"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

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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

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[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

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[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.

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[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

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[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 handing 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. Constitution[22] 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.

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[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 knowns as "circuit-riding."