is perhaps the strongest argument in favor of adopting a code of conduct for our nation's highest court.

It's an important reason why we believe Congress should direct the Supreme Court to draft and publish a code of ethics, and it should provide for a public notice and comment process.

Congressional Authority to Promote Judicial Ethics

Enacting the recommendations above would be a modest expansion of laws that have existed for roughly four decades to bring the judiciary in line with the level of transparency that is currently required of Congress and the executive branch. In other words, we are not asking for the judiciary to do anything more than the other branches, but rather insisting that the public interest be served by creating a more accountable and transparent judiciary across the board.

It is also important to point out that the judiciary itself has already weighed in on the appropriateness of financial disclosure requirements for federal judges. In *Duplantier v. United States* (1979), the Fifth Circuit ruled decisively that recently enacted financial disclosure requirements that applied to all three branches of government via the Ethics in Government Act of 1978 were not only constitutional, but vital to ensuring that the public can trust the work of the judiciary.³⁰ Judge Ainsworth, writing for the Fifth Circuit, addressed every argument the Judicial Conference has recycled to argue against these reforms now.³¹

The court upheld Congress's constitutional authority to enact laws aimed at "restoring public confidence and deterring conflicts of interest" in the judiciary.³² It also closely considered the potential that additional disclosure of information could increase the risks associated with public

²⁸ Complaints against judges and judicial discipline, 28 U.S.C. §§ 351-364 (2011), <https://www.govinfo.gov/app/details/USCODE-2011-title28/USCODE-2011-title28-part1-chap168-collectionCode=USCODE>.

²⁹ Complaints against judges and judicial discipline, 28 U.S.C. §§ 351-364 [see note 28].

³⁰ *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), https://www2.ogc.gov/web/ogc/rsf/0/B74260A52A239F72852585BA005BF01F/SFIL_E/Duplantier%20v.%20US.pdf.

³¹ Letter from Judicial Conference Secretary James C. Duff to Representative Martha Roby, Ranking Member of the Subcommittee on Courts, Intellectual Property and the Internet, concerning House Judiciary subcommittee hearing, "The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency," June 19, 2019, <https://docs.house.gov/meetings/JU/JU03/20190621/109678/HHRG-116-JU03-20190621-SD002.pdf>. Secretary Duff expressed the Judicial Conference's opposition to several measures under consideration, including requiring online posting for financial disclosures and codifying recusal explanations.

³² *Duplantier v. United States* at 668 [see note 30].

service, namely risk to one's person or family. However, the court concluded that the substantial public interest served by increased financial disclosures — such as alerting litigants to potential conflicts of interest and instilling the public with confidence in the integrity of the judiciary — outweighed these risks.³³ It bears mentioning that every nominee has the freedom to decline a nomination to the judiciary if they deem the risk too high.

Given that the Constitution empowers Congress to enact these kinds of reforms for the judiciary, given that previous congressional action indicates the same level of authority, and given that the courts themselves have weighed in on the side of the public interest in requiring disclosure and reporting from federal judges, the path forward is clear. It is hard to the point of impossible to accept any arguments that building on the existing and so-far insufficient matrix of ethics and disclosure rules for the federal judiciary is in any way inappropriate or unnecessary. Federal judges and Supreme Court Justices enjoy lifelong appointments and are not subject to regular democratic accountability checks in the way that Congress and the president are. This makes accountability and transparency in the courts, through robust ethics and disclosure requirements, even more essential.

Conclusion

The good news here is that Congress, through both Article I and Article III powers, is well within its constitutional remit to consider and enact reforms across the breadth of the federal judiciary.³⁴ Previous laws enacted by Congress, such as the Ethics in Government Act of 1978 and the Judicial Conduct and Disability Act of 1980, provide a helpful framework for additional reforms aimed at shoring up the ethical standing of the courts.

We are therefore calling on Congress to enact legislation that includes the recommendations we have laid out in the preceding testimony. In doing so, Congress can boost public trust in the judiciary specifically and in the federal government more broadly. Because of the dismal public view of government and increasing concerns about government corruption, there is no more important task for Congress in this moment than to enhance the accountability, transparency, and ethicality of all three branches of government.³⁵

³³ *Duplantier v. United States* at 670 [see note 30].

³⁴ U.S. Constitution, art. I, § 8, cl. 9; art. III, § 1; art. III, § 2, cl. 2.

³⁵ Pew Research Center, *Americans' Views of Government: Low Trust but Some Positive Performance Ratings* (September 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.

Mr. JOHNSON of Georgia. Thank you, Mr. Hedtler-Gaudette.

Next, Professor Morgan. Members, I understand votes have been called, but we will get through the testimony and then we will recess for votes. Professor Morgan, you are recognized.

Sir, please unmute. Sir, please unmute.

STATEMENT OF THOMAS D. MORGAN

Mr. MORGAN. Chair Johnson, I apologize. Ranking Member Issa, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today.

I offer the Subcommittee what I believe is a bit more positive news.

First, the problem documented by *The Wall Street Journal* is one that people of all political persuasions should agree needs solution.

Second, in my opinion, the solution does not have to be particularly complicated or costly. What the solution will require first and foremost, is that the judiciary focus on the fact that it has a real problem, and that it must take the lead in proposing and implementing solutions. Solving the problem should not be difficult. Every day, all over the country, American law firms of even moderate size undertake to determine whether they may or may not represent a potential new client consistent with the ethical rules against conflict of interest. Basically, what they have to do is compare the present and past clients of the law firm against the name of the potential new client, and the persons against which that client wants to proceed.

Nobody can keep that information solely in their head. So, law firms, all of which have basically the same problem, have stimulated the production of a whole variety of software that can make the necessary comparisons, and recognize that the legal issues related to judicial recusal are different from attorney conflict of interest. Lost firm technology would require adaptation. I suggest that the objective of both systems, and the methodology of finding the right answer is likely to be substantially the same. The Judicial Conference of the United States is well aware of this software, of course, and has instructed judges to use it. The results of *The Wall Street Journal* survey, however, suggest the operation of the system today falls well short in practice.

I would urge you to consider this system this way: Cases are normally assigned to judges only after passing through a court clerk's office. I suggest it should be at that point of entry that named parties in a case should be compared to the names of the companies and the judges—of which judges in the Judicial District or Circuit have a financial interest as shown on filings submitted by those judges.

The fact that most cases today are filed electronically should make this software system comparison even easier. Only judges cleared as not required to recuse themselves should even be eligible for initial assignment to hear a case.

The judges to whom a case is assigned should then have ultimate responsibility to do a final verification, and an ongoing verification of their eligibility to hear the case. The buck stops under the law with the judge, but he or she should have maximum help handling the system—the process right. Such a system can only be as good

as the information you have on the judge's financial records or interests. I agree with the Witnesses that have said that you want to require timely, a quick reporting of any such transactions.

To summarize what I am suggesting to the Subcommittee is that is that you should support efforts to help judges comply with the recusal rule rather than simply looking for broad scale solutions that perhaps suggest much more wrongdoing than, in fact, has occurred.

I appreciate the opportunity to be before the Subcommittee and I forward look to your questions.

[The statement of Mr. Morgan follows:]

Written Testimony of
Thomas D. Morgan, Oppenheim Professor of Law Emeritus
The George Washington University Law School

Before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Tuesday, October 26, 2021

Chairman Johnson, Ranking Member Issa and distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today.

The *Wall Street Journal* did an outstanding job of investigative journalism in a series of recent articles documenting that, during an eight year period from 2010-2018, at least 131 federal judges failed to comply with the federal standards requiring their recusal from hearing cases in which they or members of their immediate family had beneficial interests in parties to the cases.

I offer this Committee what I believe is good news. My message is that, at least relative to many of the thorny and politically charged issues Congress faces, the problem documented by the *Wall Street Journal* is one that representatives of all political persuasions should agree needs solution. Furthermore, I believe the solutions need be neither controversial nor costly. What the solutions will require is that the federal judiciary focus on the legal obligations that its members clearly have, and that Congress and the Executive branch support constructive ways to minimize and hopefully eliminate the phenomenon that the *Wall Street Journal* has identified.

When is a federal judge required not to hear a particular case?

A federal judge's disqualification from hearing certain cases is firmly grounded in a federal statute, 28 U.S.C. § 455. That statute provides, as relevant here:

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

“(b) He shall also disqualify himself in the following circumstances: * * *

“(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest * * * in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. * * *

“(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

“(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

“(1) “proceeding” includes pretrial, trial, appellate review, or other stages of litigation; * * *

“(3) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;

“(4) “financial interest” means ownership of a legal or equitable interest, however small * * *, except that:

“(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund. * * *

“(e) No justice, judge or magistrate judge shall accept from the parties in the proceeding a waiver of any ground for disqualification enumerated in subsection (b).”

The federal judiciary is also governed by ethics standards in a Code of Conduct for United States Judges that is issued by the United States Judicial Conference. The provisions that describe when a judge is required to recuse himself or herself are found in Canon 3C of that Code. In all material respects, the provisions of the Code of Conduct are consistent with the statute just quoted, so it seems clear that the federal judges accept the statutory standards as their own and should see nothing to prevent a common approach to judicial recusal issues.

What led to the failures to recuse that were documented by the Wall Street Journal?

The *Wall Street Journal* interviewed or received responses from several of the judges who did not properly recuse themselves. Based on the reports of those responses, it seems to me that five excuses for their conduct tend to predominate. Judges say they were unaware that:

1. Financial interests of the judge’s spouse and minor children must be thought of as the judge’s own and reported and treated as a basis for the judge’s recusal.
2. Financial interests held by the judge as a fiduciary for the benefit of others must be reported and treated as requiring the judge’s recusal.
3. There is no “*de minimis*” exception for a judge’s very small interest in a party to a proceeding; recusal is required for all interests “however small.”

4. The recusal requirement applies to cases in which the judge is asked to do very little; indeed, it even applies to cases that remain on a judge's docket only briefly before the judge transfers it to another court.

5. Leaving investment decisions and knowledge of the judge's portfolio to someone else is not sufficient for federal judges; they have an obligation to know what financial interests they have, and to make reasonable efforts to know the interests of their spouse and minor children.

It is hard to believe that federal judges who are some of our nation's finest lawyers have not read, or at least not internalized, statutes governing the judicial office that they hold. Even a brief look at 28 U.S.C. § 455 reveals that each of the five points is covered clearly, and none even arguably justifies a failure to recuse.

To be sure, the 131 judges identified by the *Wall Street Journal* represent a distinct minority of the 870 federal district and circuit court positions, and what I would estimate to be the more than 1000 people who occupied those positions between 2010 and 2018. A large majority of federal judges thus handled recusal correctly. But I hope and expect that there will be bipartisan agreement that the number of violators and violations the *Wall Street Journal* identified is entirely unacceptable.

Should Congress reexamine the rules underlying the five excuses just offered?

It is worth remembering that the benefits of recusal and disqualification come with a cost. One of the other ways the federal judicial system tries to avoid judicial bias and guarantee parties a fair hearing is by the random assignment of cases. Insofar as practical, the assignment system tries to minimize judge shopping. But the easier it is to say that Judges A, B & C are required to recuse themselves, the more likely it is that Judge D, whom the litigant prefers, will get the assignment. Certainly, concern about judges' hearing cases in which they have a financial interest appropriately outweighs the concern about random assignment. But my point is that the lines drawn by current federal law are not inevitable. If 28 U.S.C. § 455 were found to be too restrictive, the instances of that excess would be appropriate for reconsideration.

Taking the five "excuses" one by one, first, it may not be the case today that spouses always have the single economic identity that 28 U.S.C. § 455(b)(4) implies they have. Some spouses today try to keep their economic interests separate as much as possible, but the law's presumed identity of interests remains appropriate. Much of what the recusal requirement seeks to maintain is public confidence that the judge has no personal stake in the outcome of a matter. Even if a given judge were to claim that his wife's investment results had no effect on his lifestyle, Congress and litigants could understandably believe otherwise and properly treat the two as an economic unit in the matter that 28 U.S.C. § 455(B)(4) now does. Indeed, in its Commentary 3C to the Code of Conduct for United States Judges, the Judicial Conference extends recusal even further to cover

holdings of persons with whom the judge is not married but “with whom the judge maintains both a household and an intimate relationship.”

The second excuse offered for a failure to recuse is even easier to reject. Federal judges are already prohibited from acting in a fiduciary capacity for persons other than family members, because a fiduciary is required to place the beneficiary’s interest ahead of even the fiduciary’s own interest. Thus, the justifications for recusal when a judge’s own interest is involved are magnified when the judge is a fiduciary.

The third issue, however, whether a judge’s interest in a party should require recusal even if the interest is very small, may be worth taking more seriously. 28 U.S.C. § 455(d)(4) is not ambiguous; the judge’s interest “however small” requires recusal. The Code of Conduct for United States Judges concurs. But not all judicial ethics standards agree. The corresponding provision of the ABA Model Code of Judicial Conduct, intended to apply to state judges, is Rule 2.11(A)(3). The Terminology section of the ABA Model Code defines an “economic interest” requiring recusal as “ownership of more than a de minimis legal or economic interest.” The term “de minimis” is further defined as “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.”

As a result of this different approach, the ABA provision almost certainly results in fewer recusals, fewer provable mistakes about the need to recuse, and less departure from random assignment. The ABA standard is ambiguous, however, while the federal standard makes much clearer when recusal is required. Pointing out these conflicting goals does not justify 131 judges’ failure to comply with the standard that governs them today, and on balance, the certainty of the federal standard seems desirable. But 28 U.S.C. § 455(d)(4)(i) already recognizes the ownership of shares in a mutual fund as not requiring recusal in cases involving companies held by that fund. That is at least partly based on a de minimis principle, and I simply suggest that Congress might want to consider letting judges use a de minimis standard more generally.

The fourth excuse, that some cases involve minimal or even ministerial action by the judge, continues the distinction just seen between rule clarity and administrative convenience. Granting an extension of time for parties to negotiate a settlement, for example, or transferring a case to another court, are judicial acts reached by the recusal obligation of 28 U.S.C. § 455(d)(1), but reasonable observers might conclude that the situations ordinarily present little or no opportunity for the judge to engage in self-dealing. Other ethics standards recognize that as important. Except for very high-level executive officers, a former federal official’s role must have been “personal and substantial,” for example, before 18 U.S.C. § 207 prohibits post-government involvement in a matter. In my opinion, the likelihood of self-dealing in these trivial-involvement situations is probably low, but even the ABA Model Code of Judicial Conduct would not exclude such situations from the recusal requirement for state judges. For Congress to reach out to introduce the exception into federal law would seem unwarranted.

The fifth and final excuse, that the judge's leaving investment management decisions to others avoids the recusal requirement, is again inconsistent with current law, this time 28 U.S.C. § 455(c). That provision expressly requires a judge to remain informed about his or her economic interests and those of the judge's spouse and minor children living at home. Federal judicial regulation now makes each federal judge responsible for complying with the law that regulates his or her conduct. In my opinion, that is exactly where the obligation should ultimately reside. A judge may seek professional help in complying with the law, but surely he or she cannot and should not be able to delegate the duty to comply.

How can judges be helped to comply with the relevant recusal rules?

I suggested early in this statement that, troubling as the *Wall Street Journal's* findings properly seem, the problem of judges hearing cases while holding stock in one of the parties, is not likely to be especially difficult to solve. Every day, American law firms of any size undertake to determine whether they may not represent a potential new client because of a conflict of interest. Such a conflict would arise if taking the new case would involve the firm in filing suit against another current client of the firm or a former client in a substantially related matter, so the firm must compare the names of the firm's existing and past clients against the potential client and the persons or entities that the new client wants to challenge.

No single person could keep that large body of information in his or her head; the task is not complicated but it requires the technical capacity to make the comparisons. Fortunately, so many law firms have the same problem that competing conflicts-checking software has been developed. The reports they produce typically must be examined by human beings to assess whether the names identified do or do not require the firm to decline the case, but while the legal questions of judicial recusal may be different from attorney conflicts of interest, the basic issues and methodology for determining answers are likely to be substantially the same.

I know that the very capable officials in the Administrative Office of the United States Courts are well aware of such software and have instructed judges to use it. The results of the *Wall Street Journal* survey, however, suggest that the system needs to function much better. A significant part of the responsibility for recusal decisions apparently has been delegated to the individual circuit and district courts and ultimately to individual judges themselves.

Ideally, cases would be assigned to judges only after passing through a clerk's office. It should be at this point of entry that the parties in a case would be compared to the names of companies in which judges in the judicial district or circuit have an interest that is shown on filings submitted by the judges. The fact that all or most cases today are filed electronically should make this software-assisted comparison even easier. Only judges who would not be required to recuse themselves should then be eligible for assignment to hear the case. If such a system were followed systematically, and if judges who are assigned cases were to do a final verification of their eligibility to hear each case, stories like the ones in the *Wall Street Journal* should be a thing of the past.

Of course, such a system will be only as good as the recorded information about a judge's current financial holdings. Ideally, any given judge's stock purchases and sales will be required to be reported promptly and put into the conflicts checking system. Legislation to require such prompt reporting would be consistent with this objective. As a further benefit, the demands imposed by the reporting system might persuade more judges to reduce their conflicts by holding financial interests in the form of mutual funds that are exempt from conflict checking.

If a judge becomes aware of a prohibited interest only after beginning work on a case, should the judge be able to sell the problematic interest and continue to hear the case?

One of the *Wall Street Journal* articles raised this issue and 28 U.S.C. § 455(f), adopted in 1988, answers the question this way:

“(f) Notwithstanding the preceding provisions of this section, if any * * * [judge] to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party * * * , disqualification is not required if the * * * [judge or other person] divests himself or herself of the interest that provides the grounds for the disqualification.”

The background of this section was somewhat confusing in the news article, but it may be helpful to the Subcommittee. Judge Susan Getzendanner of the Northern District of Illinois was assigned to hear an antitrust class action filed in 1980 against Union Carbide Corporation on behalf of buyers of industrial gases. In 1983, the judge got married, and her new husband had a self-managed retirement plan. When the judge filed her financial disclosure form, names of the class members were unknown; indeed, they were among the subjects of discovery. But Union Carbide moved to recuse Judge Getzendanner because her husband's holdings included stock in IBM and Kodak, companies that do not sound like industrial gas users, but that Union Carbide said were among potential class action plaintiffs. The judge's husband sold the possibly offending shares, and Judge Getzendanner continued to preside in the case.

The matter came before the Seventh Circuit in *Union Carbide Corporation v. U.S. Cutting Service*, 782 F.2d 710 (7th Cir. 1986). Dissenting Judge Flaum argued that 28 U.S.C. § 455(b)(4) made no provision for such mid-case sales, while Judge Posner for the majority wrote that Judge Getzendanner's conduct was consistent with the spirit and purpose of the statute. The judge could not have known earlier that the financial interest represented a problem, her husband acted quickly to eliminate the interest, and nothing she did in the case going forward would affect her interest. It seems clear in context that Congress' action in 1988 was to affirm the majority's analysis and eliminate Judge Flaum's legitimate concern about a court's authority to do so.

I offer this background for two reasons. First, nothing Congress does to respond to the *Wall Street Journal* findings is likely to eliminate all cases in which judges find themselves holding one or more investments that might require their recusal. The world is simply too complex and parties are too easily added and dropped for even very careful judges and court clerks not miss a conflict from time to time. Second, I offer the background to suggest that 28 U.S.C. § 455(f) provides a way for judges to respond when they see such a problem or have one called to their attention.

I acknowledge that the somewhat optimistic tone of this testimony may sound indifferent to the disregard of ethical standards reflected in the *Wall Street Journal* articles. Nothing I have said is intended to justify those earlier lapses. What I have tried to say instead is that the problem – unlike many that Congress faces -- is one that can be reduced dramatically by steps that should be straightforward, non-controversial and relatively inexpensive.

I appreciate the opportunity to appear before this Subcommittee and I look forward to any questions you may have.

Mr. JOHNSON of Georgia. Thank you, Professor Morgan.
We will now recognize Professor Greene for five minutes.

STATEMENT OF JAMAL GREENE

Mr. GREENE. Thank you, Chair Johnson, Ranking Member Issa, and distinguished Committee Members. I am the Dwight Professor of Law at Columbia Law School where I teach and write in the areas of constitutional law and comparative constitutional law. I am not an expert in judicial ethics, but I have studied a number of questions around regulation of Federal courts.

Congress has significant authority to apply ethics and disqualification rules to lower Federal court judges. It has used that authority for ages. My testimony addresses the constitutionality of applying a code of judicial conduct and/or disqualification rules to Justices of the Supreme Court and enforcing such a code and such rules against them.

I conclude that Congress has broad constitutional authority to provide that ethics rules apply to Supreme Court Justices. That apart from impeachment, remedies for violating such rules may require that the Court itself sit at the top of the chain of enforcement.

My testimony does not address whether assuming its constitutionality applying a code of conduct to the Supreme Court is necessary, is wise, or if so, what form it should ideally take. Before addressing the merits, it is important to make a preliminary point about the nature of the constitutional interpretive question. Some constitutional questions are best answered by direct reference to the text of the Constitution, others are best answered by reference to the prior opinions of the Supreme Court. Whether and how Congress may subject Supreme Court Justices, or, indeed, other Federal court judges to ethical rules, lends itself neither to interpretation via specific textual commands, nor interpretation via judicial presence.

With limited exceptions, the text of the Constitution does not specify the ways in which Congress may regulate the behavior of Supreme Court Justices. Likewise, prior judicial precedence offers no specific guidance on the question of whether and how Congress may regulate the ethics of Supreme Court Justices.

In the separation of powers area, government lawyers, scholars, courts, all have relied heavily on historical practice to work out the division of power between the different branches of government. This also means that the judiciary is not the sole source of interpretive wisdom around this set of questions. The considered view of Congress reflected in legislation bears significant interpreted weight and it always has. It is neither necessary nor appropriate to understand congressional power in this area solely, or even primarily through a prediction about how the current or a future Supreme Court would answer a particular question.

In this area as in many others, Members of the legislature must reach their own judgments about what the Constitution permits.

Any discussion of the power of Congress to regulate the behavior of Supreme Court Justices involves a two-pronged inquiry. There is an initial question of whether Congress had the power to impose rules of conduct on Justices of the Supreme Court. There is a sec-

ond and a distinct question of what enforcement mechanisms Congress has the constitutional power to impose. On the first question, Congress has broad power to regulate the ethical practices of Justices. The constitutional source of that power is the necessary and proper clause, which has been read to give Congress broad power to order the Supreme Court's affairs. Congress has used this power to require Supreme Court Justices to sit on lower Federal courts, to set the size of the court, to impose quorum rules on the court, to define its term, to provide for the Supreme Courts building and staff, to assign a wide variety of roles to the Chief Justice of the United States, and to provide for a pension and seniority system that extends to Supreme Court Justices.

Since 1948, Congress has used Necessary and Proper Clause power specifically to impose ethics requirements on Supreme Court Justices. Justices are required to swear a specific oath or affirmation wherein they pledge to, quote, "do equal right to the poor and to the rich," and to act impartially. They are subject to a criminal prohibition on the practice of law. They are subject to disqualification and financial disclosure rules. There are statutory limits on their outside income.

These rules have not been enforced in the past against Supreme Court Justices, but the structure of enforcement raises separate and distinct issues. The main constraint on enforcement is that current ethical rules applicable to Federal judges rely on adjudication by these judges themselves. There is a strong argument that lower Federal court judges cannot sit in ultimate judgment over the Supreme Court, which is a constitutionally superior body.

The two most promising responses to this problem are either to have the court itself adjudicate ethics complaints for disqualification motions involving its Members, or to have the court sit as an appellate body over such complaints and motions after they are adjudicated by lower court judges.

I look forward to the Committee's questions, thank you.

[The statement of Mr. Greene follows:]

Written Testimony of Jamal Greene, Dwight Professor of Law, Columbia Law School
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on
“Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”
October 26, 2021

I am the Dwight Professor of Law at Columbia Law School, where I teach and write in the areas of constitutional law and comparative constitutional law. My expertise is not in legal or judicial ethics as such, but some of my prior research has explored congressional regulation of the federal judiciary, and of the Supreme Court in particular.

This testimony addresses the constitutionality of applying a code of judicial conduct and/or disqualification rules to the justices of the Supreme Court and enforcing such a code and such rules against them. I conclude that Congress has broad constitutional authority to provide that ethics rules apply to Supreme Court justices but that, apart from impeachment, remedies for violating such rules may require that the Court itself sit atop the chain of enforcement.

This testimony does not address whether—assuming its constitutionality—applying a code of conduct to the Supreme Court is necessary, is wise, or, if so, what form it should ideally take.

I. Text and Precedent Do Not Answer This Question

Before addressing the merits, it is important to make a preliminary point about the nature of the constitutional interpretative question before the Committee. Some constitutional questions are best answered by direct reference to the text of the Constitution. Others are best answered by reference to the prior opinions of the Supreme Court. Whether and how Congress may subject Supreme Court justices to ethical rules lends itself neither to interpretation via specific textual commands nor interpretation via judicial precedents.

The text of the Constitution provides that Article III judges are to hold their offices “during good Behaviour,” that they are to be compensated, and that their compensation “shall not be diminished during their Continuance in Office,” but the text does not otherwise specify the ways in which Congress may regulate the behavior of Supreme

Court justices. Except as just noted, the text also does not specify what immunities, if any, Supreme Court justices may enjoy from congressional regulation.

Likewise, prior judicial precedents offer no specific guidance on the question of whether and how Congress may regulate the ethics of Supreme Court justices. Although both the text of the Constitution and prior Supreme Court decisions support certain inferences about congressional power in this area, as discussed below, those sources cannot give definitive answers.

Two interpretive corollaries follow from the lack of textual specificity or prior judicial precedent. The first is that historical practice matters. “It is an inadmissibly narrow conception of American constitutional law,” Justice Felix Frankfurter wrote in 1952, “to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”¹ Especially in the separation of powers area, government lawyers, scholars, and courts alike have looked to historical practice to work out the division of power between the different branches of government.²

In the area of federal courts, historical practice has often been decisive for the Supreme Court. In *Stuart v. Laird*, the Court’s earliest and most significant decision regarding the power of Congress to organize its power and jurisdiction, the Court upheld the practice of justices having to “ride circuit” on lower federal courts squarely and exclusively on the basis of historical practice:

[I]t is sufficient to observe, that practice and acquiescence under [circuit riding] for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.³

As Justice William Paterson noted in his opinion, relevant historical practices include not only laws and practices of particular institutions but countermeasures and responses from other branches—or lack thereof.

The second and related interpretive corollary is that the judiciary is not the sole source of interpretive wisdom around this set of questions. The considered view of

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

² See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Prominent examples include *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (relying on historical practice to conclude that the President has exclusive authority to recognize foreign governments); *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (relying on historical practice to determine the scope of the President’s power to make recess appointments); and *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive orders transferring claims to an international tribunal based on historical practice of executive settlement).

³ *Stuart v. Laird*, 5 U.S. 299 (1803).

Congress, reflected in legislation, bears significant interpretive weight, and it always has. It is neither necessary nor appropriate to understand congressional power in this area solely or even primarily through a prediction about how the current or a future Supreme Court would answer a particular question. Judges take an oath to support the Constitution of the United States, as do members of Congress. In this area, as in others, members of the legislature must reach their own judgments about what the Constitution permits.

II. Congress Has Broad Authority To Regulate the Ethics of Supreme Court Justices

Any discussion of the power of Congress to regulate the behavior of Supreme Court justices involves a two-pronged inquiry. There is an initial question of whether Congress has the power to impose rules of conduct on justices of the Supreme Court. There is a second and distinct question of what enforcement mechanisms Congress has the constitutional power to impose. This section addresses the first of these questions. The next section addresses the second.

Congress has broad power to regulate the ethical practices of Supreme Court justices. The constitutional source of this power is the Necessary and Proper Clause, which grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁴ The Supreme Court forms part of the Government of the United States, and Supreme Court justices are constitutional “Officer[s].”

The Court’s canonical decision in *McCulloch v. Maryland* established that the Necessary and Proper Clause must be read broadly. The “discretion” Congress is permitted with respect to the means by which the powers the Constitution confers are to be carried into execution extends to “all means which are appropriate, which are plainly adapted to [a legitimate] end, which are not prohibited, but consist with the letter and spirit of the Constitution.”⁵

Historical practice confirms that the Necessary and Proper Clause gives Congress broad power to order the Court’s affairs.⁶ Congress has used this power to require Supreme Court justices to sit on lower federal courts, as noted above. It has used this

⁴ U.S. CONST. art. I § 8 cl. 18.

⁵ 17 U.S. 316, 421 (1819).

⁶ The Constitution does not expressly give the Supreme Court an administrative or rulemaking power, as it does with the House and the Senate. U.S. CONST. art. I § 5.

power to set the size of the Court,⁷ which it has changed six times; to impose quorum rules on the Court;⁸ and to define its term.⁹ Indeed, Congress unilaterally eliminated the Supreme Court term just prior to its decision upholding circuit riding. Congress likewise has used its Necessary and Proper Clause power to provide for the Supreme Court's building;¹⁰ to give the Court staff, including administrative assistants and law clerks;¹¹ to assign a wide variety of roles to the Chief Justice of the United States;¹² and to provide for a pension and seniority system that extends to Supreme Court justices.¹³

More to the point, Congress has since 1948 used its Necessary and Proper Clause authority specifically to impose ethics requirements on Supreme Court justices. Justices are required to swear a specific oath or affirmation wherein they pledge to "do equal right to the poor and to the rich" and to act impartially;¹⁴ they are subject to a criminal prohibition on the practice of law;¹⁵ they are subject to disqualification and financial disclosure rules;¹⁶ and there are statutory limits on the outside income they may receive.¹⁷ It is difficult to understand how the Necessary and Proper Clause could empower Congress to require justices to swear or affirm that they will act impartially but not allow Congress to subject the justices to any ethical requirements.¹⁸

It is important to note that these rules have never been enforced against Supreme Court justices. Chief Justice John Roberts suggested in his 2011 Year-End Report that there are doubts as to whether these rules may constitutionally be enforced.¹⁹ The main objections center around a general concern for the separation of powers and the independence of the Supreme Court. Unlike the lower federal courts, the Supreme Court is a constitutionally distinct entity that sits atop a constitutionally distinct branch of the federal government. Disqualification and other ethics rules can be used to harass or intimidate the justices and as discussed below, they can be structured in a way that sits in tension with the structural superiority of the Supreme Court over lower federal courts.

⁷ 28 U.S.C. § 1.

⁸ *Id.*

⁹ 28 U.S.C. § 2.

¹⁰ 40 U.S.C. §§ 6101, 6111.

¹¹ 28 U.S.C. §§ 671–677.

¹² See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).

¹³ 28 U.S.C. § 371.

¹⁴ 28 U.S.C. § 453.

¹⁵ 28 U.S.C. § 454.

¹⁶ 28 U.S.C. § 455; 5 U.S.C. app. 4 § 102.

¹⁷ 5 U.S.C. app. 4 §§ 501, 502.

¹⁸ See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEG. ETHICS 443, 461 (2013).

¹⁹ 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

It is conceivable that there are certain ethical requirements that would compromise the Supreme Court's independence. But as Chief Justice Roberts noted in his 2011 Year-End Report, the current disqualification rules and the Code of Judicial Conduct are apparently not among them, as the Justices claim to voluntarily comply with these requirements already. Moreover, were it the case that a code of ethics in itself interfered with the judicial independence guaranteed by Article III of the Constitution, applying such a code to lower federal courts would also raise constitutional concerns, but Congress has regulated the ethics of lower court judges since 1792, nearly as long as such judges have existed.²⁰ While it is true that the Supreme Court is constitutionally distinct from lower federal courts, which exist at the pleasure of Congress, this distinction speaks more to the enforcement of ethics rules than to their existence.

III. Enforcing a Code of Conduct Requires the Supreme Court To Sit Atop the Chain of Enforcement

The fact that Congress has the power to provide for a code of conduct for the Supreme Court does not mean that any and all means of enforcement are permitted. Legal norms may be enforced through a variety of channels. Some, such as the Judicial Code of Conduct as applied to lower court judges, are enforced through judicial self-regulation. Others are the subject of federal criminal law. There are at least two constraints on enforcing a code of conduct or other ethical rules on Supreme Court justices.

First, to the extent a code of conduct is criminal in nature, it is conceivable that such a code could apply to Supreme Court justices only after an impeachment proceeding. The Constitution specifically contemplates criminal prosecution after impeachment,²¹ but it is silent on whether an impeachable public official may be criminally convicted prior to impeachment.²² Supreme Court justices are not, of course, above the law, and a wide variety of state and federal criminal statutes can and do apply to them. It is implausible that all constitutional officers must be impeached before being criminally prosecuted, and there is little reason to apply such a principle to judges alone. Federal courts that have addressed pre-impeachment criminal prosecution have therefore agreed that it is constitutionally permissible.²³

²⁰ Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).

²¹ U.S. CONST. art. I § 3 cl. 7.

²² Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 224 (1993).

²³ *McBryde v. Comm. to Review Cir. Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 66 (D.C. Cir. 2001); *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984);

What makes the question more interesting in the context of potential application of a code of conduct to Supreme Court justices is that ethics violations implicate the performance of official judicial duties. The impeachment clause applies to “treason, bribery, and other high crimes and misdemeanors,” which can be read to imply that the sorts of offenses for which impeachment is the appropriate remedy are those, like ethics violations, that undermine public trust. Again, federal courts have not accepted this argument, as they have repeatedly permitted criminal prosecution for impeachable offenses involving breaches of public trust. Moreover, even if impeachment were the sole means of removal for judges accused of such breaches, it could still be argued that the judiciary itself—or in the case of the Supreme Court, the Court itself—has the power to sanction certain judicial conduct through means short of impeachment.²⁴

A second constraint on enforcing a code of conduct on Supreme Court justices is that ethics complaints are judicial proceedings and subject to appeal. The Constitution provides that “[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²⁵ Although this language could be read to suggest that the federal system does not tolerate multiple courts of last resort, it cannot be taken in this literal sense. The Constitution provides Congress with the power to make exceptions to the Supreme Court’s appellate jurisdiction, and it has historically exercised this power liberally.

It is another matter, however, to say that “inferior” judges may sit in judgment over the conduct of their superiors. Currently, disqualification motions are made to the relevant judges themselves and are subject to appeal; other alleged ethical violations may be referred to the Chief Judge of the Circuit and eventually to the Judicial Conference. This means that district court judges are sometimes required to rule on the conduct of appellate judges, but district and circuit court judges are not constitutionally distinct from one another. Supreme Court justices, on the other hand, are structurally superior to other federal judges. This constraint means that Supreme Court justices should not be bound to a ruling by a lower court judge on disqualification or violations of ethical rules.

Congress could consider at least three potential responses to this constraint, ordered from least to most confrontational. First, Congress could permit the Court itself to adjudicate ethics complaints or disqualification motions brought against its members. Assuming any sanction fell significantly short of removal, the better argument is that this

United States v. Hastings, 681 F.2d 706 (11th Cir. 1982); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974).

²⁴ See *McBryde*, 264 F.3d at 67 (“[T]he claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification.”).

²⁵ U.S. CONST. art. III § 1.

would be constitutionally permissible. Such sanctioning power has long been granted to the judicial council of the circuit for lower federal court judges.²⁶ Giving an analogous power to the Supreme Court raises no special constitutional concern.

A second possibility would be to allow complaints to be adjudicated by the Judicial Conference or another body of lower court judges but to provide for appeal or certiorari to the Supreme Court en banc, excluding the justice whose conduct is at issue. Concerns about awkwardness or gamesmanship of justices sitting in judgment of their colleagues would be mitigated by the fact that an initial decision will have been made by a different body. It would not be surprising if a norm of denying review in such cases were to develop, so as to avoid discomfort.

Finally, a more confrontational approach that might be equally effective would be for Congress simply to proceed with review by lower court judges of disqualification or other complaints made against Supreme Court justices notwithstanding the constitutional uncertainty of doing so. As noted, members of Congress have a duty not to go that route if they believe it is constitutionally unavailable, but if they believe otherwise, they may functionally bind the Court even if they do not do so in theory. Supreme Court justices are unlikely to test the limits of the law. They consistently claim to follow the Judicial Code of Conduct as well as the statutory rules around disqualification even without conceding that these rules constitutionally may apply to them. It is unlikely to be worth it to a justice to choose making a constitutional case out of a disqualification motion or ethics complaint rather than simply “voluntarily” obeying the decision of a body comprising lower court judges.

²⁶ 28 U.S.C. § 354.

Mr. JOHNSON of Georgia. Thank you, Professor Greene. At this time, we will now recess for votes. I would expect that we should be back in this room, ready to commence this hearing again at about 3:30 p.m. So, I want to thank the Witnesses for their forbearance. I look forward to seeing you in about 45 minutes. Thank you.

[Recess.]

Mr. JOHNSON of Georgia. This Committee meeting is called back to order. I would ask the Witnesses who are remote to open up your video line, and we will now begin with questions, and I will proceed under the five-minute rule, and I recognize myself for five minutes.

During the period *The Wall Street Journal* analyzed, one in five Federal judges who disclosed holdings of any individual stocks unlawfully heard at least one case involving the companies whose shares that they owned, 20 percent.

Mr. Hedtler-Gaudette, do those statistics surprise you, and if so, why do you think that the issue is so prevalent?

Mr. HEDTLER-GAUDETTE. Thank you, Chair Johnson. Those statistics do not surprise me, and they should not surprise anyone who has been watching and observing the Federal courts for any length of time. I mentioned in my oral testimony that the Federal Judiciary is the least transparent branch of government, and it is not surprising that, with that lack of transparency, we see violations of laws and protocols and rules.

We have seen these kinds of reports before, too. There was recently an article in the *North Carolina Law Review* that raised up some of these same issues and pointed to similar statistics. In 2014, the Center for Public Integrity did a very good investigative deep dive into this exact issue, and they found that a couple—that 26 more judges had ruled on cases that they had a financial conflict of interest in.

So, this is a longstanding and persistent issue, and I think it really speaks to the need to pursue reforms that would enhance and strengthen the integrity and the legitimacy of the courts. The way you do that is by ensuring that the public has faith and trust in the impartiality of Federal judges, and I think that faith and trust is fundamentally comprised and undermined as we see these reports continuously cropping up.

Mr. JOHNSON of Georgia. Thank you. Thank you.

Professor Jefferson, what other lessons should we draw from the fact that such a significant proportion of judges failed to abide by a clear statutory mandate to recuse themselves?

Ms. JEFFERSON. Well, I will pick up on the previous comments and say that this is a longstanding problem. As I noted earlier, I don't think we want to be in a world where we rely on journalists to enforce judicial ethics, but that is what has happened here. Although, again, I think we need to welcome these kinds of investigations, and I commend the reporting.

That the *North Carolina Law Review* study that was published in 2020, it documented, I believe, 200 instances that were similar where judges were hearing cases when they owned stock in parties. There is a law review article that I also cite in my written testimony that goes back to 2015 published in the *Georgetown Journal*

of *Legal Ethics* dealing with these issues too, and so they have been with us for a long time.

Let me just point out one anecdote though that, I think, goes to my overarching theme, which is that we need to shift from a culture of silence to a culture of compliance. It was significant to me not only that the *North Carolina Law Review* published this information, but when the scholars thanked the research assistants who worked on it, one of those research assistants asked to be unnamed for fear of upsetting a judge.

I think we want a world where our judiciary welcomes it being brought to their attention if they are out of compliance with their ethics rules, not so that we can sanction and penalize our judges but so that we can work together to make sure they are complying with all their ethical obligations. It is the concern about the intimidation for fear of upsetting a judge that has perpetuated in part the very problem that we are here today confronting.

Mr. JOHNSON of Georgia. Thank you. When *The Journal* reporters informed these judges of their violations many relied on a variety of excuses, that they were unaware of the trades, that the recusal list had misspellings that were missed by the judiciary's conflict screening software, that their trades resulted in losses, or that they had a hands-off role in trading. I am worried about what these judges' excuses reflect about the culture in the judiciary.

Professor Jefferson and Mr.—well, you won't have time to answer within the five minutes, so I will just limit it to Professor Jefferson. Do you think that judges see these kinds of failures as harmless or just simply being no big deal?

Ms. JEFFERSON. Well, I wouldn't want to presume to be in the mind of any of the judges in how they were responding. I can only take them at face value what they said in response to the reporters. You have read the reporting as well; some of them it seemed were not taking it seriously and did not think that it mattered or that the rule applied to them.

I think that there are a few different tensions here. One is the fact that the American Bar Association's model code for judges has a different standard, and so perhaps some mistakenly thought the more liberal standard applied to them. The reality is, when Congress implemented 28 U.S.C. 455, the bright line prohibition, it was very clear what was intended, not only that judges not hear cases where they hold stock in parties or have a financial interest, no matter how small, but also Congress, in the legislative history, it reflects that they intended to have a higher standard than what the ABA had suggested in its model code.

So, it is incumbent on our Federal judges to be aware of all the rules that apply to them, and my hope is that, through this hearing, through reporting and what we have seen, that we will be seeing a shift in the culture.

Mr. JOHNSON of Georgia. Thank you. My time is expired.

I will next turn to Mr. Bishop for five minutes.

Mr. BISHOP. Thank you, Mr. Chair.

Professor Jefferson, yeah, I generally agree with the notions or the recommendations and the thoughts you have laid forth in your testimony, in particular the notion of a culture of compliance. I do have some—as someone who practiced law for a long time, I didn't

encounter judges that I thought were making decisions based on their financial interest, and this disclosure requirement or disclose anything or to deal with any financial interest no matter how small, I think what happens is we end up giving the judiciary a Black eye in a way because it is almost an administrative task that doesn't really belie any interest, and they are just not aware of it, and so it ends up looking like there is this massive noncompliance, which is unfortunate.

I also get why and your article made clear why there needs to be—why a per se, however small rule is out there.

One question I had is: I noticed that one of the things that is talked about in reform is whether or not to publish all this information the same way my financial disclosure statement is published on a website. Can you offer any insight why that was not done when this was originally—when this scheme was originally set up of judges having to disclose internally or make the reports that somebody has got to ask for them, like you said?

Ms. JEFFERSON. I don't have particular knowledge about the thinking behind the process for disclosures that was adopted for the Federal judiciary as compares to what you are required to do as a Member of Congress other than to note that the Federal judiciary is not included in the same law that requires you to disclose in the way that you do.

If I may, I do agree that this bright-line rule will inevitably perhaps trip up someone who would have, as I said in my opening remarks, no actual bias in a case, but sometimes that is a tradeoff we have to make to have these clear-cut rules for eliminating the perception of bias.

Mr. BISHOP. Right.

That makes some sense. One of the things you advocate is that there be complete disclosure, publication of this, right, that they be published in a website; somebody can download it anonymously and learn what the information is.

Ms. JEFFERSON. Yes. So, I do believe that publicly available information, in particular about recusals, that is my focus. So, now, in terms of the—

Mr. BISHOP. How about the financial holdings?

Ms. JEFFERSON. Yeah, in terms of the financial holdings, there may very well be reasons to limit the disclosure of that, but certainly not beyond the litigants and making it very easily available and readily available.

Another one of the big issues for litigants is, because the Federal judiciary now only files annually, you can have a case proceed for a whole year before someone will even know that the judge that they have been before had an interest, and that is if, of course, it is a judge who is actually disclosing as they should be.

Mr. BISHOP. Yeah, okay. We will talk. I want to shift gears a little bit. Actually, I said, in my experience, I didn't see judges that I thought were doing things for financial interest. On the other hand, my experience and observation has been that the most extravagant expressions of bias have been partisan bias on the part of the bench.

I was just looking, as we were sitting here, there was a—*The Hill* did a poll or reported a poll in 2018 that 66 percent of reg-

istered voters think that Federal judges were influenced by politics or that the rulings were based more and more on their political interests.

Has there ever been any scholarship on the subject of whether judges, Federal judges are affected by ideology and whether that creates biases that they are not properly responding to?

Ms. JEFFERSON. So, I think it is—well, recusal can apply beyond financial interests, to be sure, and we should be concerned and thinking about, any time a judge has an interest that hasn't been disclosed, that is going to either actually prejudice the litigants before the judge or create the impression of bias. So, that can be a financial interest; it can also be relationship based.

In terms of partisanship, I read the same reports that the public absolutely believes that judges are driven by partisanship. You would think the Federal judiciary would be somewhat immune from that since Federal judges are appointed and not elected as many of our State judges are, but I don't have to tell this Committee that politics surrounds appointments just as much as it also surrounds elections.

In terms of a difference, if we want to distinguish between these things, here, at least in this instance, we have individuals before judges and they have no idea that the judge has a financial interest in perhaps their opponent. So, the information hasn't even been disclosed, if a judge is perceived as having a particular political viewpoint, that is often or maybe more well known. So, that is one significant difference between what we are talking about here with respect to financial interests.

Mr. BISHOP. At least it is not concealed, is what your suggestion is.

Ms. JEFFERSON. Exactly, yeah, and sunlight is the best disinfectant, right?

Mr. BISHOP. My time is expired. Thank you, ma'am.

Mr. JOHNSON of Georgia. We will now proceed to the gentleman from New York for five minutes, Mr. Nadler.

Chair NADLER. Thank you very much.

Professor Jefferson, while judges owning individual stocks pose a problem under the Ethics in Government Act, in section 455 obviously, judges are permitted to own mutual or index funds without having to recuse themselves. That approach would seem to avoid any public perception of impropriety because the public would rightfully not be concerned when judges do not know the companies in which they own stock. Why shouldn't Federal judges be limited to owning just mutual or index funds?

Ms. JEFFERSON. I actually wouldn't disagree with that. I mean, that certainly would be one approach to handle this. Just as one approach is to prohibit owning a stock in a party that is in front of the judge deciding a matter; another approach would be to require all judges when they come to the bench to divest of individual holdings and to hold mutual funds or the like.

Chair NADLER. I would think that that would be a superior route because it is proven impossible, despite the STOCK Act and various other acts that we have passed, to enforce the law, whereas mutual—requiring judges to own mutual or index funds, to put everything into mutual index funds would be self-enforcing.

Ms. JEFFERSON. Yes. I am certainly not a financial advisor, but I am told that having mutual funds is still a wise investment. So, in terms of financial concerns that a judge might have that would dissuade someone who is well qualified from the bench from taking on that role, that would be an effective option.

Chair NADLER. Thank you.

Mr. Hedtler-Gaudette, this is Chair Nadler. I would like to pose a question to you. First, what do you think of the idea that we were just talking about of requiring the judges put everything into a mutual or index fund?

Mr. HEDTLER-GAUDETTE. Thank you, Chair Nadler. I think that would certainly be the cleanest way to address this issue, although as a reasonable intermediate first step, I think doing something like applying the STOCK Act and requiring online posting of all financial disclosures of Federal judges is a perfectly reasonable way to go.

Chair NADLER. Can you tell me whether *The Wall Street Journal's* reporting is the first time we have heard about judges failing to abide by the law governing recusals and ethics and financial disclosure? Further, now that we have this reporting, is there any question that there are systemic problems that Congress and the judiciary need to address?

Mr. HEDTLER-GAUDETTE. I am sorry; can you repeat the question, Chair?

Chair NADLER. Can you tell me whether *The Journal* reporting is the first time we have heard about judges failing to abide by the laws governing recusal, ethics, and financial disclosure? Further, now that we have this reporting, is there any question that there are systemic problems that Congress and the judiciary need to address?

Mr. HEDTLER-GAUDETTE. Ah. No, that was not the first time I had heard or we in the public had heard about those kinds of issues, and I think it absolutely points to a systemic, widespread pervasive issue. We often say that opacity plays midwife to impunity in the good government community, and I think there is no clearer emblem of that mantra than what happens in the Federal judiciary right now.

Chair NADLER. Thank you very much.

Professor Greene, first, would you comment on the idea of requiring all Federal judges to put any stocks they own into mutual or index funds?

Mr. GREENE. So, I don't have any specific comment on that proposal. All I would say is that, if the concern is about being influenced by one's particular holdings, that might be a solution. If the concern is that a holding might move markets in some way or something along those lines, it might be an incomplete solution. This isn't something that I have a deep opinion about.

Chair NADLER. Does the fact that *The Journal's* reporting comes during an era of declining in trust in our institutions add urgency to the need to address these problems?

Mr. GREENE. Yes, absolutely. There is certainly a serious problem of the perceived legitimacy of the courts, and this kind of reporting certainly doesn't help.

Chair NADLER. Given this context, what risks do we incur if Congress and the judiciary do not address the issues highlighted by *The Journal's* reporting?

Mr. GREENE. Well, the risk is continuing decline in the perceived legitimacy of the courts, which I think are affected by lots of things beyond individual financial issues like what was reported in *The Journal*, but this just adds to the problem.

Chairman NADLER. Thank you. One issue that *The Journal's* reporting was unable to determine was whether these judges' rulings were influenced by their own financial stakes in the case. Even so, these episodes obviously are problematic.

Professor Jefferson, how would you respond to someone who said that, because there was no evidence that a judge made a ruling to boost the value of his or her stock or sold a stock before making a ruling that hurt the value of theirs, the misconduct unearthed by *The Journal* actually is not particularly concerning?

Ms. JEFFERSON. So, I guess I have two comments to that. First, even if a judge is not actually biased in a particular proceeding, the appearance of it, there is a harm to those individual litigants because they may not trust in the fairness of it, and then there is also a public perception harm in the legitimacy of the court.

Related to this, I would also say that, in thinking about the perceived harm, it is bigger than the public perception and the individual harm to the litigants in that we have a law on the books that Federal judges have not complied with.

So, if we don't think they should have to comply with this law because this law actually doesn't do anything about addressing either the actual harm to litigants or the appearance of harm to litigants because of their bias, then we should not have this law on the books.

In the meantime, when it is there—I mean, we all should follow our laws until they are changed or are appropriately challenged in our court system, right, but if anyone should be following the law, I would think that the public would expect our judges to be following the law.

Chair NADLER. Thank you very much.

My time has expired, and I yield back.

Mr. JOHNSON of Georgia. The gentleman from California, Mr. Issa, is now recognized for five minutes.

Mr. ISSA. Thank you, Mr. Chair.

My first question is for all. Is there any of our four panelists that believe that judges, Federal judges, should be above the law, as was alluded to by Ms. Jefferson?

Hearing none, we will assume that judges should, in fact, obey every law that they know to exist, and they should know to exist better than the average person in society.

The second one, there was a lot of discussion in the openings—in the testimony of the constitutional question, and so I will start with Ms. Jefferson. Our statutes that have to do with disclosure and recusal, do those exist for purposes of regulating the judges, or do those exist for protection of the individual's right to an impartial arbitrator? Which is the actual right that is being protected?

Ms. JEFFERSON. Yeah, so we are protecting the individual's right to due process and to a neutral decisionmaker. In terms of constitu-

tional concerns about judicial independence or interference between one branch and another, the Constitution is very clear that it is within Congress' ambit to make the kinds of reforms that I have been proposing here.

Mr. ISSA. So, following up on that, if what we are doing is protecting the individual, you have been saying, as have others, about the litigants. When it comes to the Supreme Court, when it comes to the Appellate Courts, and when it comes to the standard under which Appellate Courts second guess a Federal judge in the original ruling, isn't it fair to say that, in fact, everyone who might be affected by a precedent is, in fact, a person of standing?

I say that because you alluded to the idea that, well, maybe only the litigants would know. If the ninth circuit makes a decision based on a case, it is going to be binding. I don't even get my day in court when I go before a judge who might, in fact, come to a very different conclusion or steer a jury toward coming to a different conclusion. So, isn't there a broader right than just the litigant or the defendant?

Ms. JEFFERSON. Well, certainly in terms of wanting to ensure that the process is fair, right. So, if the individual litigants are impacted by a judge's bias, you are absolutely right that the outcome, that decision, the decision that then governs all of us who are subject to it as precedent is not legitimate because it is a product of bias.

Mr. ISSA. I guess, lastly, one of my great questions—and I am going piggyback to the Full Committee Chair—I personally don't see any reason, even though I only have mutual funds and don't maintain individual stocks for the reason of conflict, I don't see a reason that we would effectively stop the lower courts.

I would like you to opine, and I will start with Mr. Morgan, opine on the question of the Supreme Court because, ultimately, those nine men and women, without a recusal, the decisions are magnificently dependent, and we have, in my time here, 20 years in Congress, we have had Justices who clearly had a background and a bias because of previous activities on a related case who chose not to recuse themselves. So, do you feel that we have the right to demand recusal or a structure for a recusal?

Mr. MORGAN. Yes, Mr. Issa, I do. I think that it remains to be seen whether the Supreme Court will agree and what they will do, but I think that the ideal solution is for Supreme Court to voluntarily accept what is already a statutory requirement about adherence to 455 and that they voluntarily would agree to submit to the code of conduct for United States judges. Whether additional obligations would be constitutional, I recognize Professor Greene as the real expert on the panel on that question.

Mr. ISSA. Well, then I will go to Professor Greene and ask the one final question, which is, if we withhold funding until or unless the Supreme Court returns with a standard to their liking, is that constitutional?

Mr. GREENE. I have to think more—maybe think more than I have right now about the constitutionality of that kind of threat. As I sit here today—

Mr. ISSA. By the way, that is funding of the court, not funding of their salaries.

Mr. GREENE. Right, right. So, their compensation can't be diminished, but the Congress has quite a lot of control over the funding of the court, and assuming it did not—it went through proper legislative channels and was not outside the legislative process in some way, I don't, as I sit here today, see a constitutional issue with that.

Mr. ISSA. Thank you.

Thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you. We will now turn to the gentleman from California, Mr. Lieu, for five minutes.

Mr. LIEU. Thank you, Mr. Chair, and I yield my time to you for whoever you want to yield your time to.

Mr. JOHNSON of Georgia. The gentleman is kind, and I appreciate it.

Recusal is also a problem with the Supreme Court. Justices' decisions whether to recuse or not can be inconsistent. Those decisions often go unpublished, and there is no means of enforcing a failure to recuse. The decision to recuse or not cannot be appealed.

Professor Greene, you have written about proposals for reforming the Supreme Court. Should changes to the recusal process be included in any considered reforms to that body?

Mr. GREENE. I do think it is important to address the recusal practices of the court. They are currently covered by the Federal recusal statute, 28 U.S.C. 455, but there are some special considerations with the court. One is that it is at least awkward and may be constitutionally problematic for lower court judges to make decisions about whether the court should recuse, given that the court is superior in the constitutional hierarchy. The other issue is that it is very difficult to replace a Supreme Court Justice, as there are only nine of them, and you could lead to an even court.

So, there are some important considerations, and there maybe has to be some modifications when it comes to how to enforce a recusal statute against the court. The lack of transparency is a problem, and I agree with Professor Morgan that the standards that apply to other Federal court judges should apply in some fashion to the Supreme Court as well.

Mr. JOHNSON of Georgia. Thank you, Professor.

Is there anything in article III or in article I of the Constitution that would prevent Congress from directing the High Court, the Supreme Court, to bind itself to a code of conduct?

Mr. GREENE. So, there is nothing specific within article I or article III that would prevent Congress from doing that. Part of the problem in this area is that article III is not very specific. It doesn't say very much about what Congress can or can't do.

Congress does have power under article I, section 8, the Necessary and Proper Clause, to make the rules that it thinks are necessary and proper for the institutions of government to carry out their powers, and the court is one of them. So, there is no specific prohibition.

I think you would get some arguments, some sort of general separation of powers arguments about the court needing to be an independent institution, but I don't find them persuasive in this area given how much Congress can and does regulate the Supreme Court's behavior in other areas.

Mr. JOHNSON of Georgia. Thank you, Professor.

The Journal reported a large number of trades by judges during cases in which those judges oversaw suits involving those same companies. Many of those trades netted the judges as much as \$50,000.

Professor Jefferson, why is this such alarming cause for concern?

Ms. JEFFERSON. Well, I think it goes back to the purpose of recusal, which is both for the individual litigants to feel that they have gotten due process, a fair process, and knowing that a judge is making money off holding stock over one of the parties compromises that.

Then, of course, the second purpose of recusal is the public perception, and I imagine that anyone in the public hearing this would find that it diminishes how they hold our courts in esteem.

So, I think it is problematic for both of those reasons.

Mr. JOHNSON of Georgia. Thank you.

Mr. Hedtler-Gaudette, should there be penalties for or restrictions on this behavior, and if so, what should the penalties be?

Mr. HEDTLER-GAUDETTE. Thank you, Chair. Yes, there should absolutely be restrictions, and I think we have touched on a number of those options in this hearing already. One sort of clean way, as we already discussed, just prohibiting the ownership of individual stocks by Federal judges. There are other options to look at too, of course.

As far as consequences, I think it gets a little tricky because we are dealing with a situation where judges have a lifetime appointment. So, there are just a few kind of ways to hold them accountable, and one of them, of course, is impeachment, but that is an extreme approach, and I suspect you all are not going to spend a lot of your time in Congress impeaching judges.

So, I think the short answer to that is, I don't have a good answer for you on what to do about consequences, though I think we do need to spend a lot more time thinking about what we can do to hold all Federal judges accountable because, as we spoke to earlier, they ought not be above the law, and they certainly aren't above the law.

Mr. JOHNSON of Georgia. Thank you. We will now turn to the gentleman from Texas—well, let's see, actually, Mr. Gohmert is not here, so Mr. Fitzgerald.

Mr. GOHMERT. I am here. Gohmert is here.

Mr. JOHNSON of Georgia. Oh, Mr. Gohmert, I didn't—oh, okay, I did not recognize you. Oh, okay. I gotcha. All right. Okay. Thank you. Mr. Gohmert, you are recognized five minutes.

Mr. GOHMERT. Thank you, Mr. Chair.

Mr. Morgan, you mentioned the 131 judges identified by *The Wall Street Journal* article that represent, well, it is a minority of 870. It, of course, is quite concerning, but that is probably—we are probably talking about a set of about 1,000 people that were judges between 2010 and 2018. So, it is a little more than 10 percent. That is still too many.

I was wondering, if there was one action that you could take to bridge the gap so that we don't have that many judges who fail to report potential bias, what would that action be that you would recommend?

Mr. MORGAN. Mr. Gohmert, I think the single most important is, as I suggested earlier, that the clerk offices around the country screen the cases as they come in before the judge ever sees them and has access to the technical capability to not send them conflicting cases in the first place.

The second aspect would be that the judges, as others have suggested here, be required to report their trades promptly, I think much shorter than the month or 45 days or all that are prescribed in some other statutes, so that they can be very timely in the action.

Mr. GOHMERT. Yeah. So—and pardon my not knowing, is there software that a clerk could utilize to make that check quickly, like entering in the parties and seeing if there is a judge—is there software that can make that determination quickly?

Mr. MORGAN. Well, there is software that is currently used by the administrative office that tries to do that, but I am not an expert in that software, but it seems not to be particularly effective if we have this many cases that get through. So, I think you would have to adapt the wide range of software that is available to law firms who are engaged in a very similar checking operation every time a new client comes to the firm.

So, what I am saying is I think that this is a solvable technical problem and that, if we implement those kinds of changes, we ought to be able to take care of at least the numbers, which are shocking at the moment.

Mr. GOHMERT. Well, if this software that is being used is what we are going to tweak, I am not sure I have enough confidence in that. It seems like there needs to be different software that would be utilized.

In view of the problems that Director Mueller and Comey had with software at the FBI, I am not sure about Federal ability to pick proper software. They can pick software that costs a tremendous amount of money, but we would need something that actually did what we needed done, and I am not impressed with the Federal Government's role in doing that.

So, anyway, Professor Jefferson, are you aware of software that might be more appropriate to use in the Federal courts?

Ms. JEFFERSON. I am not a software expert, so I don't have something to recommend. I would just say that we need something that certainly allows for better accountability, transparency, something that allows for the information to be more readily available to the public and to the litigants in a timely basis and at a low, if actually really no cost at all.

Mr. GOHMERT. Well, it seems like there is always costs.

Mr. Chair, I appreciate your indulgence, and I yield back my time.

Mr. JOHNSON of Georgia. Thank you, sir.

We will now turn to the gentleman from Arizona, Mr. Stanton, for five-minute.

Mr. STANTON. I thank you very much, Chair Johnson. This has been a very informative hearing with outstanding Witnesses. I do appreciate many of the possible solutions to this dilemma, and it is a serious dilemma. It is critically important that the public have confidence in the judges that they may appear before and the judi-

ciary as a whole. This reporting by *The Wall Street Journal* is important and has shown that there are some gaps in that system. So, I really appreciate you organizing this hearing.

With that, I will yield the remainder of my time to Congresswoman Ross.

Ms. ROSS. Thank you very much, Representative Stanton.

Thank you, Mr. Chair, for holding this hearing.

The American Constitution was built on the promise of equal justice under the law, and our Founders designed a judicial system that strives to administer blind, impartial justice. Every American is entitled to a free and fair trial presided over by a disinterested judge.

The courts' legitimacy depends on the public confidence that people place in its ability to deliver this type of justice. Any shortcomings in our ethics systems for judges threatens this confidence. Recent reporting by *The Wall Street Journal* and in the *North Carolina Law Review*—and I am a proud graduate of UNC Law School—has made clear the limit of the judiciary's present system of addressing conflicts of interest.

We must act now to put checks in place to ensure that both real and perceived financial conflicts are avoided to restore the public's faith in our courts. We cannot miss this opportunity to further transparency and ethical integrity in the Judicial Branch.

That is why, with my bipartisan colleagues on the Judiciary Committee, I have introduced the Courthouse Ethics and Transparency Act, along with Ranking Member Issa, with the Chair of this Subcommittee, and Chair Nadler, among others. Our bill will ensure that judges face the same disclosure requirements as Members of the Legislative and Executive Branches. A double standard for the Judicial Branch is simply unjustified, and the transparency gap must be closed now.

When elected officials breach the public's trust, the public has recourse at the ballot box. Article III judges, however, are appointed for lifetime terms. Given the tremendous amount of faith bestowed upon them, Federal judges must be held to the utmost standards of ethical behavior and transparency.

Our bill will also give the public access to judicial financial disclosures in an online searchable database. This will enable ordinary citizens to access these disclosures without impacting the confidentiality protections currently in place for judges' sensitive or private information. These measures are commonsense, bipartisan, and necessary immediately.

Again, I am Representative Ross from North Carolina.

Mr. Hedtler-Gaudette, I want to thank you for your testimony. Please tell us about the relationship between the judiciary's transparency and its institutional legitimacy.

Mr. HEDTLER-GAUDETTE. Thank you, Congresswoman Ross, and I want to thank you again for your leadership in introducing the bill you just spoke about. We at POGO are happy to support it and stand ready to help as it moves forward.

As for the relationship between legitimacy and the institutional integrity of the courts, I think it is not an exaggeration to say that, without transparency in the courts, you cannot have legitimacy in the courts. As you noted, we do not have the regular accountability

mechanism for the courts—that is election—that we do for you all in this Committee room and that we do have for Presidents, and so on. We don't have those.

What that means is that we need more and stronger ways of holding people accountable in the judiciary, and those are usually going to come in the form of transparency requirements and disclosure requirements and things of that nature.

So, it seems preposterous that, under the current system, Federal judges don't even have to comply with the standard that you all in this room have to comply with when it comes to disclosing financial information. At the very least, we need to operate on the principle of what is good for the goose is good for the gander here, and we need to get the Federal judiciary to at least a place of parity when it comes to transparency.

I would also posit that that is only the first step. We still have a lot of other things that need to be addressed within the judiciary when it comes to impunity, but this is a very reasonable, pragmatic, commonsense first step, and I would strongly encourage everyone in this Committee room and everyone in Congress to support it.

Ms. ROSS. Thank you very much.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you.

We will now turn to the gentlelady from Minnesota, Ms. Fischbach, for five minutes.

Ms. FISCHBACH. Thank you very much, Mr. Chair. I appreciate the opportunity.

I just wanted to ask a couple of questions of Professor Morgan. We just—Congresswoman Ross just mentioned her legislation, and I am a little concerned, you know, that the tension and the things that are going on between holding the courts accountable and actually the exposure to danger or the public, public information being released of the judges. So, it is my understanding that there has been some pushback that this may cause issues for safety and whatever the case for the judges and for their families. So, I am wondering if that has been given any thought and if there is maybe more information that you might have on that issue.

Mr. MORGAN. I don't have additional information on that issue, but I share the concern that broad disclosure that is available to anybody anywhere in this country or around the world is not a value that has no limits. It is something that ought to be taken into account as you formulate what the standard really ought to be.

Ms. FISCHBACH. I am just wondering—I don't know if you have had the opportunity to take a look at the legislation that Congresswoman Ross was talking about—are there any safeguards in that? Or, if there haven't been, what kind of safeguards would you suggest?

Mr. MORGAN. Well, I have not had a chance to look at the legislation, but I would suggest to you that the Administrative Office of the Courts is a good source to turn to see what they have thought was important in the past in terms of protecting the judges who really are exposed in some cases to genuine danger.

Ms. FISCHBACH. Absolutely, and I appreciate that suggestion. Just maybe just a little bit based on what you have heard today,

because neither of us have had the opportunity to look at the legislation, but do you really think that this will really change some of these proposals and really change the behavior of the judges, given that I think we have said a couple of times now, yes, these things are in place, but they are just not doing them? I am wondering if you really think that this will have an effect, Professor.

Mr. MORGAN. It is very hard to predict, of course, what will actually have an effect, but I think something needs to be done. There is no question. *The Wall Street Journal* stories in themselves, I suspect, have gone through, have created a response in the judiciary that will cause them to be seriously concerned about making necessary changes.

My own view is that this is not a controversial subject or should not be and that the solutions that you come up with ought to be ones that, from my standpoint, ideally the court would impose on itself, or the court system would impose on itself through the Judicial Conference or some other institution such as that.

Ms. FISCHBACH. Well, thank you very much, Professor.

With that, Mr. Chair—

Mr. ISSA. Would the gentlelady yield, if you are finished?

Ms. FISCHBACH. Oh, yes, I would yield to Congressman Issa.

Mr. ISSA. Thank you.

Following up on the gentlelady's questions, and I will stay with Mr. Morgan, *The Wall Street Journal* got this information through publicly available documents, correct?

Mr. MORGAN. Yes, sir. They had to work at it apparently; that is, it was not easy to gather the information, but they are publicly available documents.

Mr. ISSA. So, when you look at the proposal that Ms. Ross, the Chair, myself, and others are at least putting out there as a starting point, aren't we really saying that what is already gettable would simply be gettable in an organized and timely fashion?

Mr. MORGAN. Well, I am not certain, Mr. Issa. I accept your representation. I simply—

Mr. ISSA. Okay. Well, instead, let's go to, wouldn't it be reasonable that, if something is already available, that it be available in a reasonable and timely fashion and that would not change the danger quotient here?

Mr. MORGAN. I agree with that point, absolutely.

Mr. ISSA. Thank you.

I yield back. I thank the gentlelady.

Mr. JOHNSON of Georgia. Thank you.

We will now resort to the gentleman from Tennessee, Mr. Cohen, for five minutes.

Mr. COHEN. Thank you, Mr. Chair.

First, I want to thank you and the Ranking Member for holding this hearing, notwithstanding your comments.

As the arbiters of justice in our country, the impartiality of our judiciary should be beyond reproach. Justices of the Supreme Court may be the most powerful people in our land because their decisions are not appealable, and they have got lifetime appointments. They have control and actions over our bodies, particularly women's bodies, and our actions in so many ways, and yet they do not

have any particular ethical standards or restraints, not bound by an ethical code of conduct, and that just seems wrong.

The whole idea of giving judges at all levels lifetime appointments is to get them free of any earthly desires that they may fall prey to and that they could be fair and impartial. At the same time, because they have got lifetime appointments, I have been hearing we can't really sanction them for violating any rules, which seems like a catch-22 of some nature.

Hamilton correctly said, "The Judicial Branch has neither the power of the sword nor the purse."

Professor Jefferson, what does the judiciary have to do to get parties to abide by any rules that they might set forth? Is there anything we can do to get the Supreme Court to take action?

Ms. JEFFERSON. So, Congress can require the Supreme Court to adopt a code of ethics. I think a really important point to make here though is, so there has been a lot of conversation that we can't sanction the Federal judges, but I don't think any of us want to be sanctioning Federal judges. What we want is compliance with ethics rules, and so the Supreme Court and the lower courts, the key to compliance is public accountability. We can predict how the judges will respond because we saw how they responded when each one was—at least a lot of them responded when they were called up by *The Wall Street Journal* and it was pointed out that they weren't complying with this law. Many of them followed up with litigants to let them know what happened. Many of them took steps to correct the situation.

So, imposing that similar kind of accountability by not just requiring an ethics code but then showing how it's being complied with. So, for example, not just requiring disclosure of one's finances but maybe requiring disclosure of recusal decisions.

If a judge is required to actually explain the basis for recusal, there are several important things that happen: One, there is accountability for that individual judge because he or she has to justify the decision to recuse or not recuse. Critically important, it becomes an education tool. Another judge thinks, "Oh, in a future case, I saw that a different judge recuse; I should probably be recusing too." Also, for litigants, same thing.

Mr. COHEN. That is wonderful, but what if they don't do it? What if they don't comply? What if they don't care? Your only penalty is shame.

Ms. JEFFERSON. Yeah, and shame can be powerful. I mean, one of the points that I make in my written testimony, as I said in my opening statement, is—

Mr. COHEN. Shame doesn't exist anymore.

Ms. JEFFERSON. Well, I think that may very well be true, but it would at least get us closer to more judges adhering to the rules if we knew there was a public list of judges who weren't complying. We at least now have more judges—

Mr. COHEN. What are you going to do? They don't lose their job.

Ms. JEFFERSON. Well, true. I mean—

Mr. COHEN. They don't lose their brokerage account. So, they have shame.

Ms. JEFFERSON. Taken to the extreme, it would have to be impeachment, right, yeah.

Mr. COHEN. Right. We have seen how good that is.

Ms. JEFFERSON. I understand.

Mr. COHEN. Yeah. Mr. Hedtler-Gaudette, do you have any ideas about what we could do to try to make these—can we take away, give them a financial penalty? Can Congress have a law that says, if they don't do it, that they lose X amount of money for each failure to comply?

Mr. HEDTLER-GAUDETTE. Thank you. So, I think it is a bit beyond my expertise to say whether that would be an appropriate avenue to take; although, I would point out—this is something that I also feel passionately about—that Congress does emphatically and unequivocally control the power of the purse. So, there are a number of things, with the exception of reducing the salary of a Federal judge or a Supreme Court Justice, that you all can do if you were willing to more aggressively and assertively use the power of the purse around funding of facilities and that kind of thing.

Mr. COHEN. Professor Greene, you are out there somewhere, I guess. Maybe not.

Mr. GREENE. Yes, here.

Mr. COHEN. Oh, I see you. There you are. In the power of the purse, can we really do that? Can Congress reduce the salary of a judge during their term of office? Isn't there some limitation on reducing the salaries of judicial officials?

Mr. GREENE. Yes. So, article III says that the compensation of article III judges can't be reduced during their time in office. So, that would be a limitation.

Mr. COHEN. Yeah.

Mr. GREENE. Although other uses of the power of the purse may not necessarily be limited in the same way, so—

Mr. COHEN. So, take away their interns? Take away their staff?

Mr. HEDTLER-GAUDETTE. Conceivably. It has never been tested, and there would be an argument about it that it would be resisted, but there is no clear constitutional prohibition on that, no.

Mr. COHEN. All right. I am over my time, and I have got other questions I will just put in writing, but do I want to make this comment: *The Wall Street Journal* story cited many judges. I don't think I knew hardly any of them, except for the Sixth Circuit Judge, Julia Gibbons. I do not know—she is of a different political party. I don't know of a judge or a person that I have known who is more respected for her rectitude, for her probity. The fact she or her husband had some minimal amount of stock in some company that she may or may not have known about is kind of absurd to think that would have affected her opinion whatsoever.

So, I say, I understand disclosure and transparency, but I put Judge Gibbons over *The Wall Street Journal* any day.

I yield back.

Mr. JOHNSON of Georgia. I will now turn to the gentleman from Wisconsin, Mr. Fitzgerald, for five minutes.

Mr. FITZGERALD. Thank you, Mr. Chair. I would yield my time to Mr. Issa.

Mr. ISSA. I thank the gentleman for yielding.

I think we have reached kind of an interesting point in the hearing where we are going to keep probing similar questions in dif-

ferent ways because I think we really need to know or have your opinions.

So, I will go back to Ms. Jefferson. If I am summarizing what I keep hearing again and again, we have 130 judges who if—I am sorry, Mr. Cohen has left, but if in a timely fashion had been made aware and the public was made aware of these failures under the existing statute, most of them would have acted differently. Is that a fair statement based on what actually happened?

Ms. JEFFERSON. I agree with that, and certainly the responses of many of the judges that were reported by *The Wall Street Journal* suggested that they were bringing themselves into compliance in real time.

Mr. ISSA. So, the case for informing them and the case for making it public is pretty well documented based on the reaction of many of the 130. Is that correct?

Ms. JEFFERSON. Yes.

Mr. ISSA. So, I think we have gotten past that.

Now, the question of enforcement is an interesting one and whether someone recuses themselves even faced with that. I only have experience with lawyers who, seeing a client with a large amount of money, saw no conflict with having previously represented me on the other side and wanted me to waive their recusal.

So, I know that, at least among judges, which I understand is where you get—or among lawyers, which I understand is where you get judges from, there is a tendency to be reluctant to recuse. So, one of the questions that is not in the bill that is going to be considered at some point is a structure to enforce recusal at each level, including the Supreme Court.

Would you opine on whether or not you believe that we should be looking at a structure for third-party recusal, meaning, for example, and I will just give the extreme one: There are nine Justices at the Supreme Court. If there were a challenge to two of them based on some recusal item, should the other seven stand in judgment of whether or not the recusal, or should it be continued to be left exclusively to the individuals?

Ms. JEFFERSON. So, I think that would be one important reform, and you can actually look to how that has worked in practice because we have our laboratory of States. So, Texas, where I am a law professor at the University of Houston, the Supreme Court of Texas does exactly that. If one of the justices has some sort of conflict or there is a request for recusal, the other justices weigh in on that and evaluate whether or not, in fact, that justice should recuse.

In addition to having—and in the lower courts, it is not all the District Court judges; it is one that reviews for another. So, the process needs to be scaled appropriately, depending on whether or not you are talking about the highest court or a lower court. The process needs to still happen in a timely manner.

There are other improvements or reforms that I would suggest, in addition to not only having another judge review the recusal, also having the documentation of either why or why not a particular judge recuses is an important signaling mechanism. It is accountability for that judge, but it is also education for all judges

and indeed parties going forward in the future whether or not it is appropriate for them to be seeking recusal.

Mr. ISSA. Following up on that at the lower court, as a matter of practice, at least in the Southern District of California, there is an informal, I don't want a case, but I don't want to say why, that has historically happened where the chief judge will simply pass on somebody without a reason periodically. Often, it is the complexity of the case, or in some cases, simply caseload. Do you think that that is an alternative recusal that could be a tool for those who did not want to get into the specifics of recusal prior to the assignment of a case?

Ms. JEFFERSON. I think it is. The important caveat I would put in place is, with any reform we want to make sure there is not unintended consequences. So, you would want some protections in place, for example, to avoid litigants judge shopping, maybe put a limit on the number of recusals, that sort of thing.

Mr. ISSA. Having authored the Patent Pilot Bill some years ago, I am acutely that we want to protect from there being only one judge that something goes through.

Lastly, the reforms that I just talked about and the others, if before Congress even acts, if we encourage the court to take action in any of these areas, including even the high court recusal discussion we just had, is it within their power to do it, in your opinion? Maybe you and Mr. Morgan quickly. Is that something that you believe they could do you *sua sponte*.

Ms. JEFFERSON. The court itself?

Mr. ISSA. Yes.

Ms. JEFFERSON. Oh, absolutely. In fact, I wish the Federal judiciary had already done it. Maybe they will, in light of this hearing and this leadership part. We will see. If not, it falls to you.

Mr. ISSA. Does anyone disagree with their ability to do that of their own accord?

Mr. MORGAN. I agree.

Mr. ISSA. Thank you. I yield back.

Thank you. Mr. Chair.

Mr. JOHNSON of Georgia. We will now turn to the gentlelady from North Carolina, Ms. Ross, for five minutes.

Ms. ROSS. Thank you very much, Mr. Chair.

I just want to share some information with the Committee relative to Representative Fischbach's question. I know that many Members of the Committee have not yet had a chance to see the legislation that we have introduced. I want you to know that the bill does not impact existing judicial safety and confidential rules. Under the Ethics in Government Act, which this bill amends, the immediate and unconditional availability of a judge's disclosure is not required. If a finding is made by the Judicial Conference that revealing personal and sensitive information could endanger that individual or a family member.

Further, and what happens far more often in practice is that discrete details in a judge's disclosure may be redacted to protect the individual who filed the report or a family member of that individual. The Courthouse Ethics in Transparency Act keeps this provision in place. So, I am hoping that that will smooth the road for the bill when it comes back to Committee for a markup.

Professor Greene, first, I want to thank you for staying with us. I know had you a previous engagement and we really appreciate you staying with us for this afternoon, because you have shed a lot of light on what our authority is, and how we can act consistent with the necessary and proper powers.

I would like to ask you would a publicly available online database of judicial financial disclosures fit within the historical pattern of promoting transparency and ethics in the courts?

Mr. GREENE. Yes. I don't think there is any question about that. Congress has regulated the ethics of lower Federal courts for almost the entire time they have existed so going back to the 18th century. I think this is entirely consistent with that constitutional power.

Ms. ROSS. Thank you very much.

Professor Jefferson, you have talked a lot about changing the culture, and how we can change rules that would effectively change the culture. In addition to making changes in the law, do you think it would be good to have regular ethics training for our judges?

Ms. JEFFERSON. Well, absolutely, as a college professor, of course I am an advocate of regular ethics training. Although I am mindful of that alone is not enough. In fact, I think professional responsibility is a required course in all law schools post-Watergate, but we still have lawyers who find themselves and judges as it turns out violating ethics obligations, which is why I think an important educational tool in addition to, like, a continuing legal education seminar is the public education and the education to the judges themselves when they have to publicly release information on a regular basis.

Ms. ROSS. You also have said—and I just want to basically make you repeat what you have said to some of the other folks, including my colleague, Representative Issa. How would the transparency of publicly available and searchable financial disclosures encourage the culture change that you have advocated for? Well, we have been able to see it in real time. I think rather than having journalists create that transparency, it would be better served for the judiciary itself to create that transparency. When information becomes publicly available, judges who aren't following the rules, either because they don't know about them, or just because they think no one is going to check and see if they are, will come forward and change the behavior. Maybe it won't change everyone, but I think that it absolutely shifts the culture from one of silence, where we just don't talk about it because we don't know, or because we think silence connotes respect into a culture where we are coming alongside not to sanction, but to actually bring ourselves into compliance with our ethical obligations.

Ms. ROSS. Thank you. I yield back.

Mr. JOHNSON of Georgia. Thank you. I want to thank our distinguished panel of experts for your testimony today and for your time.

This concludes the first panel for today's hearing. We will now transition to the second panel. While we do that, we will be in recess for five minutes.

[Recess.]

Mr. JOHNSON of Georgia. I will now introduce the Witness on our second panel, Judge Jennifer Walker Elrod has served as a Circuit Judge on the United States Court of Appeals for the Fifth Circuit in Houston, Texas, since 2007. She was recently appointed Chair of the Judicial Conference Committee on Codes of Conduct which provides advice on the application of the code of conduct for U.S. judges, including financial conflicts and recusals regarding financial disclosures.

Prior to joining the Federal bench, Judge Elrod was a State trial judge in Texas and worked in private practice. Judge Elrod clerked for the Honorable Sim Lake of the U.S. District Court for the Southern District of Texas, and earned her B.A. from Baylor University and her J.D. from Harvard Law School. Welcome, Judge Elrod. Thank you for participating in today's hearing.

I will repeat my earlier reminder that your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. 1001. Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time, there is a timing light on your table, or there is a timing light on the screen. When that light switches from green to yellow, you will have one minute to conclude your testimony. When the light turns to the red, it signals five minutes have expired. With that, Judge, you may begin.

**STATEMENT OF HON. JENNIFER WALKER ELROD,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

Judge ELROD. Thank you, Chair Johnson, Ranking Member Issa, and Members of the Subcommittee. I appreciate the opportunity to discuss with you the work that the Federal judiciary is doing to promote judicial ethics and transparency. My name is Jennifer Walker Elrod, and I serve as a judge on the United States Court of Appeals for the Fifth Circuit.

On October 1, 2021, I became the Chair of the Committee on the Codes of Conduct of the Judicial Conference of the United States. Judicial ethics and transparency are fundamental to an independent judiciary. They are fundamental to the public's trust in the judiciary. Litigants must be confident that they will have a fair and impartial forum to bring their cases.

Accordingly, the judiciary takes these matters very seriously, and is greatly concerned when lapses occur. My message today is, first, the judiciary has strong ethics frameworks in place, including the recusal statutes, the code of conduct canons, and the regulatory policies of the judicial conference described in my written statement. Those are powerful tools and resources available to the Federal judiciary and to the public to ensure the functioning of an ethical and independent judicial branch.

Second, the Committee on Codes of Conduct supports that framework through providing advice and extensive training. I will speak more about that in a moment.

Third, courts are working to review and work with parties to address the specific cases where recusals did not occur.

Fourth, the judiciary is already involved in additional training and technology improvements. Particularly, we have begun additional training for all judges focused specifically on conflicts checking. Further, circuit counsels' courts throughout the country, and the Committee on Codes of Conduct are all working together to review our systems to identify improvements, best practices, and additional procedures that can eliminate lapses in the future.

Fifth and importantly, transparency is essential to the integrity of the judicial branch in the public's trust in the judiciary. That is one reason why the Federal courts have public proceedings, even during this COVID era, and why we issue written opinions. It is also why the Committee on Codes of Conduct publishes its advisory opinions.

One of the purposes of the Committee of Codes of Conduct is to help judges look through ethical issues ahead of time, so that they don't make mistakes. The Committee provides ethics training and advice to Federal judges throughout the country. For example, at the request of my chief judge, I have personally provided training to the circuit judges in my circuit just this month on conflict issues. We also provide confidential guidance to judges and publish advisory opinions to inform both judges and the public.

In addition to training improvements, the Judicial Conference and the Committee on Codes of Conduct and the circuits are working on technological improvements to help better manage conflicts.

Judges already use conflict screening software, both the individual circuits and the Committee on Codes of Conduct are collecting best practices for using the conflict-checking software. Our staff are looking for possible additional improvements. The Eighth Circuit has helped spearhead this effort.

Recent media reporting on financial interest conflicts has highlighted gaps that we can address through training and technological improvements. While the number cases with reported lapses is small compared to the total number of cases that we handle, we must strive to achieve full compliance.

As I often tell my law clerks, each case is important and deserves our utmost attention. For litigants, the case may be the most important thing in their life. In fact, it may even be a matter of life and death. Therefore, it is essential that litigants believe the judges who hear their cases will be impartial. The judiciary's goal is full compliance with ethics and reporting requirements. The Committee and I will work tirelessly to meet this goal. You have my word.

Thank you again for the opportunity to appear before you today. Thank you.

[The statement of Judge Elrod follows:]

**Written Testimony of
The Honorable Jennifer Walker Elrod
United States Court of Appeals for the Fifth Circuit
Chair, Committee on Codes of Conduct
Of the Judicial Conference of the United States**

**appearing on behalf of the
Judicial Conference of the United States**

**before the United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet**

**Hearing on:
“Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”**

October 26, 2021

Written Testimony of The Honorable Jennifer Walker Elrod
on behalf of the
Judicial Conference of the United States

before the House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on:
“Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”

October 26, 2021

Introduction

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, good afternoon. I am Judge Jennifer Walker Elrod, a United States Circuit Judge for the Fifth Circuit. I also serve as the chair of the Committee on Codes of Conduct of the Judicial Conference of the United States.

The Codes of Conduct Committee of the Judicial Conference of the United States has the responsibility to provide advice, training, and other information on the application of the Code of Conduct for United States Judges (Code of Conduct) and other judicial branch codes of conduct and Titles III and VI of the Ethics Reform Act of 1989, as amended; to implement statutory provisions relating to deferral of capital gains tax on certain ethics-based divestitures of property by judicial officers; and to recommend policies concerning matters of judicial ethics.

I appreciate the invitation to appear today to discuss Judicial Ethics and Transparency. These two topics – identified as the subject of the hearing – are fundamental to an independent judiciary and the public’s trust in the judiciary. The Third Branch works diligently to assure high standards of conduct and integrity for judges and staff, in order to guarantee each case or controversy a fair and impartial forum.

Ethical conduct is an essential element of the federal Judiciary. The framework of judicial ethics includes statutes – disqualification statutes, ethics legislation such as the Ethics in Government Act and the Ethics Reform Act – and related case law; the Code of Conduct Canons, and associated commentary; and the ethics regulations adopted by the Judicial Conference, including related policies and procedures. Supporting this framework is the Codes of Conduct Committee, which can respond to judges seeking ethics advice. Such advice may be informal, a formal private confidential letter of advice, or public advice provided through nearly one hundred Advisory Opinions available to the public at the Judiciary’s website, www.uscourts.gov.

I am here on behalf of the Judicial Conference to highlight the relevant statutes, Code of Conduct provisions, and policies adopted by the Judicial Conference related to recusal and financial disclosure. I will discuss their implementation and application and summarize the Judiciary’s response to the issues identified in recent media reports.

Recusal Standards for Federal Judges

Statutory provisions – The primary federal statutes relating to conflicts of interest or recusal, more properly referred to as disqualification, are 28 U.S.C. §144 and 28 U.S.C. § 455. These statutes articulate a federal judge’s statutory recusal obligations and together address concerns of both actual bias and the appearance of bias. Section 144 permits a party to file a sufficient affidavit to attempt to establish personal bias or prejudice of a district judge. Section 455 is broader, addressing both the appearance of impartiality and other categories for disqualification. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting sections 455 and 144, Canon 3C of the Code of Conduct closely

tracks the language of section 455, and the Committee is authorized to provide advice regarding the application of the Code.

Code of Conduct provisions – Canon 3C provides that a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. In addition, the Code of Conduct requires a judge to disqualify himself or herself including instances, paraphrased here, in which:

- 1) the judge has a personal bias or prejudice concerning a party or has personal knowledge of disputed facts in the case;
- 2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter;
- 3) the judge, judge's spouse, or minor child has any financial interest in the subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding;
- 4) the judge, judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or
- 5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.

Of particular interest regarding recusal based on financial interest is the requirement for disqualification “[when] the judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest...in a party to the proceeding....” Canon 3C(1)(c). A “proceeding” includes pretrial as well as other

stages of litigation. Canon 3C(3)(d). The Code of Conduct defines “financial interest” as “ownership of a legal or equitable interest, however small,” subject to certain exceptions such as “ownership in a mutual or common investment fund.” Canon 3C(3)(c).

All judges have a duty under the Code of Conduct to keep informed about their personal and fiduciary financial interests and “make a reasonable effort” to keep informed of the financial interests of the judge’s spouse or minor child. See Canon 3C(2). Because of this duty, judges may not rely on a blind trust, or a “managed account” controlled by a financial advisor, to avoid recusal obligations. The Committee on Codes of Conduct has consistently advised that the use of a blind trust would be incompatible with a judge's duty to "keep informed" about financial interests under Canon 3C(2).

The Committee on Codes of Conduct has reminded judges investing in managed accounts to be mindful of both their recusal and their financial disclosure obligations. Under the Judicial Conference policy on electronic conflicts screening, a judge has a continuing obligation to update the judge's list of financial interests that would require recusal, which would include securities held in managed accounts. Similarly, because judges investing in managed accounts own the underlying securities, the scope of their financial disclosure obligations may change as their managed account portfolio develops.

Investments in a mutual fund will normally avoid triggering recusal concerns with respect to the securities that the fund holds. The Committee on Codes of Conduct has advised that investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds and has also advised that a judge who invests in a mutual fund has no duty to affirmatively monitor the underlying investments of the fund for recusal purposes.

Although the Code of Conduct does not define “mutual or common investment fund,” the Codes of Conduct Committee has explained that determining whether a fund qualifies involves several related considerations, including: (1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund. The Committee has concluded that most mutual funds that are registered with the Securities and Exchange Commission and sold to the public as mutual funds will likely meet the criteria above.

Determining whether a particular sector fund, industry fund, or exchange traded fund qualifies as a “mutual or common investment fund” under the Code of Conduct involves the same criteria applied to more conventional mutual funds. Such funds normally should be treated as mutual or common investment funds under the Code of Conduct and are subject to the same recusal analysis as other funds.

Ideally, the employment of careful conflict checks by the individual judge and the judge's court prevent a judge from participating at all in a case in which the judge has a disqualifying interest. Canon 3C(4) of the Code of Conduct recognizes, however, that circumstances may arise where a disqualifying interest does not surface until after the judge has been assigned a case. In such instances, the Code of Conduct addresses the propriety of the judge continuing to sit on such a case. For example, a situation may arise where a judge, or the judge's spouse or child, inherits stock while a case is pending involving that company's stock. Another example might be where a judge or judge's spouse owns stock in a corporation that intervenes as a party or that is found to be a corporate parent of a party. The existence of a disqualifying interest may be

learned directly by the judge or may come to light in counsel's motion for recusal. The issue also may arise after the judge has taken minimal action, after years of discovery orders, or after trial but before decision.

The Codes of Conduct Committee has advised that Canon 3C(4) applies to cases in which a judge has already expended a substantial amount of time, cases in which a judge has expended no time, and those in between. Accordingly, if a judge learns of a disqualifying financial interest in a party before expending judicial time on the case, the judge may avoid disqualification by divesting himself or herself of the interest.

The Code of Conduct addresses whether a judge can “divest” a financial interest that is causing a conflict. Although disposing of a disqualifying interest may allow a judge to continue to sit on a case, Canon 3C(4) limits this option to the disposal of financial interests that will not be substantially affected by the outcome of the litigation. If the financial interest could be substantially affected, even after divestment, the judge could not continue to hear the case under Canon 3C(4).

Finally, the Committee on Codes of Conduct has advised that should a judge decide to continue to participate in a matter following disposal of a disqualifying interest, the facts giving rise to the disqualification, the judge's disposal of the disqualifying interest, and the public interest in continued participation of the judge should generally be disclosed to the parties and on the record in the case.

Occasionally, a judge may not discover a financial conflict until after final judgment has been entered. In this case, the Committee on Codes of Conduct has advised that a judge should disclose to the parties the facts bearing on disqualification as soon as those facts are learned, even though that may occur after entry of the decision. The parties may then determine what

relief they may seek, and a court (without the disqualified judge) will decide the legal consequence, if any, arising from the participation of the disqualified judge in the entered decision.

Judges are required to recuse in any proceeding in which they know they hold a financial interest in a party, whether the interest is held individually or as a fiduciary. A judge who serves as a trustee is deemed to have a financial interest in all assets held by the trust and, therefore, is required to recuse in cases where a corporation whose securities are held by the trust is a party.

Judicial Conference policies – The recusal statutes and Code of Conduct are central to the broader duty of the federal Judiciary to ensure impartiality and promote transparency. Other components are the system of random assignment of cases and the policies adopted by the Judicial Conference of the United States that provide additional obligations and safeguards.

In 2006, the Judicial Conference approved a new policy intended to assist judges to comply with their ethical obligations concerning recusal and financial conflicts. In particular, the Conference required federal courts to use conflict-checking computer software to identify cases in which judges may have a financial conflict of interest and should disqualify themselves.

In recommending the mandatory conflict-checking policy, the Conference's Committee on Codes of Conduct reported that: "A fair reading of the judiciary's record shows that federal judges take their recusal obligations very seriously, and this commitment will be underscored by adoption of a mandatory automated conflict screening policy." The Committee further stated, "While automated screening is not foolproof, it is an efficient and effective supplement to a judicial officer's individualized review."

The Judicial Conference required the Administrative Office of the United States Courts (AO), in cooperation with the courts, to continue developing, refining, and deploying the

necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system and instructed the AO and courts to take additional action.

First, the policy directed the AO to examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and to provide information, training, and assistance to facilitate implementation of and participation in the screening.

Second, the policy required all judges to “develop a list identifying financial conflicts for use in conflict screening, [and to] review and update the list at regular intervals....” The AO has developed a checklist that judges may use when preparing or updating the list. Up-to-date recusal lists are the most effective tool for conflict screening.

Third, the policy provides that each judge “shall employ the list personally or with the assistance of court staff to participate in automated conflict screening.” Importantly, the policy notes that use of automated conflicted screening is in addition to each judge’s “personal review of cases for conflicts.”

Fourth, courts are required to use “automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system....”

Fifth, the clerk’s office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information and other relevant information). The clerk’s office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council.

Sixth, each clerk's office shall provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

The policy is administered and directed by the Circuit judicial councils, which also have the responsibility to "make all necessary and appropriate orders to implement the... mandatory conflict screening policy within the circuit."

Following adoption by the Judicial Conference in 2006, each chief judge was required to report to the respective circuit council on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. In turn, each circuit council was required to report to the Judicial Conference their preliminary plan for implementation of the mandatory financial conflict screening program within their circuit. In 2007, the Committee on Codes of Conduct assisted the circuit judicial councils in reviewing each of those individual circuit implementation plans to ensure they complied with the Judicial Conference policy. The policy also provides that the Judicial Conference may require further reports by the circuit judicial councils as necessary.

The Judicial Conference also implemented a policy in 2007 requiring judges to disclose their attendance at privately funded seminars. The policy and the seminar disclosures are available to the public on court websites.

Training

The development and delivery of ethics education for judges and judiciary employees – including law clerks, staff attorneys, clerks, and judicial assistants – is an important function of the Committee on Codes of Conduct. The Committee offers explanatory booklets for judges, law clerks, and employees. In participation with the Federal Judicial Center, we have

significantly expanded training opportunities at judicial meetings and on-line. Judges receive ethics education in new judge orientations meetings, as well as continuing education programs. Committee members are actively engaged in ethics presentations at national and regional meetings of judges. Training presentations encourage discussions among judges on ethics scenarios drawn from both confidential inquiries and hypothetical ethics problems. Committee members also participate in ethics education programs that include both judges and attorneys. Lawyers are often very interested in knowing about judicial ethics, such as recusal procedures and what a judge is permitted to do within the bar and the community. We have highlighted ethics issues in joint bench/bar meetings.

On-line training includes a substantial number of publications, podcasts, videos, and other materials on a broad range of ethics and Code of Conduct issues. The Committee on Codes of Conduct prepares and distributes to all judges an annual ethics quiz on current ethics topics. These forms of training supplement additional ethics training for judges that is provided at various meetings that judges are required to attend. We regard ethics as a very serious matter and look upon these training opportunities as an excellent way of working with our judicial colleagues on ethics issues. Our extensive training effort underscores the value and the importance the federal Judiciary places on ethical conduct.

Financial Disclosure Requirements

In addition to recusal statutes, the federal Judiciary is covered under additional ethics legislation and policies that require filing annual financial disclosure reports. The Judicial Conference's Committee on Financial Disclosure, a separate and distinct committee from the Codes of Conduct Committee, supervises the filing of financial disclosure reports by judicial

officers and employees. Judicial officers are required to file financial disclosure reports by Title I of the Ethics in Government Act of 1978, Pub. L. No. 95-521, amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 5 U.S.C. app. §§ 101-111 (the Act). The Act enumerates the types of information required and prescribes the general format and procedures for the reports.

The high level of compliance by judges with their financial disclosure duties and the reports we release are essential elements of public confidence in the federal Judiciary. In calendar year 2020, the Judiciary released over 13,000 reports. These reports provide transparency to the public and to litigants who may check on reportable financial and other interests that might require disqualification of a judge from a particular case.

We acknowledge that in some cases the release of reports takes too long. Efforts have been made and continue to be pursued to be more responsive to the public. Although slowly and cautiously, we are responsive to public input and have moved from an exclusively paper system to one that provides reports on thumb drives free of charge (if the requestor prefers this to paper) or electronically provides reports in PDF format as interest groups have desired.

The federal Judiciary has been engaged in continuing efforts to develop and implement a new electronic financial disclosure system, which would include both the features required for filing, reviewing, and reporting and the features needed for redacting and releasing financial disclosure reports to the public. Automating the processing of financial disclosure reports for release may improve the timeliness of response to requests to view financial disclosure reports.

It is important to note however, the financial disclosure system is separate from the recusal requirements. The disclosure requirements and exemptions from disclosure contained in the Ethics in Government Act neither define nor limit the standards imposed by the Code of

Conduct for United States Judges and other rules of the Judicial Conference or the statutory provisions for disqualification or recusal.

Judiciary's response to the issues identified in recent media reports

Recent media reporting on financial interest conflicts have highlighted gaps that we can address through education and technological improvements. While the number of cases with reported lapses is very small compared to the total number of cases that the federal courts handle, we must strive to achieve full compliance.

Over the past few months, the Director of the AO, Judge Roslynn R. Mauskopf, has communicated with judges and the courts to:

- ✓ remind judges of the published ethics guidance and resources available to judges and reiterating the importance of complying with the existing policy and requirements concerning financial interests and conflict screening;
- ✓ request judges to review the guidance and ensure compliance
- ✓ remind each judge of the duty under the Code of Conduct to keep informed about the judge's personal and fiduciary financial interests;
- ✓ remind each judge to develop a list of financial conflicts for use in conflict screening;
- ✓ remind judges to use the list and participate in automated conflict screening;
- ✓ remind courts to use the automated conflict screening to notify judicial officers of financial conflicts;
- ✓ request chief judges help ensure appropriate action is taken when a conflict has been identified in a closed case;
- ✓ remind chief judges that the Code of Conduct and the Judicial Conduct and Disability Act rules provide authority to consider actions that may be appropriate, based on the relevant facts and circumstances;
- ✓ encourage judges to consider potential improvements to the conflict screening process, and to contact the AO with any suggestions.

Director Mauskopf has requested relevant Judicial Conference committees, including my own, to consider recommendations at their next meetings that seek to clarify or improve the conflict screening process. I am hopeful the Judiciary will consider improved “best practices” for courts on how to use the conflict screening software and ensure conflicts screening software is used in each circuit. The AO will also be offering additional training for judges and court staff on conflict screening.

Conclusion

The fair and impartial adjudication of cases, in a transparent environment, is a fundamental duty of the federal Judiciary. An independent federal Judiciary is essential to the rule of law in our nation. The statutes and case law on recusal, the Code of Conduct provisions, as well as the Judiciary policies, practices, and enforcement mechanisms I have outlined in this testimony are the tools and resources available to the federal Judiciary and to the public to ensure the functioning of an ethical and independent judicial branch and to enhance the public’s trust in the Third Branch. As Chair of the Codes of Conduct Committee, and on behalf of the Judicial Conference of the United States, I assure you the federal Judiciary takes these obligations seriously. We have taken and will continue to take action to ensure ethical obligations, including recusal and reporting requirements, are met.

Mr. JOHNSON of Georgia. Thank you, judge. We will now turn to the gentleman from California for five minutes Mr. Issa.

Mr. ISSA. Thank you, Mr. Chair.

Your Honor, one of the challenges that I think we face here is we hear you; we know that your intentions are good. I will use Texas for an example. We had a judge in east Texas who had very obvious conflicts of interest as he handled more patent cases with family interest and family financial benefit for many years, and there was no action taken by the court. We now have a judge in West Texas who has made a cottage industry out of a massive amount of cases. We are still waiting to see his financial disclosures even filed, or at least made available.

Can you tell me how we can get compliance with existing law so that we can have better confidence? When I say "compliance," I mean uniform and complete compliance, because we know that you do well 80 percent of the time, but of course the interest is in the 20 percent that we don't see.

Judge ELROD. Well, you are talking about compliance, two different areas. One is in financial disclosures, which is one bucket, and that is the financial disclosures process is under the jurisdiction of the Committee of Financial Disclosures. Then you are talking about recusal checks, and that is under the Committee that I Chair now. It is very important that judges be trained fully on what their recusal obligations are.

We learned recently, for example, that judges had some confusion in this regard. The judges thought separately managed accounts, some judges did—not many, but if you have any, that is going to cause a problem—thought separately managed accounts was the same as mutual funds. Well, mutual funds have a safe harbor under our ethics guidance. Separately managed accounts are considered to be controlled funds, which did not have a safe harbor.

Mr. ISSA. Excuse me. Your Honor, I appreciate that.

I was thinking, for example, if you do not see—if you are not able to review financial disclosures and they are not being produced in a timely fashion, then how do you provide guidance for those who likely should recuse? In other words, today, neither you, nor the financial disclosure separate organization, have a timely requirement to consider recusals, and the necessary information to, in fact, make a case-by-case decision, meaning you are not in a position to tell somebody, Hey, you did have that separately managed item, and by the way you should have recused yourself because one, the compliance is limited, but—in the reporting. Then secondly, that not part of, if you will, a case review that you or some other part of the third house does.

Judge ELROD. Well, with regard to ethics conflicts checking, each judge has to keep a list of his or her recusal interests. That is not just financial interest, but other interests as well. Then those have to be shared with the required conflict screening of people in their clerk's office, so that those can be done electronically. So, there is a requirement that those lists can maintain.

To the extent I hear you. I think that you have concerns about the financial disclosure reports, which, again, is a completely different system—

Mr. ISSA. Your Honor, not to interrupt you, but the time is very limited. Of course, a lot of what we are talking about is financial disclosure, what we are really talking about, since the court has not created an ability to second-guess the judges, and to have the information, and to make sure the information is being delivered in a timely fashion, you know, it is one of those, if you will not act, how can we not feel it necessary to create a series of laws that cause you to react in a way that is more than just hoping that a judge, who is perhaps confused, perhaps is misinformed, simply doesn't do that.

I gave you the example first of East Texas, now the West Texas—and I deliberately didn't mention names—but these judges have become notorious for basically where patent cases go. If they have financial conflicts or prejudices, the fact is, they have made no effort to recuse themselves, not once.

Judge ELROD. Well, Mr. Issa, it would be inappropriate for me to comment on a particular circumstance regarding any particular judges. I would say that there is a system for disciplining judges that don't comply with our conflicts-checking regulations.

Mr. ISSA. If you would provide to us a list of any judges that have been disciplined for the record, I would appreciate it.

My time has expired. I don't want to be unfair to the Chair. If you would provide us a list of any discipline so that we can review that and see whether it proportional.

Judge ELROD. I can't con—thank you.

Mr. JOHNSON of Georgia. When *The Journal* reporters asked the judges, they profiled why they failed to recuse themselves from cases on which they had a clear financial conflict of interest, several of them blamed the judiciary's conflict-checking software. That simply cannot be a valid excuse. Aren't judges responsible for knowing what stock they and their spouses hold and taking the necessary steps to avoid hearing cases that they must recuse themselves from?

Judge ELROD. Chair Johnson, judges are responsible for maintaining a list of all their financial holdings, and being knowledgeable about their financial holdings, as well as the holdings of their spouse and minor children. So, that is the judge's responsibility at all times.

Mr. JOHNSON of Georgia. The bottom line is this: If we cannot assume that judges are doing something as basic as checking whether they own stock in a party, in a case before them, Congress may need to act. For example, should Congress require that judges affirmatively State that they have checked whether they have to recuse themselves from a case and then impose penalties for non-compliance?

Judge ELROD. Mr. Chair, Congress—I know that—I can't speak of what Congress is doing, but I can tell you what the courts are doing. We are making sure that the judges know they have these obligations. We are making sure that we don't have gaps in our software, and that these checks are performed at the very instance of a case coming to be, and then are repeated, should the parties change, or some person's financial circumstances change. So, we are making sure.

As I mentioned before, judges who do not follow these policies, which are policies the Judicial Conference that all judges check and participate in this, can face discipline from the Judicial Council and the chief judge in their circuit.

Mr. JOHNSON of Georgia. So, can you commit to providing the Committee, pursuant to Congressman Issa's request, a list of actions that the conference has taken with respect to holding judges accountable for failing to recuse? For failing to report?

Judge ELROD. I cannot commit to providing that list, but I certainly will make an inquiry about that. The problem with that is that judicial conduct matters are confidential while they are ongoing. Sometimes they can give a public reprimand or something upon the conclusion of them. If a proceeding is ongoing, that is generally considered a confidential proceeding. We can follow up with the—

Mr. JOHNSON of Georgia. Just simple numbers.

Judge ELROD. I will follow up with the conference on what could be provided.

Mr. JOHNSON of Georgia. Thank you.

A handful of proactive judges have taken the initiative to post their own recusal lists, or versions of that information online in their local courthouse websites. I applaud them on taking those steps and showing that they take their responsibility seriously. Shouldn't every judge simply be required to post recusal lists online?

Judge ELROD. Well, there is some problems with the requirement to post recusal lists online. First, recusals are not only about finances. One reason for recusals might be personal relationships, either—or even animosity between parties, and the judge, or the judge's family. Disclosing such relationships could harm the privacy of third parties.

Also, and very importantly, publishing these types of lists could lead to forum shopping. We are all aware of situations where people hire particular lawyers because they think someone's going to be recused, or sue a particular party, or bring them in. So, there are concerns about forum shopping and privacy interest of third parties that would be [inaudible] by those types of lists.

Mr. JOHNSON of Georgia. Thank you, Judge.

We will, now turn to the gentlelady from North Carolina, Ms. Ross, for five minutes of questions.

Ms. ROSS. Thank you very much, Mr. Chair. Thank you, Judge, for being with you us and for taking on quite a heavy load dealing with judicial ethics. So, we appreciate both your time with us, and your time away from the bench dealing with your fellow judges.

We understand that the judiciary has not made judges' 2019 annual disclosures publicly available in response to a request for all disclosures. Why does it take so long for the information to be available? Could this lag prejudice a litigant who has grounds to request recusal due to a conflict of interest?

Judge ELROD. Thank you, Congresswoman Ross.

First, I just want to reiterate that the financial disclosure process is under the jurisdiction of the Committee of Financial Disclosures and is in a totally separate system than the recusal system. One is a transparency measure, and one is a recusal judicial ethics

measure. I did want to say that it is my understanding that the reason these reports have taken a long time, and I agree with you that they have taken a long time, is that they undertake a lot of these preparations of these disclosures when they get so many thousands of requests for disclosures, and they do a lot of preparation by hand.

However, it is my understanding that the judiciary in that group, that committee, is developing and implementing a new electronic financial disclosure system, which will include features for filing and features needed for releasing reports to the public on a more timely basis. Obviously, technology can help the judiciary in this area. We can do so many more things using technology than by hand painstakingly going through these reports.

Obviously, the interest in improving the timeliness, the response to these requests to review reports, while also taking into account the serious security concerns with the increasing availability of personal and sensitive information available about judges online. I do believe that the judiciary is in the process of automating this process with the goal of improving the time limits.

Thank you. I can't hear you.

Ms. ROSS. I am so sorry.

To my second question, could the lag prejudice a litigant who has grounds to request recusal due to a conflict of interest?

Judge ELROD. I am not familiar with the process of using financial disclosures for recusals in cases. I would hope that the judge, if they had a financial interest, would recuse. If they didn't, as I said, they can be subject to discipline. I would hope that we would make sure that we are complying with all our obligations. In general, I believe judges are conscientious and are trying to get these things out. Also, I believe that judges care about not sitting on cases that they are not supposed to sit on.

Ms. ROSS. Okay.

Judge ELROD. So, I think that they would—I believe the judges are conscientiously trying to do this, but, of course, there have been some gaps that have been identified.

Ms. ROSS. Okay.

Judges are currently notified when requests for copies of their financial disclosures are made, including the identity of the requesting party. Could this have a chilling effect on whether a litigant makes such a request? Without this information, how could a litigant ensure that the judge hearing the case does not have a conflict of interest?

Judge ELROD. Again, I don't deal with personal financial disclosures. I haven't studied that issue. I would hope not. Judges are, as you pointed out earlier, we have judicial independence, and we should recognize that some people will want to know information about us. I used to run for office in Texas, and people want to know information about judges. People want to know information about Federal judges, information that doesn't damage our security, or our well-being, or those of others, or impact third-party security interests or privacy interests. People are going to want to know, and I don't think the judges should hold that against litigants.

Ms. ROSS. Okay.

Thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you.

I now turn to the gentleman from New York, the Chair of the Full Committee, Mr. Nadler, for five minutes.

Chair NADLER. Thank you, Mr. Chair.

Judge Elrod, thank you for testifying today. I would like to ask you a similar question to one I posed to the first panel. It seems that many of the difficulties with financial disclosure and recusals could be avoided if judges and their close family members were restricted to holding only mutual or index funds. Would that solve this problem, not only eliminating the appearance of impropriety, but also making things easier on individual judges who would no longer have to keep track of all their investments before they take on a given case?

Judge ELROD. Well, Chair Nadler, I agree with you that holding mutual funds does simplify the process for judges. As we indicate in our guidance to judges, mutual funds can ordinarily be a safe harbor for judges. They simplify the process for judges. So, do I think that it would solve every problem regarding recusal? Certainly not, because there are broad and mandatory financial recusal provisions that deal not only with stock holdings, but with any financial interest. Then also, all the other types of reasons the judges have to recuse that don't involve finance at all.

It is true that although a judge is permitted to own stock, the recusal statute and the code also discourage judges from having financial interest stock or otherwise that might lead to frequent recusals. The codes of conduct states specifically that as soon as the judge can do so, without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification. So, judges need to be mindful of all these decisions when they are considering what should be in their portfolios or considering their spouse or—

Chair NADLER. I don't understand your answer. If we required the judges have everything in a mutual or index fund, why wouldn't this solve all the problems we are talking about?

Judge ELROD. It would help with the financial recusal issues, some of them, except for any other type of financial interests that wouldn't be a stock-based mutual interest. You could hold real property, other types of interests and things. Not every—

Chair NADLER. As far as stocks are concerned, would it be a solution?

Judge ELROD. Well, I keep my funds in a mutual fund, because I find that it is much more—it is easier to handle as a judge.

Chair NADLER. I have been surprised by some of the guidance provided to judges about how to comply with the Ethics in Government Act is not made publicly available. For example, neither the public nor Congress can see copies of the instructions that judges are given for filling out their financial disclosure forms. This is in contrast to Congress and the Executive Branch, both of which make their instructions publicly available.

Do you know why all judiciary guidance documents for financial disclosures are not made available to the public? Is this something that the Judicial Conference is planning to revisit as part of its response to *The Wall Street Journal* investigation?

Judge ELROD. Congressman Nadler, I do not know the answer to that question. I don't work on financial disclosures. I am not familiar with the guidance documents and the publicity. I know financial disclosures as a judge who must complete them annually.

Chair NADLER. Okay. The common response from the judges who are asked by *The Journal* about their failures to recuse, was they did not know they were required to recuse under the circumstances, either because the investments in question were held by a spouse or managed by a money manager. Those circumstances fall squarely within the recusal statute. This seems like a failure in part of training. How does a Judicial Conference plan to redress this going forward?

Judge ELROD. Congressman Nadler, as I indicated earlier, we have already begun training specifically on these issues. I conducted such training for my circuit judges already this month. We are going to have continued training through the end of the year and beyond, but we are going to be having a significant amount of training on this very issue. We don't want any judge to be ignorant of the rules regarding financial holdings. It is very important, because judges are ultimately responsible for their financial holdings.

Chair NADLER. Thank you very much.

I yield back.

Mr. JOHNSON of Georgia. Thank you.

The gentlelady from North Carolina is, again, recognized for five minutes.

Ms. ROSS. Well, thank you for your generosity, Mr. Chair.

Judge Elrod, I would like to read from a statement from Ms. Sherry Cheshire whose husband, Jim, died of Mesothelioma and whose wrongful death suit was effectively ended by a judge who owned at least \$15,000 worth of shares in each of the two defendants in that case. The judge's financial conflicts were disclosed by *The Wall Street Journal*.

Ms. Cheshire wrote to the Chair, and I quote,

To learn this now, 3 years after our case ended is like reopening a painful, painful wound. I always knew that no lawsuit would ever bring Jim back. But I did feel that getting justice would, in some way, honor Jim and his service to our country of which he was always so proud. To now learn that we were never going to get justice because the judge had a financial interest in two of the companies responsible for Jim's death is a shock and a devastating disappointment. I thank you for the opportunity to be heard. And I know Jim thanks you, too, for hearing him.

Ms. Cheshire's statement shows that the effect of a judge's failure to recuse isn't abstract or hypothetical. It is real. The appearance of unfairness causes real pain to the parties who come to our courts seeking justice. What would you say to Ms. Cheshire in response to her written statement?

Judge ELROD. Congresswoman Ross, I cannot respond about any particular situation regarding any judge and their recusal obligations. So, I cannot respond in particular.

As I stated in my opening statement, it is crucial for the integrity of the judiciary that we make sure that we comply with our ethical obligations, both to avoid impropriety, but also, to avoid the appearance of impropriety. Litigants need to know that they have judges will fairly, fairly hear their cases.

Chair NADLER. Would the gentlelady yields?

Ms. ROSS. I yield.

Chair NADLER. Thank you.

I just want to ask you, in the kind of a case that was just referred to, where it is demonstrated—assume the facts, it is demonstrated that someone was not treated fairly because of a conflict of interest by the judge. What can be done to right that?

Judge ELROD. Well, the clerk's offices have written to—and again, I am not speaking about any particular case, but I know that the judges have instructed the clerk's office to notify the litigants if they participated. Then the litigants may have opportunities to pursue other avenues about the cases. It depends on the individual cases. I could not comment on any pending case or any particular outcome, but they could pursue—litigants, in general, could pursue case—pursue things to open their case, or to pursue different avenues regarding in the court system for their case.

Also, as again I have mentioned earlier, the Judicial Conduct & Disability Act of 1980 provides ways that judges in the judicial council, each circuit, can deal with judges who don't obey the rules. Again, I am not talking about any particular real-world situation.

Chair NADLER. I thank the gentlelady for yielding. I yield back to you.

Ms. ROSS. Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you.

I have one question about the conflict-checking software that I understand is built into the case management electronic case files, or CM/ECF system that the courts use for all court business. That system has gone largely unchanged for almost two decades. It has been criticized by a range of experts as unfit for the business of the United States courts. It has proven itself vulnerable to external security risks. Most modern conflict-checking software catches even misspellings and close variations on names, but CM/ECF cannot.

I fear that CM/ECF is really not up to the task of screening for financial conflicts. It is supposed to be a failsafe, a resource of last resort when judges' individual personnel conflict checks fail. In response to *The Journal's* reporting of exposure of the widespread failures of that system to operate as intended, does the Judicial Conference or the administrative office have any plans to update CM/ECF so that it is better suited to fulfilling its critical role? If so, can you describe what those plans entail and when the public can expect to see those plans implemented? Judge Elrod?

Judge ELROD. Chair Johnson, we have a NextGen CM/ECF that also works with our conflict-checking software. Our conflict-checking software can check misspellings. If is set up for that, it can check missed capitalizations, spaces between words. Our conflicts checking software can work at a very high level of checking for those things, if it is set for those levels. Now, there is a tension between you don't want to overset the automated software that might over-recuse based upon similar names, parties, and things like that. At the same time, you want to make sure you catch them all. So, one of the things that we are actually working on right now is determining what are the best practices for what the settings should be, and then communicating those throughout the districts in the United States. I think that is a very important project that can be done fairly swiftly.

Mr. JOHNSON of Georgia. So, the judges who blamed their failure to recuse on the software, what is your explanation for that?

Judge ELROD. Chairman Johnson, I am not here to speak about any particular judge's situation or his or her explanation. I am here to talk about what I have learned about improvements we can make in the judiciary. One improvement we can make is that we make sure that every check is done before a case is assigned, and that the software is set so that it does capture misspellings, missed words, capitalization issues, and things like that. So, those are things that can be improved and can be improved quickly.

Mr. JOHNSON of Georgia. Thank you, Judge Elrod. We appreciate your testimony today and for your patience throughout this hearing.

With that, our hearing is adjourned. Thank you, once again, to all the Witnesses for appearing today. Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses, or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 5:52 p.m., the Subcommittee was adjourned.]

APPENDIX



PRESIDENT
RAKIM BROOKS

CHAIR
PAULETTE MEYER

October 26, 2021

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary

Dear Chairman Nadler,

On behalf of the Alliance for Justice (AFJ), a national association representing over 130 public interest and civil rights organizations, I write to thank you for holding the hearing, "*Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*." We are pleased that you are tackling, among other critical issues, the pattern of judicial ethical violations outlined this month in the *Wall Street Journal* (WSJ). It was alarming to discover that over 100 federal judges failed to disqualify themselves from cases in which they have a financial interest, though they are required to do so. Our organization knows intimately that Americans are losing confidence in the courts because they have been stacked in favor of the wealthy and the powerful. It is crucial that we correct these, and other practices, that undermine our justice system.

As you know, federal judges are bound by a strict set of ethical rules. These rules, including [28 U.S.C. § 455](#)—passed in the wake of the Watergate crisis—and [Canon 3](#) of the Code of Conduct, require judges to recuse themselves when they, or a close family member, have a financial interest in the proceeding "however small." Notably, these rules also prohibit the appearance of conflict and require judges to recuse themselves even if their role in the proceeding is minor. Judges are also required to file financial disclosure statements so that the public can identify financial interests that should have led to recusal.

That is why it is so outrageous that, as reported by the Wall Street Journal, between 2010 and 2018, [131](#) federal lower court judges participating in 685 lawsuits failed to follow these laws. In the suits in question, the judges and close family members held shares in companies that were plaintiffs or defendants in cases before their court. In two-thirds of those suits, the judges ultimately ruled in favor of the party in which they held a financial interest. In 61 of these suits, the judges or their families traded the stock of the plaintiff or defendant's company during the case.

The nondisclosures highlight a compliance issue, lack of reliable processes for conflicts, and a persistent lack of transparency that must be addressed to preserve the basic tenets of justice and fairness. Federal judges often apply laws, make decisions, and in some cases take away someone's liberty based on what may seem like minor violations of laws or rules. Yet, here, for rules that apply to them, too few judges have the same vigilance they expect of others. We have an ineffective system of transparency and accountability rife with delay and confusion for the public and courts alike. As evidenced by the situation in the WSJ report, the financial disclosures judges are required to complete annually are not regularly updated and requesting and obtaining them can be time-consuming.

What is worse, it does not appear to be the case that these judges were simply unaware of the ethical rules. Many

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 Page 2

contacted by the WSJ did not claim ignorance, but blamed the conflict screening software, clerks, or said that because a trade resulted in a loss, it could not have been intentional.

Since at least the “[Powell memo](#),”—in which future Justice Lewis Powell encouraged the business community to weaponize the courts in order to protect their own economic interests—conservatives have been focused on packing the federal courts. Their explicit goal has been to erode our democracy and degrade protections for persons of color, women, LGBTQ+ Americans, workers, consumers, and clean air and water. Indeed, nearly 30 years ago, in 1993, AFJ published [Justice for Sale](#), a comprehensive report detailing the sophisticated campaign to reshape the federal judiciary, elevating corporate profits over social justice and individual rights. Litigants trying to hold large corporations accountable already have the scales of justice stacked against them. Judges who ignore ethics rules and rule in cases they hold a financial interest only further exacerbates the inability of workers and consumers to obtain justice.

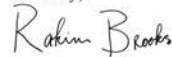
Significant reform is required if we are to restore Americans trust in the courts. Public confidence in the federal courts is at an all-time low. As of September 2021, just 40% of Americans approve of the job of the U.S. Supreme Court, according to a Gallup poll. The same poll indicated that just 54% of Americans have confidence in the federal judiciary overall, down from a high of 80% in the late 1990s. The decline in approval noted by the Gallup poll is true for Democrats, Independents, and Republicans alike.

Because federal judicial appointments are for life and the Judicial Conference rarely imposes penalties for misconduct, there must be a better system of checks to ensure judges are acting fairly and all parties receive a fair adjudication of their claims. Federal judges are the keepers of the promise of equal justice before law. They therefore have a legal, ethical, and moral obligation to ensure that anyone entering their courtroom can be confident that they will receive a fair and impartial hearing. That responsibility requires the highest standards of vigilance in avoiding even the appearance of a conflict of interest. Despite federal law and federal judicial policy, the system is not working to ensure that corporations do not receive an unfair advantage.

Finally, we hope this hearing will also address the fact that the judicial code of conduct does not apply to the Supreme Court. There are scores of examples of questionable conduct by Supreme Court justices over the years; and it is long past time for our nation’s highest Court to be subject to the same highest standards of conduct as lower court judges. As over 100 law professors wrote in a 2011 [letter](#): “[a]dherence to mandatory ethical rules by justices, and requiring transparent, reviewable recusal decisions that do not turn solely on the silent opinion of the challenged justice will reinforce the integrity and legitimacy of the Supreme Court.”

Thank you for holding this hearing to shed light on this threat to equal justice. This deeply entrenched pattern of violations should be thoroughly investigated. AFJ looks forward to working with you in the coming years to restore a court system deeply committed to equal justice under law.

Sincerely,



Rakim Brooks
 President, Alliance for Justice

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Free Law
Project



Providing Free Access
to Legal Materials

Statement for the Record of Michael Lissner
Executive Director, Free Law Project

26 October 2021

House Committee on the Judiciary

“Judicial Ethics and Transparency: The
Limits of Existing Statutes and Rules”

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee:

Thank you for the opportunity to submit testimony on the important topic of judicial ethics and transparency.

I am writing as the executive director of Free Law Project, a 501(c)(3) non-profit organization in Oakland, California, that uses software, data, and advocacy to make the U.S. legal system more equitable, efficient, and accountable.

My testimony is divided into two sections. In the first, I discuss some experiences Free Law Project has had gathering data from the judicial branch and placing it online for the benefit of the public. I go into some depth about our work building the database of financial disclosure information that *The Wall Street Journal* used in its recent series on judicial conflicts.

In the second section, I make concrete recommendations to this Subcommittee that would fix the immediate problem of financial conflicts and ethical lapses in the judiciary, and make the branch more transparent so that it is more widely trusted and understood by the public.

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Since our first days in 2010, Free Law Project has been focused on gathering legal information and placing it online for public access.

We host several archives of legal information, some of which are the largest of their kind. As an example, in 2014 we learned that federal circuit courts were only posting oral argument recordings on their websites for brief periods of time. We were told, and we observed, that recordings would be posted on court websites for a week or so, after which they would be removed as servers ran out of space.

To be frank, we found this appalling — in 2014, and still today, there is no good reason why recordings cannot be posted publicly and permanently. To address this, we began gathering oral argument audio from circuit court websites and posting it on our own. We still do this to this day, and we believe we now have the largest collection of oral argument recordings in the world.¹ The courts did an bad job; we fixed it.

A similar story unfolded in the creation of our financial disclosure database, which we officially launched a few weeks ago.² This database contains over 250,000 pages of judicial disclosure forms, covering over 1.5 million investment transactions by judges.³ It was this database that *The Wall Street Journal* used in its recent reporting,⁴ which, as the Subcommittee knows, demonstrated a groundbreaking revelation of ethical lapses in the judicial branch.

As with our database of oral arguments, we began the disclosure collection when we discovered that the reports were available, but that they were being systemati-

1 This collection can be accessed at <https://www.courtlistener.com/audio/>. At present, it has approximately 2.4 million minutes of oral argument recordings.

2 “Free Law Project Creates the First Online Database of Federal Judicial Financial Disclosures,” William Palin, 28 September 2021, <https://free.law/2021/09/28/announcing-federal-financial-disclosures/>.

3 This collection can be accessed at <https://www.courtlistener.com/financial-disclosures/>. Details of the information in the collection can be read at: <https://www.courtlistener.com/coverage/financial-disclosures/>.

4 See: “131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 28 Sept. 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421/>, “How the Journal Found Judges’ Violations of Law on Conflicts,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 28 Sept. 2021, <https://www.wsj.com/articles/how-the-journal-found-judges-violations-of-law-on-conflicts-11632833775/>, and “Federal Judges or Their Brokers Traded Stocks of Litigants During Cases,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 15 October 2021, <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192/>.

cally removed from public access. The availability is thanks to the Judicial Conference itself, which, in 2017, created a new policy that allowed the disclosures to be released on "electronic storage devices...at no cost to the requestor."⁵ This is laudable, but the systematic removal of these records is due to §105(d) of the Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1824, which states that after a "six-year period [financial disclosure reports] shall be destroyed."⁶

Upon discovering the temporary availability of these records, we requested them all.

In 2017, we officially requested all the disclosures that were legally available. Since then, the judiciary's Financial Disclosure Office has delivered these disclosures to us on USB thumb drives. To date, we have received about 400 gigabytes of disclosure information covering 2011 to 2018. Despite timely requests, we still have not received information from 2019, 2020, or 2021. This is transparency delayed. It frustrates the purpose of the Ethics in Government Act. What might the public — and this subcommittee — have learned if those records were available now?

Until recently, each of the disclosures on these thumb drives came as a single, long image representing the many pages of a disclosure placed end-to-end like an ancient scroll.⁷ This made critical information like a judge's stock ownership or details of their financial transaction throughout the year very hard to read, not to mention completely inaccessible to the visually impaired.

To make sense of this, we dedicated significant resources to developing an open-source tool to convert the "scroll" files to PDFs and extract the information those PDFs contained.⁸ All of this extracted information formed the basis our new financial disclosure database.

As we worked on gathering these disclosures and making their contents available, we began seeking a media collaborator that could help analyze, understand, and ex-

5 "Report of the Proceedings of the Judicial Conference of the United States," United States Courts, 14 March 2017, https://www.uscourts.gov/sites/default/files/2017-03_0.pdf#page=12.

6 "Ethics in Government Act of 1978," 26 Oct. 1978, <https://www.govinfo.gov/content/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-app-ethicsing.pdf#page=15>.

7 The longest of these "scrolls" has 266 pages of disclosures: https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/189/marvanne-trump-barrv-disclosure.2011_1.pdf.

8 "Disclosure Extractor," Free Law Project, accessed 22 Oct. 2021, <https://github.com/freelawproject/disclosure-extractor>.

plain what we had gathered. At *The Wall Street Journal*, we found the collaborators we needed. Using the data we had compiled, they were able to expose hundreds of ethical lapses in the judiciary.

Even *this* is surely a major undercount: The *Journal's* work focused on district and appellate court judges, and excluded magistrate and bankruptcy judges; their work focused mainly on individual stock holdings, to the exclusion of the many other types of investments judges can hold; and their work was based on case captions (e.g., “Albatross v. Loon”), not full party lists, which would expose numerous other parties — and conflicts — in a case.⁹

The above explains the history of our database of financial disclosures, and how we came to collaborate with the *Journal*.

Unfortunately, these archaic practices and multi-year delays harm public confidence in the judiciary. As the saying goes, justice delayed is justice denied. The same is true for transparency. Today, we have no idea what new stories are hiding in the last three years of judicial financial disclosures.

Fortunately, it does not have to be this way. At this point in my testimony, I would like to shift gears and make a number of concrete recommendations based on our experience and these revelations.

Recommendations

1. **Ban all magistrate judges, bankruptcy judges, and Article III judges and justices from making or holding investments in individual stocks.**

Though politically difficult, *this* is the simple legislative fix. Instead of trying to hem in the ethical lapses exposed by the *Journal*, end them. The *Journal* makes clear that the judicial branch is unable to fix this problem technically. Meanwhile, judges repeatedly say they had no idea they were conflicted or that the conflicts were not material. It's the clerk's fault, or the conflict software; their spouse's trust, or their investor's action.

To the contrary, these lapses *do* matter, regardless of their size, why they exist, or how they came to be. They create both actual conflicts of interest

⁹ Please note that this last reason for the undercount is due to the PACER fee system, which requires journalists pay to access party lists. To properly analyze full party lists would cost hundreds of thousands of dollars in access fees. Once again, PACER fees have blocked transparency in the judicial branch.

and the appearance of conflicts of interest. Both attenuate trust in the impartiality of the judiciary.

The only way to eliminate this impropriety and to restore public trust is to simply end individual investments by judges and justices. With a lifetime appointment as an Article III judge, you do make sacrifices. Same if you are a magistrate judge appointed to a renewable eight-year term, or a bankruptcy judge appointed to a renewable 14-year term. This is a reasonable sacrifice to demand.

In the judiciary's own words, "A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."¹⁰

2. Rapidly place *all* judicial financial disclosures online.

Financial disclosure documents are currently completed by bankruptcy judges, magistrates, and Article III judges and justices. Unfortunately, getting timely access to these documents is currently not possible. As explained above, we are still waiting for disclosures from more than two years ago. This is too long to wait.

We are eternally grateful to the Financial Disclosure Office for its tireless work getting us these documents, but their process is far too complicated and their resources too few. The process must be simplified so that redactions can be made easily — or automatically — and so documents can be placed online routinely, without an organization like Free Law Project making an official request.

The best approach would be to transform this process from a paper-oriented one to a digital-first process. Other arms of the federal government, such as GSA's 18F, would be well suited to help with this work, and the Disclosure Office should be properly resourced so that it can do its part.

3. Make disclosures available in machine-readable formats.

Free Law Project spent tens of thousands of dollars writing software to make sense of the disclosure documents we received. For our organization, this has been a considerable expense.

¹⁰ *Guide to Judicial Policy*, Canon 2A, comment (Mar. 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

This expense is a key reason why conflict transparency has been elusive. The data should be available in spreadsheets or similar formats so that organizations like Free Law Project do not have to ever repeat this effort.

4. Nomination disclosures should be available from the Financial Disclosure Office before nomination hearings.

At present, judicial nominees must complete financial disclosure documents. These are essential transparency tools, but they are nearly impossible to obtain in advance of nomination hearings.

Like annual disclosures, these should be online for the public, in machine-readable format.

5. Repeal statutes requiring the destruction of financial disclosure reports.

To our knowledge, financial disclosure documents for sitting Supreme Court justices are not available in any location. As mentioned above, this is an unfortunate result of §105(d) of the Ethics in Government Act, which requires the destruction of disclosures older than six years.

Rapidly placing these documents online will make the destruction of them less problematic in the future, but there is no reason to keep the six-year destruction date on the books. The six-year time frame is a relic of a time when paper document storage had real costs. Digital record-keeping has no similar costs.

This section of the code should be removed.

6. Consider passing a public access law for the judiciary.

In researching these disclosures, we have been repeatedly stymied in our understanding by the absence of a FOIA-like public records law for the judicial branch. For example, there is a guide for completing financial disclosure forms, but it is unavailable to the public. We have asked for it but have been denied.

Although the common law right of access doctrine may make it theoretically possible to obtain such documents, in practice it lacks the timelines and bright-line rules that come with modern sunshine statutes. A proper public-access law is needed so that the judicial branch ceases to be the least transparent branch of our government.

We have researched this topic in some depth and have presented an analysis of our work to the FOIA Advisory Committee to the Archivist of the United States.

We invite members of this Subcommittee to review this work.¹¹

Subcommittee members, thank you for your time reading my remarks and recommendations. Like many of you, I have spent a considerable part of my life working to improve transparency, accountability, and trust in the judicial branch.

Through my efforts and those of others, Free Law Project has become a leading organization for gathering, preserving, and presenting legal information online. Although the work we do sometimes creates difficulty for the judicial branch, we firmly believe that our work enhances theirs.

Today, our work gathering financial disclosure information is bearing this out. Ethical lapses that have been under the covers for far too long have now been exposed. This subcommittee is taking action to fix the problem.

This work fortifies the judiciary and our democracy. Thank you.

I welcome any follow up questions or clarifications.



Michael Lissner
Executive Director
Free Law Project

¹¹ "Our Presentation to the FOIA Advisory Committee on the Need for a Public Access Law for the Judicial Branch," Michael Lissner, Free Law Project, 4 March 2021, <https://free.law/2021/03/04/judicial-foia-presentation>.

October 25, 2021

The Honorable Henry C. "Hank" Johnson, Jr.
United States House of Representatives
2240 Rayburn House Office Building
Washington, DC, 20515

The Honorable Darrell E. Issa
United States House of Representatives
2300 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on "Judicial Ethics & Transparency: The Limits of Existing Ethics and Rules," October 26, 2021.

Dear Chairman Johnson and Ranking Member Issa,

I write to you today to share the story of my husband's military service, his suffering and death caused by the companies who supplied the products with which he worked, our experience in the legal system, and the recent and very painful revelations concerning the biased judge in our case. I miss my husband terribly every day, but I was relieved when the legal process was behind us. Now I've learned that all along, that process was in the control of a judge who was ignoring and violating the basic rules of fairness.

My husband James enlisted in the Navy right out of high school in 1965. He proudly served his country for 24 years. He rose steadily through the ranks, and eventually retired in 1989 as a Lieutenant Commander.

Like thousands of other Navy sailors, Jim worked with products that contained asbestos. At his deposition taken before he died, he testified that he worked with all kinds of equipment in the engine room of his ships: turbines, pumps, air compressors, feed tanks, forced draft blowers, valves, evaporators and so on. James worked with all this equipment personally and also supervised others. The regular, ongoing maintenance of these products produced immense quantities of asbestos dust that Jim breathed in every day. Little did he know it would kill him, because none of the products he worked with ever contained a warning about the danger of asbestos.

Jim was diagnosed with mesothelioma, a cancer caused only by asbestos, in 2015. The best way I can describe the next 24 months is that it was hell for him. He had a third of one lung removed, and had a treatment called "talc pleurodesis" in which talc is placed in the lungs to irritate them. Jim also had a stroke during his initial hospital recovery.

Once he was back home, it eventually became clear that Jim was not going to get better. He was always short of breath and could barely take a walk with me. He was put on a chemotherapy regimen that affected him worse every cycle and made him nauseous all the time. Jim wasn't able to do anything anymore with our grandchildren. He couldn't do any of the normal

things he used to do: couldn't fish, couldn't go out in the boat, couldn't work out at the gym, couldn't even climb a few steps.

In total, Jim had three surgeries and four rounds of chemotherapy. He had to lay down frequently just to relieve pain. His last months were a blur of doctors' offices: for more scans, to have his port flushed, for evaluations and on and on. No one should go through what Jim went through.

Like so many other veterans who have died of asbestos-related diseases, Jim and I filed suit against the companies responsible for his illness and death.

Jim died in April of 2017. At some point in 2018, my lawyers told me that our case had been dismissed. We had obtained settlements from some of the companies, but the judge dismissed our claim against the remaining defendant, Crane Co., because he said our expert witness couldn't testify. The judge let a defendant off the hook even though the company had contributed to Jim's injury.

The companies defended the case tenaciously, and tried to blame everyone but themselves: each other, the Navy, even Jim himself. I understand that this is part of the process in any lawsuit, and I can accept that. But just two months ago, I learned something I surely cannot accept: that the judge in our case did not follow the rules.

I have learned that the judge, United States District Judge David Norton, owned stock in two of the companies we sued – 3M Co. and General Electric Co. And these were not trivial stock holdings: he owned at least \$15,000 worth of stock in each company. I also understand his rulings were highly unusual in asbestos litigation, and that they can hurt all veterans in their suits. It can also greatly help the companies our judge owned stock in.

To learn this now, three years after our case ended, is like reopening a painful, painful wound. I always knew that no lawsuit would ever bring Jim back. But I did feel that getting justice would, in some way, honor Jim and his service to our country, of which he was always so proud. To now learn that we were never going to get justice, because the judge had a financial interest in two of the companies responsible for Jim's death, is a shock and a devastating disappointment.

I humbly urge you to address this situation. I thank you for the opportunity to be heard, and I know Jim thanks you too for hearing him.

If there is any further information, I can give you, I will be happy to provide it.

Thank you very much.

/s/ Sheri Chesher

Sheri Chesher