Written Testimony of
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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 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 is 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.