JUDGES BREAKING THE LAW: AN EMPIRICAL STUDY OF FINANCIALLY INTERESTED JUDGES DECIDING CASES*

BENJAMIN B. JOHNSON** AND JOHN NEWBY PARTON***

We present the first extensive study of nonrecusals by federal district judges and report two key empirical findings. First, we found seventy-five judges participated in over 200 total cases despite owning stock in one of the parties to the litigation, a clear violation of both statutory law and judicial ethics. As we used a very conservative methodology and did not review every judge, this is a lower bound on recusal failures. Second, we found judges employ very different strategies when deciding whether to recuse due to a potential financial conflict of interest. This variability signals two distinct problems: the current rules as to when a judge should or should not recuse are unclear, and as a result, judges fail to recuse when they should and also recuse when they should not. This suggests a clear need for reform.

We provide a theoretical framework to evaluate judicial recusal policies due to financial relationships. We identify a trade-off between two core concerns of the judiciary: fairness and legitimacy. Fairness considerations suggest treating a judge's financial interests in a party like other relationships that judges have with litigants, lawyers, or witnesses. Legitimacy concerns urge a carve out for particular types of financial interests that would lead observers to think a judge could be acting to advance their own financial interests. These suggestions represent both a fundamental reorientation of existing recusal law and theory and a practical solution to a fundamental problem that has gone unobserved for too long.

** Assistant Professor, Penn State Law (University Park). Corresponding author.

*** M.P.A. Candidate, Princeton University. We are grateful for comments from Charles Cameron, Miguel de Figueiredo, Kellen Funk, Margaret Hu, Jud Mathews, Catherine Rogers, Mark Storslee, Dane Thorley, Megan Wright, and Daniel Walters. We are also indebted to Victoria Alexander, Rebecca Bain, Claire Banks, Lisa Cumming, James Deiter, Nika Gigashvili, Solabomi Ladega, Matthew Newton, Alexandra Norton, and Adam Wage for their research assistance. One research assistant (RA) wished to remain unnamed so as not to risk upsetting any judges. We thank that person as well.

INTRODUCTION

> *"It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion."*[1]

On June 8, 2012, Emelda and Raymond Lopez filed a lawsuit against Wells Fargo.[2] Judge *A*[3] was initially assigned to the case.[4] Four days later, Judge *A* recused himself sua sponte under the statute governing recusals, 28 U.S.C. § 455 ("recusal statute"),[5] finding that he had a "financial interest" in the defendant "through ownership of shares in three mutual funds owned by a

1. Pfizer Inc. v. Lord, 456 F.2d 532, 544 (8th Cir. 1972).

2. Lopez v. Wells Fargo Bank, N.A., No. 12-cv-01492, 2012 U.S. Dist. LEXIS 164893, at *1 (D. Colo. Nov. 19, 2012).

3. In this Article, the authors have chosen to anonymize the names of judges used in their review. The purpose of this is to ensure the audience can properly focus on the larger, systemic issues with the recusal system rather than the actions of individual judges. However, relevant cases are cited to provide enough information to allow for replication and further review.

4. *See* Order of Recusal at 1–2, *Lopez*, 2012 U.S. Dist. LEXIS 164893, at *1 (No. 12-cv-01492) [hereinafter Order of Recusal June 12] (showing Judge *A* as the presiding judge who recused on June 12, 2012).

5. 28 U.S.C. § 455.

securities affiliate" of Wells Fargo.[6] According to his financial disclosure report, Judge *A* also had three checking accounts at Wells Fargo.[7] The case was then assigned to Judge *B*.[8] After she notified the parties that she had "various business associations with Wells Fargo Bank," Emelda and Raymond requested her recusal.[9] Judge *B* recused, citing her "business relationships with Wells Fargo" and the plaintiffs' concerns.[10] The case was then assigned to Judge *C*,[11] who, according to his financial disclosure report, owned between $15,000 and $50,000 in Wells Fargo bonds and less than $15,000 in Wells Fargo stock.[12] Within a week, Judge *C*, acting sua sponte, struck the complaint.[13]

In this one case, we observe three different judges applying three different standards as to the level of financial involvement that requires recusal. Problematically, none of the three judges actually followed the law. The recusal statute requires a judge to recuse whenever he[14] has a "financial interest" in the subject matter of the litigation or one of the parties.[15] The recusal statute defines a "financial interest" as "ownership of a legal or equitable interest . . . [in] a party," but it carves out exceptions for ownership through mutual funds and deposit accounts in "a mutual savings association, or a similar proprietary interest . . . only if the outcome of the proceeding could [not] substantially affect the value of the interest."[16]

Judge *A* owned shares of mutual funds owned by an affiliate of Wells Fargo.[17] This is not an ownership interest in Wells Fargo; it is incredibly unlikely that a judgment for or against Wells Fargo would affect the value of *A*'s mutual funds, and thus *A*'s mutual funds are explicitly not financial interests requiring recusal according to the recusal statute.[18] Judge *B* recused because of

6. Order of Recusal June 12, *supra* note 4, at 1–2.

7. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 4–5 (2013) [hereinafter Judge *A*, FINANCIAL DISCLOSURE REPORT 2012], https://tinyurl.com/JudgeAFinDisRep2012 [https://perma.cc/5GJC-7FPG].

8. *See* Order of Recusal at 1–2, *Lopez*, 2012 U.S. Dist. LEXIS 164893, at *1 (No. 12-cv-01492) [hereinafter Order of Recusal June 22] (showing Judge *B* as the presiding judge who recused on June 22, 2012).

9. *Id.*

10. *Id.*

11. *See* Minute Order Regarding Docket #10 at 1–2, *Lopez*, 2012 U.S. Dist. LEXIS 164893, at *1 (No. 12-cv-01492) (showing Judge *C* as the presiding judge who recused on June 28, 2012).

12. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 12, 17 (2013) [hereinafter Judge *C*, FINANCIAL DISCLOSURE REPORT 2012], https://tinyurl.com/JudgeCFinDisRep2012 [https://perma.cc/RS8X-VGTW].

13. *Lopez*, 2012 U.S. Dist. LEXIS 164893, at *2–3.

14. The recusal statute uses masculine pronouns when speaking of judges.

15. 28 U.S.C. § 455(b)(4); *see also* RICHARD E. FLAMM, RECUSAL AND DISQUALIFICATION OF JUDGES: FOR CAUSE MOTIONS, PREEMPTORY CHALLENGES AND APPEALS 238 (Banks & Jordan L. Publ'g Co. ed., 2020).

16. § 455(d)(4).

17. Order of Recusal June 12, *supra* note 4, at 1.

18. § 455(d)(4).

her "business associations" with Wells Fargo.[19] Insofar as these business associations are checking and savings accounts,[20] they are also not "financial interests" according to the plain text of the recusal statute.[21] Judge *B*'s line of credit would also fall outside of the recusal statute, since one does not own a legal interest in a bank by taking out a loan. Thus, Judge *B* had no disqualifying financial interest in Wells Fargo. Finally, the one judge who did have a clear disqualifying financial interest—stock ownership—in Wells Fargo was Judge *C*.[22] The only judge who should have recused was the only judge who did not.

This single case demonstrates three distinct problems with the current recusal system. First and most obviously, some judges are deciding cases even though they have a statutory obligation to disqualify themselves. Perhaps the most striking finding in this Article is the astounding frequency with which judges fail to recuse themselves when they have a legal obligation to do so. We found over 200 instances where a judge owned stock in a party and still participated in the case.[23]

The second problem revealed in *Lopez v. Wells Fargo Bank, N.A.*[24] is that judges sometimes recuse themselves when there is no legal reason to do so. This problem is fundamentally similar to the first. In both instances, judges are failing to follow the recusal statute, but the harm from the second is less obvious. Judges who fail to recuse when they should put the fairness of a given proceeding at risk. On the other hand, judges who recuse when they should not undermine the random assignment of judges by changing the probabilities that other judges will be selected. The pervasive upending of random assignment threatens the fairness of the judicial system both to litigants and to judges. The problem is not simply that one judge is unavailable to hear one particular case. Parties with publicly traded securities are usually repeat litigants, and many judges are overly conservative in their recusal practices. This significantly alters the mix of available judges for some—but not all—parties across a large number of cases.

The third problem is that, aside from stock ownership, there is no clear standard for what constitutes a "financial interest" requiring a judge to recuse. Three different judges applied three different standards in the same case despite all being bound by the same legal and ethical obligations. We argue that there

19. Order of Recusal June 22, *supra* note 8, at 1.

20. Notice of Disclosure at 1, *Lopez*, 2012 U.S. Dist. LEXIS 164893, at *1 (No. 12-cv-01492) (showing Judge *B* as the presiding judge disclosing a potential financial interest on June 13, 2012).

21. *See* § 455(d)(4).

22. Judge *C*, FINANCIAL DISCLOSURE REPORT 2012, *supra* note 12, at 11–12, 16.

23. *See* discussion *infra* Parts I–II; BENJAMIN B. JOHNSON & JOHN NEWBY PARTON, RECUSAL FAILURES SPREADSHEET (2020), https://pennstatelaw.psu.edu/sites/default/files/documents/Recusal_Failures_Spreadsheet.xlsx [https://perma.cc/2S89-M88H].

24. No. 12-cv-01492, 2012 U.S. Dist. LEXIS 164893 (D. Colo. Nov. 19, 2012).

should be a clear standard balancing the risk of perceived bias against the need to maintain a functioning and fair judicial system.

This Article is built around the first empirical study of federal district court judicial recusal practices.[25] We first show that, in hundreds of cases, dozens of judges are breaking the law and violating their ethical obligations by participating in cases where they own stock in a company.[26] This clear and concerning finding is glaring evidence of a much larger problem: the legal standards governing judicial recusal are grossly inadequate, and judges often ignore them. In the remainder of the Article, we demonstrate that judges employ a wide range of standards for recusal based on financial links to parties. We suggest that this state of affairs results both from unclear, insufficient standards and from institutional rules designed to obscure whether judges are following the rules. This lack of clarity and accountability undermines the legitimacy of the judiciary as a whole.

This Article adds to a growing empirical literature that examines recusal. For example, a recent state-level empirical study demonstrated that voluntary recusal rules alone are generally inadequate to induce recusal for campaign-finance-related conflicts.[27] We find much the same to be true at the federal level, at least whenever a potential conflict arises. Another recent empirical study of federal appellate judges points out the effects of actually enforcing recusal rules.[28] Because certain types of judges are likely to own stocks, those types of judges are more likely to recuse.[29] This means that the set of available judges to hear cases from blue-chip companies looks quite different from the universe of federal judges at large.[30] We expand on this observation to explain

25. JOHNSON & PARTON, *supra* note 22. There are some studies on federal appellate judge recusals. *See, e.g.*, Reity O'Brien, Kytja Weir & Chris Young, *Federal Judges Plead Guilty*, CTR. FOR PUB. INTEGRITY, http://www.publicintegrity.org/2014/04/28/14630/federal-judges-plead-guilty [https://perma.cc/8EMQ-SUU8] (Aug. 5, 2014, 10:39 AM) (explaining that there were twenty-four cases where circuit court judges owned stock in a party to the case); *see also* Joe Stephens, *Ethics Lapses by Federal Judges Persist, Review Finds*, WASH. POST (Apr. 18, 2006), https://www.washingtonpost.com/wp-dyn/content/article/2006/04/17/AR2006041701296_pf.html [https://perma.cc/X7MD-L4BS (dark archive)] (studying stock conflicts involving federal appellate judges).

26. *See generally* JOHNSON & PARTON, *supra* note 23 (listing cases that judges participated in despite possessing financial conflicts).

27. *See* Jonathan S. Krasno, Donald P. Green, Costas Panagopoulos, Dane Thorley & Michael Scwam-Baird, *Campaign Donations, Judicial Recusal, and Disclosure: A Field Experiment*, J. POL. (forthcoming 2021) (manuscript at 1–2) (on file with authors).

28. *See generally* James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163 (2015) (discussing the consequences of judicial recusals).

29. *See id.* at 1201–02, 1210 (finding that recusals from direct stock ownership results in a pool of remaining judges to hear "cases involving corporate litigation [that is] more likely to [be comprised of] male judges, African-American judges, younger judges, judges with fewer personal assets, judges appointed by a Republican president, and judges that were former law professors").

30. *See id.*

how recusal undermines the random assignment of judges that is crucial to legitimating the judicial system.

This Article proceeds in four parts. In Part I, after describing our data, we lay out our key empirical findings: (1) clear evidence of judicial lawbreaking in cases with stock ownership, and (2) the muddle of recusal practice in nonstock cases.

Part II examines the financial disclosure and recusal process as well as the current legal and ethical requirements that govern judicial recusals. We show how confusing and inadequate the existing rules are. For example, a judge who owns a stock must recuse, but a judge who engages in riskier securities trading on the same share of stock (for example, selling short or purchasing a put or call option) does not need to recuse.

Part III builds a theory to evaluate recusal policy. Key to the analysis is the role of random assignment in the legal process. Some judges will be more likely to rule in favor of businesses than others, and case outcomes will be affected by which judge parties draw.[31] Given the inherent bias of human decision makers, the fairness of the system relies on the luck of the draw. Parties deserve a fair shot at drawing more or less probusiness judges. Recusals upset this balance. If a judge's probusiness proclivities correlate with their financial relationships, recusal will remove a disproportionate share of probusiness judges and some parties will have a smaller chance of drawing a probusiness judge. Such an outcome undermines the fairness of the system. This concern must be balanced against traditional fairness considerations which require judges to recuse when they have "a personal bias . . . concerning a party."[32] The key is to determine whether the extant relationship is one that could bias a judge in favor of a party.

Part IV considers policy reform. Our proposal is threefold. First, establish clear rules. Second, publish judges' financial disclosure filings and automate case assignment. Third, maintain a list of recusal failures modeled on the Six-Month List created by the Civil Justice Reform Act.[33] The recusal statute and Code of Conduct for U.S. Judges ("Code of Conduct") are concerned with

31. *See* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 1–2 (2009) (finding that randomized case assignments lead to randomized outcomes due to differences in competence and ideology).

32. 28 U.S.C. § 455(b)(1).

33. *See* Civil Justice Reform Act, Pub. L. No. 101-650, §§ 101–106, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482). The Six-Month List provision is codified at 28 U.S.C. § 476(a). *See also* Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 367 (2020). The Six-Month List includes motions that were filed more than six months ago, bench trials submitted more than six months ago, cases pending more than three years, and bankruptcy and Social Security appeals pending more than six months. *Id.* at 367 n.12. The judges associated with these cases are identified publicly. *Id.* at 367. Colloquially, the Six-Month List is known as the "Report of Shame," and judges try very hard to stay off of it. *See id.* at 375 & n.47.

eliminating the perception of bias, and therefore they require recusal under certain circumstances.[34] Judges who do not recuse when they should do so fail in their legal obligation under the recusal statute. What is more, while judges have a statutory and ethical obligation to make themselves aware of their financial holdings, people can and do make good faith mistakes. We do not mean to presume bad faith, but the prevalence of recusal failures and the vast range of recusal practices suggest that reform is desperately needed.

I. DATA, METHODS, AND FINDINGS

Our study combines information from three sources. We began with a set of financial disclosure reports filed by district court judges.[35] In order to detect conflicts, we then compared those reports to two different databases of docket sheets: [36] www.justia.com ("Justia") [37] and www.bloomberglaw.com ("Bloomberg Law").[38]

The Ethics in Government Act of 1978[39] requires federal judges to make financial disclosures via annual reports.[40] The recusal statute requires judges to disclose their own and their close family members' (spouse and dependent children) different types of financial relationships, including information about assets and entities that generate income (including reimbursements).[41] The recusal statute also requires judges to disclose liabilities such as credit card debt, mortgage information, or student loans.[42] The disclosure requirements that deal with assets, however, are most relevant to recusals. The assets that must be disclosed include the stocks, bonds, funds, trusts, and accounts (money market, checking, and savings) held by the judge, spouse, or children.[43] While disclosure requires the names of the assets, the exact value of the investments is not

34. *See* § 455(b)(1); 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY, pt. A (2019) [hereinafter GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT], https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/2TYK-AKAS]; § 476(a); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988).

35. Financial disclosure reports were obtained from Judicial Watch. JUD. WATCH, https://www.judicialwatch.org/ [https://perma.cc/XQS6-ZXT4].

36. We used two sources in an effort to be more comprehensive. The Bloomberg dataset appears to contain more cases, but it associates only the final judge to a case. Justia did not have every case, but it did associate more than one judge with a case. We checked both in an effort to capture more conflicts. Neither dataset is perfect, so we likely missed additional conflicts. Thus, our results should be considered a lower bound on the number of actual recusal failures.

37. *Dockets & Filings*, JUSTIA, https://dockets.justia.com/ [https://perma.cc/6893-748H].

38. BLOOMBERG L., https://www.bloomberglaw.com/ [https://perma.cc/66VE-9ZG8].

39. Pub. L. No. 95-521, 92 Stat. 1824–67 (codified as amended at 5 U.S.C. app. §§ 101–505).

40. *See* 5 U.S.C. app. §§ 101–104 (outlining the annual financial disclosure requirements for judicial officers and other federal government employees).

41. *Id.* § 102.

42. *See id.*

43. *See id.*

required.[44] Instead, judges must disclose that the investment falls within a given range.[45] The same is true of the amount of income generated by assets.[46] For example, a judge who received $1,100 in dividends from a $45,000 investment in Verizon stock would report making $1,001–$2,500 in income from dividends paid on Verizon stock valued at $15,001–$50,000.[47]

The annual reports we use in our study are financial disclosure reports publicly available through Judicial Watch an organization which describes itself as "a conservative, non-partisan educational foundation" that "promotes transparency, accountability and integrity in government" and "advocates high standards of ethics . . . to ensure that political and judicial officials do not abuse the powers entrusted to them by the American people."[48] These disclosures are technically public documents available from the Administrative Office of the U.S. Courts ("AO").[49] However, all requests must identify the name, occupation, and address of the requestor.[50] The requestor is then permitted to view the financial disclosure report by appointment in the Financial Disclosure Office of the AO.[51] The judge is then told who is requesting the report.[52] Obviously, lawyers may be hesitant to inquire about a judge's finances midlitigation.[53]

We studied disclosures for more than six hundred judges filed for the years 2009–12.[54] Importantly, the data on Judicial Watch is incomplete, such that we have information for only some years for some judges. Similarly, some financial disclosure reports that we do have are redacted or unclear. While our data is not

44. *See id.*

45. *Id.*

46. *Id.*

47. *See id.* § 102(a)(1)(B)(i)–(ix) (providing the categorial ranges for items of income that must be reported).

48. *About Judicial Watch*, JUD. WATCH, https://www.judicialwatch.org/about/#mission [https://perma.cc/5GD2-LU3U].

49. 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY, pt. D, § 540.10(a) (2018) [hereinafter GUIDE TO JUDICIARY POLICY, FINANCIAL DISCLOSURE], https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf [https://perma.cc/7GTJ-UMLL] (deriving the guidelines from 5 U.S.C. app. §§ 101–111).

50. *Id.* § 540(c)(1).

51. *Id.* § 540.10.

52. *Id.* § 540.30(a).

53. Associated Press, *Inside Washington: In the Digital Age, Federal Judges' Financial Reports Still Only on Paper*, FOX NEWS, https://www.foxnews.com/us/inside-washington-in-the-digital-age-federal-judges-financial-reports-still-only-on-paper [https://perma.cc/9BML-BCQW] (Nov. 17, 2014) ("There's a disincentive [for] litigants and other interested parties to ask for a particular judge's financial disclosure form . . . .").

54. We used Judicial Watch because it provided immediately available financial disclosure reports and contained the vast majority of possible reports within the parameters of our empirical study. JOHNSON & PARTON, *supra* note 23. The above-mentioned barriers to receiving reports firsthand from the AO made it impractical source of data. *See supra* notes 48–53 and accompanying text.

perfect, we stress that these data limitations mean we are more likely to have undercounted financial conflicts.

We began with a universe of more than 1,100 judges who served in the district courts during at least a portion of 2009–12, including inactive and senior judges.[55] We do not normally expect to find disclosure reports for periods before judges began their judgeships, for the year a judge vacates (as many judges vacate only upon death), or for periods after they vacated.[56] Finally, we do not expect to find reports from judges who did not hear a single case in a given year—nor would these reports be interesting to us, as they could not possibly contain financial conflicts. That the vast majority of the reports were available increased our confidence in the data source.

We compared information from the financial disclosures with docket sheets from two different databases. First, we wrote computer code to automatically download information from Justia. Justia provides case-level information such as judges, parties, case types, venue, docket number, and filing data. We searched for and automatically downloaded case information for judges in our study for the years 2009–12. Second, we manually searched Bloomberg Law by party and judge over our time period to capture any cases where a judge participated in a case in which they had a financial relationship with a party.

Identifying recusal failures and proper recusals is not always straightforward. Judges sometimes recuse themselves after they have participated in a case, recuse and then vacate the recusal order despite still having a financial interest in a party to the case,[57] or recuse after the case has

55. For a searchable list of all federal judges, see *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges [https://perma.cc/Y4SG-8XMW]. To replicate our set, download the full list of judges by selecting "Download an Export," then "Export organized by judge (Excel workbook)." Then, sort the Excel sheet by "Court Type (1)" and delete all entries that are not U.S. District Court. Then, sort the remaining entries by "Commission Date (1)" and delete all entries commissioned in 2013 or later. Finally, sort the remaining entries by "Termination Date (1)" and delete all entries terminated in 2008 and before. We counted 1,139 district court judges with a commission date of December 31, 2012, or before, and a termination date (if any) of January 1, 2009, or after.

56. According to the data from the Federal Judicial Center, from 2009–12, 120 district court judges vacated. Of the 120 who vacated, 72 died, 33 resigned or retired, and 14 were appointed to another judicial position. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/advanced-search [https://perma.cc/FH3C-NXAE] (using advanced search criteria of all U.S. District Courts, termination date between January 1, 2009, and December 31, 2012, and termination type). For additional information on what causes judges to leave the district court, see data from the Federal Judicial Center database. *Id.*

57. *See, e.g.*, Order of Recusal at 1, Balkema v. Wachovia Sec., LLC., No. 11-412, 2011 WL 2633617 (N.D. Cal. Jan. 25, 2013) [hereinafter Order of Recusal September 13] (showing Judge *D* as the presiding judge who recused on September 13, 2011); Order Vacating Order of Recusal at 1, *Balkema*, 2011 WL 2633617 (No. 11-cv-00412) [hereinafter Order Vacating Order of Recusal September 16] (showing Judge *D* vacating his preceding order of recusal on September 16, 2011). On September 2, 2011, Judge *D* purchased somewhere between $250,001 and $500,000 in Wells Fargo

concluded.[58] Some judges also fail to report some of the required information about the dates of asset ownership, leading to ambiguity about whether a conflict existed within a particular case.[59] Further, limitations in our methodology have almost certainly caused us to overlook conflicts.[60]

The relevant question that guided our research is whether a judge participated in a case where the judge had financial links to one of the parties. Participation, for our purposes, means the entry of any order other than one recusing or transferring the case to another district judge. We found it both difficult and unnecessary to parse different orders for several reasons. Not all orders are created equal (such as, granting summary judgment is dispositive while an order allowing counsel to proceed pro hac vice is not). Also, though some motions are formally dispositive, earlier orders that set the metes and bounds of the case might be effectively dispositive. For example, refusing discovery on an issue might make it impossible to prevail, and the plaintiff might drop the suit rather than waste money continuing a hopeless cause. But our question is whether judges are following the rules. We are not asking whether failure to follow the rules affected case outcomes, although that is

securities. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 5 (2012) [hereinafter Judge *D*, FINANCIAL DISCLOSURE REPORT 2011], https://tinyurl.com/JudgeDFinDisRep2011 [https://perma.cc/W3XQ-N63N]. This demonstrates financial ties between Judge *D* and Wells Fargo immediately prior to his order of recusal, *see* Order of Recusal September 13, *supra*, and persisting before and after Judge *D* issued an order vacating his order of recusal, *see* Order Vacating Order of Recusal September 16, *supra*. Wells Fargo also purchased Wachovia in 2008. Sara Lepro, *Wells Fargo Buys Wachovia for $15.1 Billion*, ABC NEWS (Oct. 3, 2008), https://abcnews.go.com/Business/SmartHome/story?id=5946486&page=1 [https://perma.cc/A2MD-2T32].

58. *See infra* notes 112–18 and accompanying text.

59. For example, we identified fifteen recusal failures by Judge *H*. *See infra* notes 85–89 and accompanying text. However, his 2009, 2010, and 2011 financial disclosure reports were incomplete, and his 2012 financial disclosure report was unavailable. *See Document Archives*, JUD. WATCH, https://tinyurl.com/JudgeHFinDisRep2012 [https://perma.cc/W8V3-ZHX6]; *infra* notes 85–89 and accompanying text. Therefore, we could not conduct further research.

60. For example, Bloomberg Law's search engine does not identify all judges who presided over a single case; instead, it identifies only the judge who most recently presided over a case. *Compare Results for Dockets*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw/search/results/91f4b497dbf881443c4837335dd2dfdd [https://perma.cc/KW32-S27J (dark archive)] (showing that the results of a Bloomberg Law search for Judge *A* do not include *Lopez*), *with* Order of Recusal June 12, *supra* note 4 (showing Judge *A* as presiding judge in *Lopez*). Thus, hypothetically, if a judge improperly decides some motions in the case, then recuses, and the case is assigned to and decided by a second judge, Bloomberg Law will identify the second judge as the only judge associated with the case. *Id.* As a result, we would miss the first judge's recusal failure. Furthermore, we also miss improper recusals. If a judge recuses when they should not, we will miss that recusal if the case is assigned to a different judge in the Bloomberg Law data. *Id.*

Another limitation of our review process is our early use of a computer program to help us flag the names of companies that appeared both in a judge's disclosure reports and in that judge's case history. Because the computer conversion from PDF to text was imperfect, this method failed to flag all conflicts for manual review. Accordingly, we manually coded financial disclosure reports in later stages of our study.

obviously an interesting and important question. Since we are simply interested in whether judges broke the rules, the magnitude of the failure is only of second-order concern and thus order type (other than recusal or transfer) is irrelevant.

Only counting orders as improper participation is a conservative measure of recusal failure. There are instances where parties voluntarily withdraw before the judge has ruled on any motions, yet the judge may have improperly participated and failed to recuse. For example, judges can send signals at initial hearings (before any order is entered) that a party will lose, thus causing the party to voluntarily withdraw.[61] We implicitly treat these cases as recusals, effectively assuming the judge did not improperly participate (since "signals" will not appear on docket sheets)[62] and would have recused had the party not voluntarily withdrawn. Similarly, when multidistrict litigation was transferred from a conflicted judge to another district, we generally did not count this as a recusal failure even though the failure to recuse from these cases is arguably a violation of the recusal statute. We are therefore putting forward a conservative count of the number of failures to recuse.

Finally, our study will fail to pick up some instances where a judge's financial stake has a clear effect on proceedings. For instance, consider the order in *Kruse Technology Partnership v. Daimler AG*.[63] Judge *E* recused himself in several cases where he owned stock in a party.[64] But in *Kruse*, Judge *E* posted the following notice:

> NOTICE OF INTENT TO RECUSE
>
> This is one of several actions brought by Kruse Technology Partnership ("Kruse"), and was assigned to Judge [*E*] as a related case. (Local Rule 83-1.3.) There are obvious efficiencies in having one judge deal with the

61. Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 232 (2002) (explaining that pretrial conferences allow for opportunities in which "[t]he court may 'signal' the likely result with a not too subtle query").

62. *See id.* at 254 ("Most signaling occurs off the record and often takes place in private chambers.").

63. No. 10-cv-01066, 2012 WL 12888668 (C.D. Cal. Oct. 22, 2012).

64. *See* Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Wise v. Bank of Am., Nat'l Ass'n, No. 11-cv-00905 (C.D. Cal. June 17, 2013); Order Rescinding Order re Transfer, Network Signatures Inc. v. Safeway Inc., No. 11-cv-10663 (C.D. Cal. Sept. 12, 2012); Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Gonzales v. Bank of Am. N.A., No. 10-cv-01453 (C.D. Cal. Dec. 6, 2010); Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Zambrano v. Bank of Am. N.A., No. 10-cv-01155 (C.D. Cal. Sept. 21, 2010); Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Clevely v. Ford Motor Co., No. 09-cv-00912 (C.D. Cal. Aug. 28, 2009); Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Ford Motor Credit Co. v. J.W. Burch & Sons Inc., No. 09-cv-00476 (C.D. Cal. Aug. 7, 2009); Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, Readylift Suspensions Inc. v. Ford Motor Co., No. 09-cv-00089 (C.D. Cal. Feb. 11, 2009).

> substantive issues in these case [sic], particularly where they arise in the context of a complex, multi-patent case.
>
> Ford Motor Company ("Ford") is one of ten defendants named in this case. Judge [*E*] owns common stock in Ford. Because of Judge [*E*]'s financial interest in Ford, he is required to recuse himself. 28 U.S.C. § 455(b)(4). This conflict cannot be waived. 28 U.S.C. § 455(e).
>
> It is not clear that the claims against all ten defendants are inextricably bound up, and that the claims against each must be litigated in a single action. If Ford were not a defendant in this action, Judge [*E*] would of course proceed.
>
> If Ford remains a defendant in this action after ten days, Judge [*E*] will recuse himself.[65]

The plaintiffs complied with Judge *E*'s hints and dropped Ford from the case.[66] This clearly benefited Ford: even if the lawsuit would not have prevailed, Ford at least avoided further litigation costs. Indeed, this is the only example where we can confidently link a company's favorable outcome to the judge's portfolio. Nevertheless, we did not include the case in our count of recusal failures because Judge *E* did not preside over it until the plaintiffs eliminated the conflict. This example highlights that our count of recusal failures is not only conservative but also understates the scope of the problem because it does not account for unfair outcomes that technically comport with the law.

Given these caveats, Part II explores the extent to which judges flouted statutory obligations and participated in cases where they had financial ties to a party. While the sample of judges is not random,[67] the purpose of this study is to identify a practice rather than to make statistical claims about its prevalence. The study found that a surprisingly large number of judges flout recusal rules, and these findings are only the lower bound of such instances.

II. JUDGES FAIL TO RECUSE WHEN REQUIRED BY LAW TO DO SO

Both the U.S. Code and the Code of Conduct are clear: judges must recuse themselves when they own stock in a party.[68] The recusal statute requires a judge to disqualify himself whenever "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial

65. Notice of Intent to Recuse at 1, *Kruse*, 2012 WL 12888668 (No. 10-cv-01066).

66. Kruse Technology Partnership's Notice of Voluntary Dismissal of Ford Motor Co. Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) at 2, *Kruse*, 2012 WL 12888668 (No. 10-cv-01066).

67. Given the nonrandom nature of our sample, we do not attempt to claim any sort of statistical inference.

68. 28 U.S.C. § 455(b)(4) (stating that judges must disqualify themselves from proceedings in which they have a financial conflict of interest); GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(1)(c) (stating that judges must disqualify themselves from proceedings in which they have a financial conflict of interest).

interest in the subject matter in controversy or in a party to the proceeding[.]"[69] The recusal statute defines a "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party";[70] the Code of Conduct tracks the recusal statute's language on "financial interest" exactly.[71] Courts have interpreted the recusal statute as providing a bright-line rule that requires recusal whenever a judge has an "equity financial interest of any size."[72] But judges often cross this line.

Our primary question is whether or not judges recuse when they are required by law to do so. While we defer a more fulsome analysis of the recusal statute and Code of Conduct, we note here that it is black-letter law that judges are required to recuse themselves whenever they own any amount of stock in a party to a case before them. We found that many judges did not meet even this minimal obligation: judges sometimes dismissed the case,[73] rendered summary judgment,[74] or remanded the case to state court.[75] We go into greater detail below, but we want to stress that our analysis does not suggest that these judges were actually biased in any case. We do not intend to accuse any of these judges of bias or prejudice in any case or in any set of cases. Rather, we are simply reporting that these judges repeatedly decided cases when they had a financial interest that required recusal.

69. § 455(b)(4).

70. *Id.* § 455(d)(4).

71. GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(3)(c); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n. 7 (1988) (noting that 28 U.S.C. § 455 "was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C").

72. Chase Manhattan Bank v. Affiliated FM Ins., 343 F.3d 120, 127 (2d Cir. 2003).

73. *See, e.g.*, Order Dismissing Plaintiff's Complaint at 2, Frederick v. Wells Fargo Bank NA, No. 12-cv-00553 (E.D.N.Y June 5, 2012); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 19 (2013) [hereinafter Judge *G*, FINANCIAL DISCLOSURE REPORT 2012], https://tinyurl.com/JudgeGFinDisRep2012 [https://perma.cc/S5FA-4BSG] (revealing that Judge *G* presiding over *Frederick* owned Wells Fargo stock in 2012).

74. *See, e.g.*, Nat'l Builders & Contractors Ins. v. Slocum, No. 10-cv-00253, 2011 BL 194207, at *7–8 (S.D. Miss. July 26, 2011); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 5 (2012), https://tinyurl.com/FinDisRep2011 [https://perma.cc/KJ5Z-M2G7] (revealing that the judge presiding over *Slocum* owned stock in Regions Bank—an unnamed defendant in the case—in 2011).

75. *See, e.g.*, Order Remanding Case to State Court at 5, JPMorgan Chase Bank, NA v. Ransby, No. 10-cv-01459 (N.D. Ga. July 9, 2010); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 5 (2011), https://tinyurl.com/FinDisRep2010 [https://perma.cc/LB3B-N9AW] (revealing that the judge presiding over *Ransby* owned J.P. Morgan stock in 2010).

A. *Examples of Recusal Failures*

Judges can fail to recuse in several ways. The first and most obvious is when judges are assigned a case involving a party in which they already own stock. For example, in November of 2009, a lawsuit against J.P. Morgan for wrongful termination was removed from state to federal court.[76] The case was assigned to Judge *F* who owned J.P. Morgan stock valued at $15,000 or less in 2009 and 2010.[77] Instead of recusing himself, Judge *F* dismissed the case with prejudice in June 2010.[78]

At other times, judges do not own stock when the case begins, but they purchase stock during the course of litigation. Take, for example, *Capital One, N.A. v. Leser*.[79] At the beginning of the case, Judge *G* owned no Capital One stock, but she purchased between $15,001 and $30,000 of the stock less than two weeks before the parties settled.[80] Another example: *Arriaga v. Wells Fargo Bank*[81] was assigned to Judge *H*, commenced on April 6, 2009,[82] and ended in 2013.[83] Judge *H*'s 2009 and 2010 financial disclosure reports do not include any mention of Wells Fargo,[84] so there is no indication that he should have recused

76. Klein v. J.P. Morgan Chase, No. 09-cv-06594, 2010 WL 2287485, at *1 (W.D.N.Y. June 1, 2010).

77. *See id.*; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2009, at 20 (2010), https://tinyurl.com/JudgeFFinDisRep2009 [https://perma.cc/DNM5-AJKA]; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 19 (2011) [hereinafter Judge *F*, FINANCIAL DISCLOSURE REPORT 2010], https://tinyurl.com/JudgeFFinDisRep2010 [https://perma.cc/5KPD-FQ2K].

78. *Klein*, 2010 WL 2287485, at *2. Judge *F* did recuse himself in another case where he owned stock in a party. *See* Order of Recusal at 1, Bausch & Lomb Inc. v. CIBA Vision Corp., No. 10-cv-06643 (W.D.N.Y. Nov. 16, 2010) (stating that "upon review of the Court's conflict list," the case, which included Novartis as a defendant, must be assigned to another judge); Judge *F*, FINANCIAL DISCLOSURE REPORT 2010, *supra* note 77, at 8 (revealing that Judge *F* owned Novartis stock in 2010).

79. No. 10-cv-00393 (E.D.N.Y. May 17, 2010) (Bloomberg Law, 2d Cir., Dockets).

80. *See* Complaint at 1, *Leser*, No. 10-cv-00393 (indicating that Judge *G* was assigned to the case upon the filing of the plaintiff's complaint in January 2010); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2009, at 21 (2010) [hereinafter Judge *G*, FINANCIAL DISCLOSURE REPORT 2009], https://tinyurl.com/JudgeGFinDisRep2009 [https://perma.cc/T3NC-V7YF] (indicating that Judge *G* divested herself of all Capital One stock on October 23, 2009); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 24 (2011), https://tinyurl.com/JudgeGFinDisRep2010 [https://perma.cc/E7PN-3VWR] (revealing that Judge *G* purchased Capital One stock on May 4, 2010, and May 5, 2010); Consent Order Settling Matter at 1, *Leser*, No. 10-cv-00393 (ordering, on May 17, 2010, that the matter be settled).

81. No. 09-cv-02115, 2013 WL 1303831 (N.D. Ill. Mar. 27, 2013).

82. Complaint at 1, *Arriaga*, 2013 WL 1303831 (No. 09-cv-02115).

83. *Arriaga*, 2013 WL 1303831, at *4.

84. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2009, at 4–14 (2010) [hereinafter Judge *H*, FINANCIAL DISCLOSURE REPORT 2009], https://tinyurl.com/JudgeHFinDisRep2009 [https://perma.cc/WL57-4DN6]; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR

himself during the first two years of litigation. But during October and November of 2011, while the case was ongoing, Judge *H* made four purchases of Wells Fargo stock.[85] Judge *H* did not recuse himself and eventually granted summary judgment in favor of Wells Fargo on March 27, 2013.[86] This is one of seven cases involving Wells Fargo where Judge *H* failed to recuse himself despite owning stock in the company—at least as last recorded.[87] Nor is Wells Fargo the only party with which a circumstance like this one occurred. While owning stock in each of the following parties, Judge *H* failed to recuse in four cases involving Deutsche Bank[88] and four involving Ford, Pfizer, and General Electric.[89]

CALENDAR YEAR 2010, at 4–12 (2011) [hereinafter Judge *H*, FINANCIAL DISCLOSURE REPORT 2010], https://tinyurl.com/JudgeHFinDisRep2010 [http://perma.cc/U3MW-ARP3].

85. *See* COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 12 (2012) [hereinafter Judge *H*, FINANCIAL DISCLOSURE REPORT 2011], https://tinyurl.com/JudgeHFinDisRep2011 [https://perma.cc/CN65-WLJM]. Of the four purchases of Wells Fargo stock (denoted by "WFC," the New York Stock Exchange stock symbol for Wells Fargo), three occurred on October 19 (two being valued at $15,000 or less, and one being valued at between $15,001 and $50,000); the fourth purchase occurred on November 15 and was valued at between $15,001 and $50,000. *Id.* Judge *H* sold Wells Fargo stock in October and November; one sale was on October 20 (valued between $15,001 and $50,000) and the other was on November 15 (valued between $15,001 and $50,000). *Id.* We do not have Judge *H*'s 2012 disclosure, so we do not know if he liquidated his entire position in the November sale. If so, Judge *H* might have been able to avail himself of the statutory divestiture provision of 28 U.S.C. § 455(f); however, it is not clear that purchasing shares in a party while litigation is ongoing would count as an "appearance or discovery, after the matter was assigned to him" of a financial interest. *See* 28 U.S.C. § 455(f).

86. *Arriaga*, 2013 WL 1303831, at *4.

87. *See* Civil Docket for Case, *Arriaga*, 2013 WL 1303831 (No. 09-cv-02115) (showing Judge *H* presiding over case during October and November 2011); Civil Docket for Case, Wells Fargo Equip. Fin., Inc. v. Titan Leasing, Inc., No. 10-cv-04804, 2012 WL 6184896 (N.D. Ill. Dec. 7, 2012) (same); Civil Docket for Case, Hopper v. Wells Fargo Bank, N.A., No. 11-cv-04121, 2012 U.S. Dist. LEXIS 140664 (N.D. Ill. Sept. 18, 2012) (same); Civil Docket for Case, Agri-Best Holdings, LLC v. Direct USA, Inc., No. 10-cv-06978 (N.D. Ill. May 25, 2012) (same); Civil Docket for Case, Wells Fargo Bank, N.A. v. Young, No. 11-cv-05198 (N.D. Ill. July 31, 2011) (same); Civil Docket for Case, Wells Fargo Bank, N.A. v. Chicalace, No. 11-cv-04819 (N.D. Ill. July 17, 2011) (same); Civil Docket for Case, Wells Fargo Bank, N.A. v. Rosas, No. 11-cv-04336 (N.D. Ill. June 25, 2011) (same); Judge *H*, FINANCIAL DISCLOSURE REPORT 2011, *supra* note 85, at 12 (showing Judge *H* owned Wells Fargo stock in October and November 2011).

88. *See* Civil Docket for Case, Deutsche Bank Nat'l Tr. Co. v. Fischer, No. 10-cv-06270 (N.D. Ill. Sept. 30, 2010) (showing Judge *H* presiding over case during September, November, and December 2010); Civil Docket for Case, Deutsche Bank Nat'l Tr. Co. v. Batastini, No. 10-cv-05990 (N.D. Ill. Sept. 21, 2010) (same); Civil Docket for Case, Deutsche Bank Nat'l Tr. Co. v. Spradling, No. 10-cv-05924 (N.D. Ill. Sept. 17, 2010) (same); Civil Docket for Case, Deutsche Bank Nat'l Tr. Co. v. Palumbo, No. 1:10-cv-05293 (N.D. Ill. Aug. 21, 2010) (same); Judge *H*, FINANCIAL DISCLOSURE REPORT 2010, *supra* note 84, at 11 (showing Judge *H* owned Deutsche Bank stock in September, November, and December 2010).

89. *See* Civil Docket for Case, Federico v. Freedomroads RV, 09-cv-02027 (N.D. Ill. Sept. 10, 2012) (showing Judge *H* presiding over case with Ford as a party); Civil Docket for Case, Simonian v. Pfizer, 10-cv-01193 (N.D. Ill. May 23, 2011) (showing Judge *H* presiding over case with Pfizer as a party); Civil Docket for Case, Dearden v. Electro-Motive Diesel, 09-cv-05325 (N.D. Ill. Sept. 25,

Another curious example occurred in *Price v. J.C. Penney Corp*.[90] Rhonda Price sued her former employer under Title VII of the Civil Rights Act of 1964[91] for racial discrimination and retaliation after filing an official complaint with human resources.[92] Judge *I* was assigned to the case in March 2012.[93] Eight months into the case, he purchased J.C. Penney stock.[94] He presided over the case for three more months.[95] Only after the parties approached Judge *I* to inform him that they had reached an agreement to dismiss the case did Judge *I* inform them of his financial interest.[96] The parties then signed a "Stipulation of Waiver of Conflict,"[97] and Judge *I* dismissed the case.[98] Although Judge *I*

2009) (showing Judge *H* presiding over case with General Electric as a party); Civil Docket for Case, State Farm Fire & Casualty Co. v. Sharp Corp., 09-cv-01104 (N.D. Ill. Aug. 25, 2010) (same); Judge *H*, FINANCIAL DISCLOSURE REPORT 2009, *supra* note 85, at 5, 10; Judge *H*, FINANCIAL DISCLOSURE REPORT 2010, *supra* note 84, at 5, 8, 11. Judge *H*'s financial disclosure reports (2009, 2010, and 2011) often do not indicate whether a sale of stock was a full or partial sale. Therefore, in researching Judge *H*, we assumed that Judge *H* liquidated his entire holdings in any given company on the last sell date mentioned in his financial disclosure report, unless otherwise indicated.

90. No. 12-cv-00138 (E.D. Ark. Mar. 8, 2013) (Bloomberg Law, 8th Cir., Dockets).

91. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000h).

92. Complaint at 2–3, *Price*, No. 12-cv-00138.

93. *Id.* at 1.

94. *See id.*; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 4 (2013) [hereinafter Judge *I*, FINANCIAL DISCLOSURE REPORT 2012], https://tinyurl.com/JudgeIFinDisRep2012 [https://perma.cc/FQ5Z-3MWL] (showing that Judge *I* purchased J.C. Penney stock on November 29, 2012—approximately eight months after Judge *I* was assigned to the case).

95. *See* Order Dismissing Case at 1, *Price*, No. 12-cv-00138 (showing Judge *I* continued presiding over the case for three months after his purchase of J.C. Penney stock until dismissing the case on March 8, 2013).

96. *See* Unopposed Motion to Dismiss at 1, *Price*, No. 12-cv-00138 (showing that parties to the case reached an agreement on March 6, 2013); Joint Stipulation of Waiver Conflict at 1, *Price*, No. 12-cv-00138 (indicating that Judge *I* informed parties on March 7, 2013, of a conflict due to J.C. Penney stock ownership).

97. Joint Stipulation of Waiver Conflict, *supra* note 96, at 1 (showing the parties waived Judge *I*'s conflict on March 8, 2013). This is not a common docket entry. We searched "Stipulation of Waiver of Conflict of Interest" in several databases. Westlaw and Google Scholar returned no such instances. Bloomberg Law returns one result. *See Results for Dockets*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw/search/results/2ac9bb85392e0745358bcc6c566f0984 [https://perma.cc/CY98-47V5 (staff-uploaded dark archive)] (showing that the results of a Bloomberg Law search for "Stipulation of Waiver of Conflict of Interest" includes *WC McQuaide Inc. v. Able Trucking*, No. 2002-cv-00459 (Ohio Comm. Pleas Apr. 26, 2002) (Bloomberg Law, Ohio, Dockets)). Note, the American Bar Association's Model Judicial Code of Conduct states that judges "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification." MODEL CODE OF JUD. CONDUCT Canon 2 r. 2.11(C) (AM. BAR ASS'N 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification/ [https://perma.cc/PZ4X-AWZR]. However, this ability to disclose and permit waiver of disqualification does not apply to judges with financial conflicts of interest. *See infra* notes 100–02 and accompanying text.

98. Order Dismissing Case, *supra* note 95, at 1 (showing Judge *I* dismissed the case on March 8, 2013).

should have recused months earlier after purchasing the J.C. Penney shares—or divested his interest in the company—disclosing to the parties and securing their agreement might have seemed reasonable under the circumstances. The problem is that it was illegal.

Section 455(e) of the recusal statute explicitly forbids judges from accepting "waiver of any ground for disqualification enumerated in subsection (b)" of the statute.[99] That subsection is the part of the rule that requires recusals for financial interests such as stock ownership.[100] While waivers might represent a reasonable alternative to recusals which strain the court system and delay litigation, the recusal statute unambiguously prohibits such waivers.[101]

A different illegal maneuver occurred in *Meluch v. Ford Motor Co.*[102] Originally assigned to Judge *J*, the case was transferred when the judge, who held Ford stock,[103] recused himself.[104] It passed through at least one other judge[105] until, remarkably, Judge *J* requested it back.[106] The order reassigning the case back to Judge *J* explained that he "was mistaken about a conflict and . . . requested the matter be returned to his docket."[107] The request was granted.[108] It should not have been.

For one, Judge *J* still owned stock in Ford,[109] which should have precluded his participation in the case.[110] Even if he really had been mistaken, however, Judge *J* was no longer able to participate. Multiple circuit court opinions have held that a judge who disqualifies himself may not vacate the recusal order and participate at a later time.[111] Indeed, to do so creates an appearance of impropriety, whether the initial recusal was warranted or not.

99. 28 U.S.C. § 455(e).

100. *Id.* § 455(b)(4), (d)(4).

101. *Id.* § 455(e).

102. No. 10-cv-00651 (N.D. Ohio Mar. 29, 2010) (Bloomberg Law, 6th Cir., Dockets).

103. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 8 (2011) [hereinafter Judge *J*, FINANCIAL DISCLOSURE REPORT 2010], https://tinyurl.com/JudgeJFinDisRep2010 [https://perma.cc/T9LT-A95Y].

104. Order of Recusal at 1, *Meluch*, No. 10-cv-00651.

105. Order of Reassignment at 1, *Meluch*, No. 10-cv-00651.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; Judge *J*, FINANCIAL DISCLOSURE REPORT 2010, *supra* note 103.

110. 28 U.S.C. § 455(b)(4).

111. *E.g.*, Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988) (finding that, after recusal, a judge "is limited to performing ministerial duties necessary to transfer a case to another judge (including the entering of 'housekeeping' orders)"); Arnold v. E. Air Lines Inc., 712 F.2d 899, 904 (4th Cir. 1983) ("Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred."); Doddy v. Oxy USA, Inc., 101 F.3d 448, 456–57 (5th Cir. 1996) (holding that a judge erred in vacating the recusal order after recusing herself); McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1261 (5th Cir. 1983) (holding that permitting a disqualified judge to assign the case "would violate the congressional command that the disqualified judge be removed from all

A final interesting pair of examples are *Hutchinson v. J.P. Morgan Chase Bank*[112] and *Bae v. J.P. Morgan Chase & Co*.[113] These cases raise a distinct but related problem within the recusal framework. While presiding over both cases, Judge *K* owned stock in J.P. Morgan Chase, which should have disqualified him.[114] He remanded the first case back to state court[115] and dismissed the second.[116] After disposing of both cases, Judge *K* recused himself.[117] His orders, both using identical language, are worth considering in full:

> It now has come to Judge [*K*]'s attention that he had a small financial interest in JP Morgan at the time he closed the case. Judge [*K*] believes, since he was unaware of his financial interest, that his financial interest did not affect the outcome of the case nor could it be reasonably questioned that it did so. In any event, Judge [*K*] hereby recuses himself from this case because of his financial interest and this case will be reassigned to another judge in the event this case is reopened for any reason.[118]

There is no reason to doubt that Judge *K* honestly did not know of his "small financial interest" in J.P. Morgan. And, to be fair, 28 U.S.C. § 455(b)(4) requires recusal whenever a judge "knows" that he has a financial interest.[119] Lacking knowledge, it is perhaps incorrect to charge Judge *K* with violating subsection (b)(4) of the recusal statute.

If left there, however, the incentive problems are manifest. A judge can simply remain ignorant (or plead ignorance) and avoid any need to recuse. Since, as we argue below,[120] the recusal statute is written to further the public legitimacy of the judiciary, its object is to eliminate instances where judges could be perceived to be biased. Allowing ignorance to be a full defense seems to undermine the intent of the recusal statute.

---

participation in the case" and might also "create suspicion that the disqualified judge will select a successor whose views are consonant with his").

112. No. 10-cv-00483 (C.D. Cal. Dec. 17, 2010) (Bloomberg Law, 9th Cir., Dockets).

113. No. 09-cv-01127 (C.D. Cal. Feb. 10, 2012) (Bloomberg Law, 9th Cir., Dockets).

114. *See* § 455(b)(4); Order Remanding Case to State Court at 2, *Hutchinson*, No. 10-cv-00483; Order Granting Voluntary Dismissal at 2, *Bae*, No. 09-cv-01127; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 8 (2011), https://tinyurl.com/JudgeKFinDisRep2010 [https://perma.cc/SZE8-L2F4]; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 8 (2013), https://tinyurl.com/JudgeKFinDisRep2012 [https://perma.cc/FPF6-39C7].

115. Order Remanding Case to State Court, *supra* note 114, at 2.

116. Order Granting Voluntary Dismissal, *supra* note 114, at 2.

117. Order of Recusal, *Hutchinson*, No. 10-cv-00483 [hereinafter *Hutchinson*, Order of Recusal]; Order of Recusal, *Bae*, No. 09-cv-01127 [hereinafter *Bae*, Order of Recusal].

118. *Hutchinson*, Order of Recusal, *supra* note 117; *Bae*, Order of Recusal, *supra* note 117.

119. § 455(b)(4).

120. *See infra* Sections III.A–C.

The drafters of the recusal statute seem to have been aware of this problem. Subsection (c) of the recusal statute therefore says, "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."[121] If Judge *K*'s lack of knowledge absolves him of guilt under subsection (b) of the recusal statute, it condemns him under subsection (c).

To his credit, Judge *K* does not try to excuse his recusal failure. Instead, he argues that there is no reason to think he was actually biased in the case, yet he does not assert that this is the proper inquiry.[122] His choice to recuse himself in this awkward way, if anything, speaks highly of his desire to follow the rules. The problem, though, is that he did not do so. Unfortunately, he is not alone.

B. *How Does Recusal Failure Happen?*

How is it that so many judges fail to recuse when they own stock in parties to so many cases? Systems are perfectly designed to achieve the results they get, and the recusal system is no exception. There are two parts to the recusal system we highlight now. The first is case assignment. Different districts handle case allocations differently, and seldom do courts publish detailed case assignment protocol.[123] Common administrative sense suggests courts use one of two approaches: (1) leave it to the judge to recuse as necessary, or (2) maintain a running log of judges' disqualifying investments in the clerk's office and ensure that conflicted judges are not assigned cases where there are conflicts. Indeed, our off-the-record conversations with former clerks suggest as much. In the second approach, the list of investments, of necessity, comes from information provided by the judge. If a judge fails to include an actual conflict or creates a conflict after the case has begun, the clerk's office cannot provide any meaningful protection against conflicts. Conversely, if a judge notifies the clerk of a "conflict" that does not actually rise to the level of a conflict, the clerk's office will almost certainly divert cases away from the judge that should not be diverted.

When a recusal failure occurs, it is often impossible (at least from the outside) to determine where the breakdown occurred. The judge might have failed to notify the clerk's office, or the clerk's office might have missed the

121. § 455(c).

122. *See Hutchinson*, Order of Recusal, *supra* note 117; *Bae*, Order of Recusal, *supra* note 117.

123. *See, e.g.*, W.D.N.C. Civ. R. 73.1(a) ("All cases shall be initially assigned to a United States District Judge."); *Frequently Asked Questions: How Are Judges Assigned to Cases?*, U.S. DIST. CT. E. DIST. TEX., http://www.txed.uscourts.gov/?q=faq/filing [https://perma.cc/8VX9-K5JW] ("In divisions with more than one judge, they are randomly chosen by a computer database, similar to a deck of cards. When one judge is assigned, the 'cards' are shuffled again for the next selection. The Clerk's Office has no discretion in the assignment of cases.").

judge's addition to the list or the inclusion of a conflicted party in the case. In an attempt to uncover more, we emailed the clerk's office in a district where we had identified a judge with dozens of failures to recuse while owning stock in a party.[124] We did not mention our findings but merely asked whether the clerk's office screened cases for conflicts or whether judges handled recusals themselves.[125] The email we received in return was one sentence: "Our judges follow the code of conduct."[126] Ultimately, failures to recuse fall solely on judges; it is their obligation to know their financial interests and to recuse accordingly.[127]

A second and related system is the filing of annual financial disclosure reports under the Ethics in Government Act.[128] The information is often dated by the time it is filed. Financial disclosures are not due until May 15 of the year following the year which the disclosure covers.[129] For example, a judge presides over a case in February 2020 and an observer wants to detect a conflict. The observer could wait three months until May 2020 when the judge will file a financial disclosure, but that will be for the year 2019. The judge may have divested of a conflicting asset in January 2020—or purchased a conflicting asset—after the filing period for 2019 had closed but before presiding over the February 2020 case. An observer must wait until May 2021—fifteen months later—when the judge is required to file a disclosure for 2020 to determine the potential conflicts from February of 2020. This level of attention requires the existence of an observer who is especially diligent.

Parties to a suit have the strongest incentives to detect and avoid potentially biased judges, but they are unlikely to press judges for recusals. If a party moves to recuse, it risks upsetting the judge, who might interpret such a motion as an accusation of bias.[130] If the judge denies the motion, the party gains nothing and is left facing a judge whose impartiality the party just ostensibly questioned.[131] While there is a process to contest a judge's failure to recuse, such review is exacting and rarely granted, further disincentivizing litigants from seeking recusal.[132]

124. Email from Ben Johnson, Assistant Professor of L., Penn State L., to Annette Panter (July 16, 2019, 11:23 AM) (on file with author).

125. *Id.*

126. Email from Annette Panter, Assistant to the Clerk of Ct., U.S. Dist. Ct. for the N. Dist. of Ill., to Ben Johnson (July 16, 2019, 1:11 PM) (on file with author).

127. 28 U.S.C. § 455(c).

128. 5 U.S.C. app. §§ 101–111.

129. § 101(d).

130. *See* FLAMM, *supra* note 15, at 11.

131. *Id.* at 13.

132. The judicial review process involves filing suit against the judge and seeking mandamus, which in this case would be an order from a court to the judge compelling the judge to correct his earlier mistake. *See, e.g.*, *In re* Cameron Int'l Corp., No. 10-30631, 2010 WL 2930736 (5th Cir. 2010) ("This circuit has recognized that the question of recusal is reviewable on a petition for a writ of

Parties would be especially loathe to make such a motion without solid information as to the judge's actual financial links to a party. The dated nature of filings is obviously one hurdle they must deal with, but parties cannot get their hands on even dated disclosures without putting themselves in a similarly awkward position. Though disclosures are publicly available from the AO,[133] requests must provide the name, occupation, and address of the requestor.[134] If requesting the information on behalf of another party, the requestor must also specify that person or organization.[135] This information is then given to the judge and the financial disclosure report is released to the requesting party.[136] If requestors conceal this information, they are guilty of perjury.[137] Accordingly, parties cannot even inquire as to potential disqualifying links without potentially risking judicial reprisal.

If judges are not intentionally violating the law, then they must be simply unaware of (or forget about) their holdings or existing conflicts with a company who is a party to the case. And assuming that sooner and more frequent filing deadlines would make judges more aware of and remember their holdings, the year-long lag time between filing deadlines—as well as the fact that the filing deadline is well past the end of the fiscal year—increases the likelihood that judges will be less aware of their financial holdings. In effect, the system is set up to fail.

III. JUDGES HAVE VERY DIFFERENT RECUSAL PRACTICES

A. *Unclear Rules and Unhelpful Practices*

Even if the mechanics of the system were improved, the wide range of financial links between judges and parties poses a problem. District court judges have obligations to recuse under both the U.S Code and the Code of Conduct.[138] Recusal rules aim to imbue the judicial process with two fundamental characteristics: fairness and legitimacy. Recusal prevents not only actual bias (fairness) but also the mere appearance of bias (legitimacy). Of course, the general assumption here is that legitimacy-based recusals will be overinclusive

mandamus. The writ, however, will not lie in the absence of exceptional circumstances, and the party seeking the writ has the burden of proving a clear and indisputable right to it." (citations omitted)).

133. *See supra* notes 49–53 and accompanying text. To review the request form, see ADMIN. OFF. OF THE CTS., *Request for Examination of Report Filed by a Judicial Officer of Judicial Employee*, U.S. CTS. (Dec. 2019), https://www.uscourts.gov/sites/default/files/ao010a.pdf [https://perma.cc/EV9T-VGSE].

134. *See supra* notes 49–53 and accompanying text.

135. *See supra* text accompanying notes 49–53.

136. *Supra* text accompanying notes 49–53.

137. *See* 28 U.S.C. § 1746; *supra* text accompanying notes 49–53.

138. *See* § 455(b)(4); GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(1).

so that the system will be fair and legitimate, with the only drawback being decreased efficiency. We think this assumption misses something important. There is a trade-off between legitimacy and bias centered on an often-overlooked feature of our system, namely the random assignment of judges.

B. *The Fairness-Legitimacy Trade-off*

If a judge stands to profit from one side's victory and that knowledge influences their decisions, such bias is unfair to the parties. However, if nobody knows about this motivation, it poses little threat to the legitimacy of the system since legitimacy rests on public perception. On the other hand, suppose a judge's spouse owns stock in a company. The judge does not know this (despite the statutory obligation to remain informed of such financial interests), and so the judge treats this case just as they would any other. There is no unfairness, but if the public discovered that the judge in fact had a financial interest in a party to the case, the legitimacy of the system may well be imperiled.

So understood, there is a difference between fairness and legitimacy, and the relationship between the two might not be obvious. Of course, the more unfair a system is, the more likely it is to ultimately be considered illegitimate. Still, the concern with legitimacy serves two important purposes. First, it offers an alternative rationale for applying and enforcing rules against judges other than concern over judicial bias. Second, it draws our attention to the distinction between fairness and legitimacy. Legitimacy depends on public perception, whereas fairness is an intrinsic trait of the system, independent of public perception. It is tempting to only focus on eliminating anything that might be considered "unfair" in a trial in order to bolster public perception of the process. But, as we will argue below, such efforts to make a system more legitimate might well make things less fair.

1. Fairness to Parties

A key feature of our judicial system is the random assignment of judges.[139] Ideally, the outcome of the case would not depend on the judge assigned to it,

139. *See* United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass. 1992); J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1103 (2000) (explaining that circuits attempt to insert neutrality into the judicial process through the implementation of a random assignment system for cases and judges); Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 205 (2014) ("Not only is random assignment assumed to be the status quo, it is also a popular, venerated practice."); Ronen Perry & Tal Z. Zarsky, "*May the Odds Be Ever in Your Favor": Lotteries in Law*, 66 ALA. L. REV. 1035, 1036–37, 1042 (2015) ("[T]he variety of instances in which the law actually resorts to lotteries is overwhelming."); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 1, 47 (2009) ("[M]ost adjudicators now embrace randomization within their own institutions: they commonly use lotteries to assign incoming cases to each other."). Some authors are skeptical of the benefits of random assignment. *See, e.g.*, Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291, 291

but in practice, this has not been the case. Insofar as different judges have different views of law, proclivities for admitting evidence, thresholds for granting summary judgment, or other procedural tendencies that can impact outcomes, the judge that parties draw may significantly affect the likely outcome of a case.

While it cannot be guaranteed that every case will be treated the same by a judge, random assignment effectively guarantees that every case has an equal chance to be decided by any judge. Thus, while the ultimate judicial assignment might tilt the probable outcome of a given case, random assignment flattens out the judicial idiosyncrasies at the beginning of the process.[140] In short, fairness is proffered at the assignment stage because it is harder to ensure at the trial stage.[141]

Recusals pose a strong theoretical challenge to this system. Suppose there are two types of judges. Type One judges tend to grant motions to dismiss and invest in large blue-chip financial companies. Type Two judges are more likely to let cases move to discovery and to invest in index funds.[142] If an individual sues a large bank, for example, there is a much greater chance that Type One judges will recuse because of their financial ties to large financial companies. This would mean the remaining Type Two judges are less or not biased along the "big-company" dimension. However, the remaining Type Two judge pool will be biased along the "claims-dismissal" dimension, in that parties are more likely to draw a Type Two judge who rarely grants motions to dismiss.

Fairness requires that cases be heard by judges who do not have a financial stake in the outcome. If operating well, the recusal system should effectively remove biased judges from the pool either ex ante (by having the clerk remove them from the pool) or ex post (by the judges recusing). The challenge is that if certain recused judges are removed, the makeup of the pool could change in ways that may also be unfair.

Contrast three possible situations when a case is assigned to a judge. First, a judge is actually biased, but nobody knows this, and they do not recuse. Then the subsequent proceedings are unfair though they appear legitimate. Second, the judge has a disqualifying financial interest that does not actually bias them, people know about it, but they do not recuse. This threatens the system's

(2000) ("[T]he random selection of judges creates other serious problems for the judiciary . . . ."); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 215 (1999) (suggesting the United States end the practice of randomly assigning judges).

140. *Cf.* Brown & Lee, *supra* note 139, at 1041–43 (discussing fairness at the appellate stage).

141. *See id.*

142. Index funds do not entail equity ownership of the underlying securities. James Chen, *Guide to Index Fund Investing*, INVESTOPEDIA, https://www.investopedia.com/terms/i/indexfund.asp [https://perma.cc/RVA6-W2XA] (last updated May 23, 2020). Therefore, they do not amount to financial interests requiring recusal. *See* United States v. Ala. Power Co., No. 01-CV-152, 2014 WL 467519, at *3 (N.D. Ala. Feb. 5, 2014).

legitimacy even though the judge was fair. Third, the judge has a disqualifying financial interest that does not bias them, but they follow the rules and recuse. This preserves legitimacy, but it could make the system less fair because it changes the composition of the pool of judges who may hear the case. Thus, preserving the legitimacy of the system may actually introduce unfairness if it changes the probability of parties drawing a certain "type" of judge.

In this way, varying interpretations of recusal requirements, which are likely to emerge when the recusal statute is unclear, are importantly different from a diversity of views regarding legal interpretation. When a case turns on a point of law, parties understand ex ante that judges will differ in how they interpret legal materials. Parties accept this fact because they had a fair shot at getting a range of different interpretations from different judges through random assignment and because the parties believe the judge does not have a rooting interest—much less a financial stake—in the case. But when judges follow different rules of recusal, random assignment fails and the parties are more likely to think judges are biased. Put differently, random assignment and procedurally unbiased judges are what make differing judicial tendencies (in other words, substantive bias) tolerable.

This analysis applies to all recusals. Anytime a judge recuses, they alter the probabilities of parties being assigned a particular judge. This is a cost the system is willing to pay in order to avoid the larger cost of deploying a judge plausibly perceived to be biased in a given case. Thus, any recusal is costly in terms of undermining the random assignment of judges, but some are necessary. If a judge recuses when they need not, then the cost is unnecessary and wrong. To be sure, there are other features of our judicial practice that create similar problems.[143] However, the existence of other problems does not justify the creation of new ones.

2. Fairness to Judges

Random assignment not only legitimates the process for litigants in a given case, but it also roughly equalizes the burden across judges. Random selection is designed to create a process where judges cannot control the types of cases they draw. Specifically, the probability that any given judge is assigned to a case should be independent of the characteristics of that case.[144] Random

143. For example, senior judges only take certain types of cases. Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540–41 (2007). Indeed, scholars and litigants have been concerned about institutional deviations from random assignment for years. *See, e.g.*, Brown & Lee, *supra* note 139; Jonathan L. Entin, *The Sign of "The Four": Judicial Assignment and the Rule of Law*, 68 MISS. L.J. 369, 370–74 (1998); Dane Thorley, *Randomness* Pre-*considered: Recognizing and Accounting for "De-Randomizing" Events When Utilizing Random Judicial Assignment*, 17 J. EMPIRICAL LEGAL STUD. 342, 342 (2020).

144. Ideally, the judge should not affect the outcome of the case since, in theory, judges are all applying the same law. That is, we would like to imagine judges as umpires. *See* Aaron S.J. Zelinsky,

assignment also makes things fair for the judges. Since every judge has a similar probability of being assigned any given case, judges do not have to worry about being stuck with more than their share of tedious or complex cases.[145]

Recusals directly upset this process. With recusals, case-specific factors affect the probability that a judge will be assigned a case. When a judge is recused from a case, the probability that they will decide the case drops to zero, which means that other judges have an increased probability of deciding the case. Parties in the case now have different probabilities of drawing a given judge than parties in other cases. Moreover, other judges now have a higher probability of drawing certain types of cases. This means judges may face an unfair distribution of work over time. Pity the poor judge who does not own bank stocks; they must deal with all of the mortgage cases.

Worse, judges might be able to use the recusal rules to game the system. For instance, a judge who did not want to see another mortgage document in the wake of the financial crisis could simply buy shares of Bank of America, Wells Fargo, J.P. Morgan, or another major mortgage lender, and be summarily recused from most mortgage cases. Thus, recusal rules might create bad incentives for judges that could lead to behavior that makes the system less fair for everyone. And even if this behavior is unlikely, the potential for it to occur may affect public perception and decrease legitimacy.

The concern about upsetting the probabilities of parties being assigned a particular judge is not merely theoretical. If only a single judge in a large district owns a particular company's stock and is summarily removed from the pool, this removal will not have a large effect on the probabilities. In practice, however, the number of judges with financial conflicts can be so great that very few judges in a district can preside over certain cases.[146] Such a circumstance substantially upsets random assignment and can create substantial delays in litigations. Consider, for example, *Eshterhardi v. Morgan Stanley Smith Barney, LLC*,[147] a case from the Central District of California.[148] Even though the case

The Justice as Commissioner: Benching the Judge-Umpire Analogy, 119 YALE L.J. ONLINE 113, 114–17 (2010) (tracing the lineage of the analogy). But just as umpires have different strike zones, judges apply rules inconsistently.

145. We do not assume case assignments are distributed independently or uniformly. For instance, if several cases involve the same underlying facts, subsequent cases should be assigned to the initial judge in the interest of judicial economy; thus assignment is not independent across cases. Similarly, if one judge has a full docket, then another judge with more room on the schedule should get the case; thus there is not a uniform distribution. In our view, legitimacy does not depend on independent draws from a uniform distribution. Instead, it requires that the features of the case itself should not affect the likelihood of drawing a particular judge.

146. *See* JOHNSON & PARTON, *supra* note 23; *infra* notes 198–200 and accompanying text.

147. 11-cv-07866 (C.D. Cal. Nov. 13, 2012) (Bloomberg Law, 9th Cir., Dockets).

148. *Id.* at 1.

involved only a single named defendant, six judges had to recuse themselves from or reassign the case before a seventh judge was able to hear it.[149]

Judge *L* was assigned to the case first.[150] He recused himself in October 2011 because he held less than $15,000 of stock in Citigroup, Inc., which, along with Morgan Stanley, owned Morgan Stanley Smith Barney, LLC.[151] The case then went to Judge *M*, who recused in November because he held less than $15,000 of Morgan Stanley stock.[152] The case was then assigned to Judge *N* who recused in December citing his and his family members' interests in both Morgan Stanley and Citigroup.[153] Judge *N*'s own financial disclosure reports show ties with Morgan Stanley, but not any that demand recusal under 28 U.S.C. § 455(b)(4).[154]

From there, the case went to Judge *O*, who recused himself, citing "a financial interest in one of the parties."[155] Although he held $15,001–$50,000 in a Morgan Stanley money market account, $50,000–$100,000 in a Citibank account, and $150,002–$350,000 in Smith Barney money funds and its bank deposit program, his financial disclosure reports do not include assets that would be considered financial interests under 28 U.S.C. § 455 or that would otherwise generate recusal obligations.[156] Nevertheless, Judge *O* recused, and

149. *See infra* notes 150–60 and accompanying text.

150. *See* Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05 at 1, *Eshterhardi*, 11-cv-07866 [hereinafter Order to Reassign Case October 27] (showing Judge *L* as the presiding judge who recused on October 27, 2011).

151. *See id.*; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 5 (2012), https://tinyurl.com/JudgeLFinDisRep2011 [https://perma.cc/A4XW-LB5P].

152. *See* Order to Reassign Case October 27, *supra* note 150, at 1; Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, at 1, *Eshterhardi*, 11-cv-07866 [hereinafter Order to Reassign Case November 17] (showing Judge *M* as the presiding judge who recused on November 17, 2011); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 9, 26 (2012), https://tinyurl.com/JudgeMFinDisRep2011 [https://perma.cc/N2LD-MTBC].

153. *See* Order to Reassign Case November 17, *supra* note 152; Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05 at 1, *Eshterhardi*, 11-cv-07866 [hereinafter Order to Reassign Case December 14] (showing Judge *N* as the presiding judge who recused on December 14, 2011).

154. *See* 28 U.S.C. § 455(b)(4); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 3–11 (2012) [hereinafter Judge *N*, FINANCIAL DISCLOSURE REPORT 2011], https://tinyurl.com/JudgeNFinDisRep2011 [https://perma.cc/BGU4-DRL9].

155. *See* Order to Reassign Case December 14, *supra* note 153, at 1; Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, *Eshterhardi*, 11-cv-07866 [hereinafter Order to Reassign Case December 27] (showing Judge *O* as the presiding judge who recused on December 27, 2011).

156. *See* § 455; COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 4–5 (2012) [hereinafter Judge *O*, FINANCIAL DISCLOSURE REPORT 2011], https://tinyurl.com/JudgeOFinDisRep2011 [https://perma.cc/7WLK-UZYN].

the case was reassigned to Judge *P*, who ordered that the case be reassigned without citing a reason.[157] Her reports do not indicate any financial ties to the defendant.[158] From there the case made its way to Judge *Q*, who recused herself in January because she had a stock interest of undisclosed value in Morgan Stanley.[159] From there the case was assigned to Judge *R*, who was finally able to hear the case.[160]

In this one case, one-sixth of the judges in the Central District of California recused themselves.[161] This is a very real problem for random assignment. But the problem was made worse because three of the six judges who recused did so despite not having a financial interest,[162] as defined by the recusal statute and Code of Conduct,[163] in any of the parties.

C. *The Need for Consistency*

The key feature of the fairness-legitimacy trade-off is that fairness and legitimacy both operate at a systemic level. The fairness concerns we identify are not limited to a biased judge in a particular case. Rather, there is also concern that the pool is biased before the case begins. Worse, the bias likely affects all cases since judges are constrained in how many cases they can take at any point in time. Suppose a judge owns several bank stocks. As a result, they decide a disproportionately low number of mortgage cases because they have to recuse so often. Accordingly, nonbank parties filing state fraud claims under the district court's diversity jurisdiction are more likely to get this judge, at least if

157. *See* Order to Reassign Case December 27, *supra* note 155; Order Returning Case for Reassignment at 1, *Eshterhardi*, 11-cv-07866 [hereinafter Order Returning Case January 5] (showing Judge *P* returning the case to the clerk's office for reassignment on January 5, 2012).

158. *See* COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2011, at 4–9 (2012), https://tinyurl.com/JudgePFinDisRep2011 [https://perma.cc/LFA4-N73T]. Judge *P*'s year 2012 financial report is not available on Judicial Watch. *See Document Archives*, JUD. WATCH, https://tinyurl.com/JudWatchJudgePArchives [https://perma.cc/44KK-D5JW]. Because Judge *P* did not officially recuse until January 5, 2012, the possibility exists that she acquired some stock that disqualified her. *See* Order Returning Case January 5, *supra* note 157, at 1. But rather than disproving our point, this would go to the problem of judges being able to escape cases they do not like by simply acquiring a financial interest in one of the parties. *See supra* text accompanying notes 145–46.

159. *See* Order Returning Case January 5, *supra* note 157; Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, *Eshterhardi*, 11-cv-07866 [hereinafter Order to Reassign Case January 6] (showing Judge *Q* as the presiding judge who recused on January 6, 2012).

160. *See* Order to Reassign Case January 6, *supra* note 159; Order to Dismiss Entire Action at 2, *Eshterhardi*, 11-cv-07866 (showing Judge *R* as the presiding judge who dismissed the entire action).

161. *See supra* notes 150–60 and accompanying text (showing recusal of six judge). Using the Federal Judicial Center data, see *id.*, wherein we identified thirty-six active and senior judges as the total number of available judges in the Central District of California in November of 2011.

162. *See supra* notes 150–60 and accompanying text (showing recusal of six judges).

163. 28 U.S.C. § 455(b)(4); GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C).

districts work to keep the judge's workload balanced. Thus, the nonbank parties face a biased pool because of recusals in different cases.

Given the importance of random assignment to the system and the systemic effects of recusal decisions, recusal policy should be set at the system level, not left up to judges. If judges are free to apply different personal standards as to whether certain links are disqualifying, then the probability of a case being assigned to a judge is no longer set objectively by the system. Rather, the probability reflects the idiosyncratic private views of individual judges.

For example, suppose there are two types of judges. Some judges are too quick to recuse, while others are too slow. Judges who are too quick rarely decide cases when parties might question their impartiality, but they also upset the random assignment process by improperly unbalancing the probability that cases are assigned to different judges. Judges who are too slow rarely upset the random assignment process, but they sometimes decide cases they should not. Implicit in this example is some Goldilocks rule that properly balances the costs of recusal against the costs of perceived bias, balancing fairness and legitimacy.

In a world of perfect and complete information, judges, parties, and clerks would all know whether or not a judge would be improperly biased in a given case. Then biased judges could be removed from the pool and the random selection mechanism could possibly be reweighted so that the probability of drawing a judge more willing to grant discovery does not change as a result of the removal.

But we do not live in a world of complete information, and we cannot observe bias ex ante. Indeed, judges themselves may be unaware of certain implicit biases. Certainly, the bar and general public will be unable to determine whether a judge was biased in a case, much less whether they will be biased in a future case. This reality makes it impossible to enforce judge-specific recusal standards.

Judge-specific standards pose additional problems when observers compare across judges and cases rather than focusing on a single judge and case in isolation. If judges have different standards, consider a Judge Alpha who participates in cases where other judges would recuse because of some financial interest. Observers see not only that this potential conflict exists but also that other judges would recuse. This comparison makes Judge Alpha's failure to recuse more suspect and increases the risk that observers will infer bias. They may think, "If all of the other judges would recuse, why is Judge Alpha so motivated to stay and decide this case?" Similarly, consider a Judge Beta who will recuse even when no other judge would. Judge Beta is now *more likely* to be perceived by observers (and other judges) as shirking work or perhaps trying to manipulate the types of cases they decide. Different standards, therefore, not only guarantee that errors are being made, they exacerbate the costs of those errors.

D. *Unclear Laws and a Conflicted Committee*

Unfortunately, the law is not designed well enough to give us clear rules, and at times, the U.S. Code and Code of Conduct appear to conflict. For example, take Judge *G* who held stock in Wells Fargo when she was assigned[164] to *Frederick v. Wells Fargo Bank NA*.[165] After her assignment to the case, but before she began participating, she sold off at least part of her interest in the bank.[166] By selling, rather than recusing, it appears she attempted to invoke an exception provided by 28 U.S.C. § 455(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 . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification.[167]

The problem, however, is that Judge *G* had not yet dedicated "substantial judicial time" to the matter.[168] In fact, she had dedicated no time to the matter at all. The recusal statute's divestment exception, therefore, is arguably inapplicable.

And yet, while Judge *G* arguably violated the recusal statute, Judge *G* did not violate the Code of Conduct.[169] While the Code of Conduct reasserts much of subsection (f) of the recusal statute verbatim, it omits the language about "substantial judicial time."[170] Moreover, the Committee on Codes of Conduct has issued an advisory opinion essentially disposing of the substantial time requirement and sanctioning immediate divestment as a means to avoid recusal:

> The Committee believes that th[e] provision [permitting divestment] 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

164. Complaint at 1, Frederick v. Wells Fargo Bank NA, No. 12-cv-00553 (E.D.N.Y. June 5, 2012); Judge *G*, FINANCIAL DISCLOSURE REPORT 2012, *supra* note 73, at 19 (showing Judge *G* owned Wells Fargo stock on February 3, 2012).

165. *See* No. 12-cv-00553 (E.D.N.Y. June 5, 2012) (Bloomberg Law, 2d Cir., Dockets).

166. *See* Complaint, *supra* note 164, at 1 (indicating Judge *G* was assigned to the case); Memorandum and Order, *Frederick*, No. 12-cv-00553 (reflecting the first participation of Judge *G* in the case as March 2, 2012); Judge *G*, FINANCIAL DISCLOSURE REPORT 2012, *supra* note 73, at 19 (showing Judge *G* sold at least part of her interest in Wells Fargo on February 16, 2012, placing the sale between February 3, 2012, and March 2, 2012).

167. 28 U.S.C. § 455(f).

168. *Id.*; *see supra* notes 164–67 and accompanying text.

169. *See* GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(4).

170. *See* § 455(f); GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(4).

> 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.[171]

The Committee on Codes of Conduct's interpretation presents several problems. For one, a judge who divests gives the appearance of wanting to decide the case, which suggests they are not disinterested.[172] More concerning, however, is that the opinion expands the divestment exception beyond the narrow circumstance defined by the recusal statute.[173] The Committee on Codes of Conduct is part of the Judicial Conference of the United States, whose membership is comprised entirely of judges subject to 28 U.S.C. § 455.[174] In other words, the same judges who are bound by the recusal statute have decided that they are not actually constricted by parts of its language.

The disagreement between the Code of Conduct and the recusal statute presents judges like Judge *G* with an uncomfortable dilemma: follow the recusal statute or follow the Committee on Codes of Conduct's Ethics Advisory Opinions. We can hardly fault her for choosing the latter. But we believe that the lack of clarity that results from the disagreement—and the mere fact that judges subject to the recusal statute have also been positioned to expand its permissiveness—presents challenges to the perception of the judiciary as impartial.

There are other instances where the Committee has taken permissive interpretations of the ambiguity in 28 U.S.C. § 455. A key question in the recusal statute is whether an asset is a "financial interest" or some "other interest."[175] The specific language mandates recusal when the judge:

> knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in

171. 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY, pt. B, § 220, no. 69 (2019) [hereinafter GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS], https://www.uscourts.gov/file/25673/download [https://perma.cc/44PH-4LWK].

172. The Committee acknowledges this problem in the advisory opinion, speculating that "disposing of a disqualifying interest may under some circumstances create an appearance of impropriety." *Id.* It then dismisses this possibility as "remote." *Id.*

173. 28 U.S.C. § 455(f).

174. *See* ADMIN. OFF. OF THE U.S. CTS., *About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/SV5A-L763]. "Membership is comprised of the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit." *Id.* Each of these judges is a "judge of the United States" for the purposes of 28 U.S.C. § 455. *See* §§ 451, 455(a).

175. § 455(b)(4).

> controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.[176]

Notice that subsection (b) of the recusal statute requires that the judge disqualify himself for having *any* "financial interest," but requires disqualification for "other interest[s]" only if the case outcome could "substantially affect[]" that interest.[177] Consistent with the recusal statute, the Code of Conduct requires a judge to disqualify themselves whenever "the judge's impartiality might reasonably be questioned."[178] This includes "instances in which . . . the judge knows that the judge . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding."[179] Here again we see the distinction between "financial" and "other" interests and the different treatment of the two.

Given the special treatment of "financial interests," it is important to understand what a "financial interest" (defined as "ownership of a legal or equitable interest") in a party actually is.[180] It is almost universally understood that this language requires recusal whenever a judge owns stock[181] in a party to the case before the judge.[182] Beyond this, however, things are unclear. Many other types of financial links would give judges a financial stake in a party. Consider a few concrete examples.

1. Should Judges Recuse when They Own Bonds?

In August 2012, while presiding over *Barrionuevo v. Chase Bank*,[183] Judge *T* purchased bonds worth between $50,001 and $100,000 issued by J.P. Morgan Chase.[184] Similarly, Judge *U* participated in many cases involving Bank of America while owning between $100,001 and $250,000 worth of bonds issued by the bank.[185] Over the period 2010–12, Judge *V* dismissed a suit against Walt

176. *Id.*

177. *Id.*

178. *See* GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 3(C)(1).

179. *Id.* at Canon 3(C)(1)(c).

180. *Id.* at Canon 3(C)(1)(c), 3(C)(3)(c).

181. To our knowledge, a possible distinction between common and preferred stock has never been explored in case law or secondary sources.

182. *See, e.g.*, Chase Manhattan Bank v. Affiliated FM Ins., 343 F.3d 120, 127–28 (2d Cir. 2003); FLAMM, *supra* note 15 at 238–39.

183. 885 F. Supp. 2d 964 (N.D. Cal. 2012).

184. *See* Reassignment Order, *Barrionuevo*, 885 F. Supp. 2d 964 (No. C-12-0572) (indicating that the case was reassigned to Judge *T* on February 27, 2012); *Barrionuevo*, 885 F. Supp. 2d at 964 (showing Judge *T* as the judge at the conclusion of the case when it was decided on August 6, 2012); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 12 (2013), https://tinyurl.com/JudgeTFinDisRep2012 [https://perma.cc/PXC4-M5BJ].

185. *See* Civil Docket for Case, Aainfinity v. Bank of America, No. 10-cv-01741 (W.D. Wash. Nov. 10, 2010) (showing Judge *U* presiding over case during November 2010); Bisson v. Bank of America,

Disney,[186] presided over a case against J.P. Morgan,[187] and dismissed a third against HSBC Bank.[188] What makes these three cases notable is that Judge *V* owned Disney bonds when he dismissed the case against Disney;[189] he owned J.P. Morgan bonds when he presided over the case against J.P. Morgan;[190] and he owned between $100,001 and $250,000 worth of HSBC bonds when he dismissed the case against HSBC.[191]

One need not accuse any of these judges of actual bias to worry about the appearance of impropriety; a party who litigates in front of a judge with a six-figure stake in the other side might not feel that the process was entirely fair. We should also worry that the broader public might lose confidence in the judiciary if such practices became widely known.

Treating debt investors (bond holders) and equity holders (stock holders) differently ignores that both are stakeholders in a company. In both instances, the judge has put money behind the company and stands to benefit if the company does well. The investments differ in that debt investors choose safer and more stable payouts, while equity holders accept more risk for potentially higher rewards.[192] But in either case, the investor is betting on the company.

N.A., No. 11-cv-01969 (W.D. Wash. Apr. 17, 2012) (showing Judge *U* presiding over the case between January and April 2012); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 6 (2011), https://tinyurl.com/JudgeUFinDisRep2010 [https://perma.cc/LU62-SUCX] (showing Judge *U* purchasing Bank of America bonds in July 2010 and owning those bonds through the end of the calendar year); COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 6 (2013), https://tinyurl.com/JudgeUFinDisRep2012 [https://perma.cc/M4BJ-XTDZ] (showing Judge *U* owning Bank of America bonds for the entirety of 2012).

186. Stipulation and Order of Dismissal with Prejudice Pursuant to FRCP 41(a)(1)(A)(ii) at 1, Franzen v. Walt Disney World Co., No. 10-cv-01585 (E.D.N.Y. Aug. 24, 2010).

187. Order of Dismissal at 1, Chacon v. WMC Mortg. Corp., No. 11-cv-05660 (E.D.N.Y. June 26, 2012) (showing JPMorgan Chase Bank, N.A., as a defendant until March 19, 2012).

188. Rule 41 Stipulation of Dismissal at 1, Schiavello v. HSBC Bank USA, Nat'l Ass'n, No. 11-cv-02998 (E.D.N.Y. June 12, 2012).

189. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2010, at 11 (2011), https://tinyurl.com/JudgeVFinDisRep2010 [https://perma.cc/N3VP-SA7G] (showing Judge *V* owned Disney bonds during the time he dismissed the case against Disney).

190. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2012, at 6 (2013), https://tinyurl.com/JudgeVFinDisRep2012 [https://perma.cc/6XD8-SWZC] (showing Judge *V* owned J.P. Morgan bonds during the time he presided over the case against J.P. Morgan).

191. *Id.* at 8 (showing Judge *V* owned HSBC bonds during the time he dismissed the case against HSBC).

192. J.B. Maverick, *Debt Market vs. Equity Market: An Overview*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/071415/what-are-differences-between-debt-and-equity-markets.asp [https://perma.cc/5SN8-P92Z] (last updated June 25, 2019).

Moreover, bonds, just like stocks, are tradeable financial instruments.[193] The price of a bond reflects (in part) the likelihood that the borrower will be able to make the scheduled payments.[194] If the judge owns bonds issued by the plaintiff, judgment in favor of the plaintiff makes it marginally more likely that the plaintiff will be able to pay its obligations. This theoretically lowers the credit risk and raises the value of the bonds. The effect is muted compared to equity, but it is still there. In light of the recusal statute's insistence that any investment, "however small," is enough to trigger a disqualifying financial interest,[195] that the effect size is smaller would appear irrelevant.

And yet, when judges own a party's debt, such recusal is generally understood not to be mandatory.[196] Debt investments are treated very differently than equity investments. The relevant advisory opinion on the Code of Conduct (the "Debt Advisory Opinion") asserts that since traditional debt investments do not convey an ownership interest, such investments do not create a financial interest in the relevant party.[197]

This view was dispositive in *In re Cameron International Corp*.[198] This case was an appeal to the Fifth Circuit in the course of the litigation following the BP Deepwater Horizon disaster.[199] Judge *W* was the judge in over forty of the cases emerging from the disaster because so many other district judges had to recuse themselves.[200] In the course of litigation, Judge *W* discovered that he owned debt issued by Halliburton and Transocean, two parties to the litigation.[201] Though the judge immediately disclosed and sold off those securities, defendants moved for recusal anyway.[202] The Fifth Circuit followed the Debt Advisory Opinion and determined that, since debt instruments do not create an ownership interest, such securities are not financial interests in a party

193. *See* Chizoba Morah, *Bond Market vs. Stock Market: What's the Difference?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/09/difference-between-bond-stock-market.asp [https://perma.cc/2MRB-8BSB] (last updated Sept. 22, 2020).

194. James Chen, *Bondholder Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bondholder.asp [https://perma.cc/8SXQ-K63D] (last updated Aug. 26, 2020).

195. 28 U.S.C. §455(d)(4).

196. *See, e.g.*, *In re* Cameron Int'l Corp., 393 F. App'x 133, 135 (5th Cir. 2010) (citing GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS, *supra* note 171, at no. 101 ("Debt interests are not considered to give rise to [a] financial interest in the debtor that issued the debt security because the debt obligation does not convey an ownership interest in the issuer.")).

197. GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS, *supra* note 171, at no. 101. The Debt Advisory Opinion does make an exception for convertible debt. *Id.* If the bond can be converted into stock, then it does create a financial interest. *Id.*

198. 393 F. App'x. 133 (5th Cir. 2010).

199. *Id.* at 133–34.

200. *Id.* at 134.

201. *Id.*

202. *Id.*

for purposes of the recusal statute.[203] The defendants petitioned the Fifth Circuit for mandamus, which the Fifth Circuit denied, finding "no error" in Judge *W*'s reasoning.[204]

We question whether the Fifth Circuit's interpretation is the best reading of the recusal statute for several reasons. First, this interpretation seems to render parts of the recusal statute surplusage.[205] Second, bondholders—like equity holders—are stakeholders in the company.[206] Finally, there is no good reason, in this context, to treat debt differently than equity. The purpose of the recusal statute is best served by a bright-line rule requiring recusal when a judge has a financial interest in a party, whether that be an equity or debt interest.

We begin with the argument from the rule against surplusage, which requires that every word or phrase be given effect.[207] The recusal statute first defines financial interest in broad language and then carves out exceptions.[208] Following the rule against surplusage, we propose that the broad language be interpreted in a way that provides room for the subsequent carve outs to do some work, rather than accepting an interpretation that makes the carve outs functionally irrelevant.

Applying the rule against surplusage to the recusal statute, the broad language at the beginning of the definition of financial interest cannot simply mean an ownership interest in the company itself through its stock.[209] For example, subsection (d)(4) of the recusal statute clarifies that "proprietary interest of a policyholder in a mutual insurance company" is not a financial interest in the insurer, nor is a "proprietary interest . . . of a depositor in a mutual savings association" a financial interest in the savings association unless the outcome of the proceeding could "substantially affect" the value of the

203. *Id.* at 135–36. The Fifth Circuit raised but did not address the possibility that the bonds might have created either a "financial interest in the subject matter in controversy" or that the judge might have to recuse because the value of the bonds "could be substantially affected by the proceedings." *Id.* at 136 nn.7–8. The first of these would be a nonstarter because the Fifth Circuit agreed with the lower court that bonds are not "financial interests" because they do not convey ownership. *Id.* at 135–36. If bonds do not convey ownership of the party, they certainly cannot convey ownership of the "subject matter in controversy." The latter possibility would also likely fail because the "however small" requirement of the recusal statute that imposes recusal obligations when a judge owns a "financial interest" would not apply to some "other interest." *See* 28 U.S.C. § 455. Thus, unless Judge *W*'s holdings were notably excessive, it would be unlikely that the Fifth Circuit would issue mandamus relief.

204. *Cameron Int'l Corp.*, 393 F. App'x. at 133–36.

205. On surplusage, see generally ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition.").

206. *See* OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 126–55 (1995).

207. *See* SCALIA & GARNER, *supra* note 205, at 174.

208. § 455(d)(4).

209. *See id.*

judge's interest.[210] Taking out an insurance policy does not give a person an ownership interest in State Farm, nor does opening a checking account at Bank of America give a depositor an ownership stake in the bank. If a financial interest arises only when a judge owns stock,[211] then there is no reason to make an exception for insurance policies or deposit accounts.

For purposes of debt investments, however, the relevant carve out is subsection (d)(4) of the recusal statute, which says when a judge owns government securities, there is only a financial interest when "the outcome of the proceeding could substantially affect the value of the securities."[212] For instance, if a judge's daughter receives a $50 U.S. savings bond for her birthday, the judge need not recuse himself in a case that could not "substantially affect the value of the" savings bond. Purchasing government bonds does not create an ownership interest in the governments that issue such securities. If debt investments in a party do not create financial interests in that party, then there is no reason to create this carve out for government debt.

Notice that the exception does not address the "however small" language in the opening parts of the recusal statute definition.[213] Instead, the exception says that in the case of government bonds—and only government bonds—the judge need not recuse unless the case could substantially affect the value of the securities.[214] Therefore, the exception strongly implies that a judge who owns any amount of government bonds must recuse himself from a case that could substantively affect the value of the bonds. But this obligation would attach only if ownership of debt otherwise creates a financial interest. Similarly, the limitation to substantial effects on the value of the securities only applies to government debt.[215] There is no such limitation for debt securities for private entities.[216] Here again, the carve out in subsection (d)(4) of the recusal statute seems to imply that ownership of debt instruments does create financial interests in parties.[217]

210. *Id.* § 455(d)(4)(iii). The same carve out extends these exceptions to "similar proprietary interest[s]," which brings insurance policies from for-profit insurers and deposit accounts at for-profit banks under the exception. *Id.* § 455(d)(4); *see also* GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS, *supra* note 171, at no. 26 (comprising an opinion titled "Disqualification Based on Holding Insurance Policy from Company").

211. To be sure, the recusal statute also applies when the judge is a "director, adviser, or other active participant in the affairs of a party," but we set these aside for the moment. § 455(d)(4).

212. *Id.* § 455(d)(4)(iv).

213. § 455(d)(4). Recall that the recusal statute defines a "financial interest" as "ownership of a legal or equitable interest, however small . . . ." *Id.*

214. *Id.* § 455(d)(4)(iv).

215. *Id.* § 455(d)(4)(i)–(iv).

216. *Id.*

217. *Id.*

It is also worth noting that the Debt Advisory Opinion is not consistent in its requirement of an ownership interest in a company.[218] While ordinary bonds are not financial interests, convertible bonds—those that can be converted into stock—do count as financial interests.[219] Convertible bonds can be converted into an ownership in the company, but they do not themselves convey ownership.[220] The Debt Advisory Opinion implicitly reasons that despite no ownership resulting from convertible bonds, different treatment is justified because the value of the convertible bond is inextricably linked to the value of the issuer's stock.[221] Similarly, the value of short positions and stock options would also be inextricably linked to the stock price.[222]

We think the convertible bond guidance makes more sense. The relevant linkage is the one that might exist between the case outcome and the value of the security the judge owns. In the case of convertible bonds, the Debt Advisory Opinion sees an indirect link: the case could affect the value of the stock, and the value of the stock could affect the value of the bonds.[223] But in the case of ordinary bond debt, there is also a direct link.

2. Short Positions and Options

Consider the case *Sokolowski v. Home Depot U.S.A., Inc.*[224] Nancy Sokolowski sued the company on May 18, 2009 for sex discrimination, and her case was assigned to Judge *X*.[225] A little more than three weeks before the assignment, the judge had sold call options on Home Depot.[226] In layman's terms, Judge *X* stood to profit if Home Depot's stock price went down, but stood to lose a potential limitless sum of money if the price of Home Depot's

218. *See* GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS, *supra* note 171, at no. 101.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. No. 09-cv-00915 (M.D. Fla. Nov. 20, 2009) (Bloomberg Law, 11th Cir., Dockets).

225. *See* Complaint at 4, *Sokolowski*, No. 09-cv-00915; Case Management and Scheduling Order at 3, *Sokolowski*, No. 09-cv-00915.

226. COMM. ON FIN. DISCLOSURE, ADMIN. OFF. OF THE U.S. CTS., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2009, at 41 (2010) [hereinafter Judge *X*, FINANCIAL DISCLOSURE REPORT 2009], https://tinyurl.com/JudgeXFinDisRep2009 [https://perma.cc/M4P5-SVLL]. While owning call options on Home Depot, Judge *X* was assigned to and presided over *Sokolowski*. *See* Complaint, *supra* note 225, at 4; Judge *X*, FINANCIAL DISCLOSURE REPORT 2009, *supra*; *see also* Order of Dismissal at 1, *Sokolowski*, No. 09-cv-00915. For readers unfamiliar with call options, see *infra* notes 228–30 and accompanying text; Justin Kuepper, *Call Option Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/c/calloption.asp [https://perma.cc/AS6A-W24Y] (last updated May 26, 2020) ("Call options are financial contracts that give the option buyer the right, but not the obligation, to buy a stock, bond, commodity, or other asset or instrument at a specified price within a specific time period.").

stock rose. If we are concerned about the financial incentives of judges, the risk of unlimited loss is a relevant feature to consider.

This example demonstrates that the recusal statute's current focus on ownership interest is also too limiting when we consider even slightly more exotic financial positions. To see why, first imagine the financial exposure of a judge who owns stock in Ford Motor Company, which is the judge taking a "long position" in Ford, expecting the value will rise over time. Suppose a plaintiff sues Ford after a car crash. Does the judge have exposure? Certainly. If Ford has to pay a large judgment and the case sets a precedent for future plaintiffs, then Ford's expected future profits will be lower and the price of Ford stock will be lower than it otherwise would be. If Ford loses, the judge loses. But if Ford wins, the uncertainty stemming from litigation (the possibility that Ford might have lost and its share price would have fallen) is resolved in Ford's favor, and the share price should increase. Thus, if Ford wins, the judge wins.

Now consider a judge who takes a short position in Ford. That is, the judge (through a broker) borrows a share of Ford from another investor and sells that share on the open market. Sometime in the future, the judge will purchase a share of the same stock in the open market to replace the borrowed share. If the market price of Ford stock falls during the interval of time between when the judge sold the borrowed share and when they purchased a share of Ford to replace it, they profit the difference between those two prices. On the other hand, if the market price of Ford stock increases in that interval, then the judge has to replace the borrowed share at this higher market price and make up the difference from their own resources. Basically, if Ford stock falls, the judge profits; if Ford's stock price increases, the judge loses money.

Now consider the judge's exposure in the same trial. If Ford loses, then the share price should fall, and the judge profits. If Ford wins, then the share price should rise, and then the judge loses. The primary difference from the perspective of the judge's financial exposure between a long position and a short position is that profit and loss switch. The switch also extends to the size of the gain or loss. Owning a stock has unlimited upside (if the stock price goes to infinity) and limited downside; you can only lose the money you paid for the shares and then only if the price goes to zero. On the other hand, if the judge shorts a stock, the judge loses (a possibly infinite amount of) money as the price goes up, but the upside is limited to what the judge makes if the price goes to zero.

However, things are very different from the perspective of the legal obligation to recuse. Notice that when the judge owns Ford stock, they owns an equitable interest in Ford. When the judge shorts Ford, he never owns Ford

stock. If the recusal statute requires an ownership interest in Ford, then short positions are not "financial interests."[227]

The same is true in the case of options. Compare two situations: Judge Gamma owns a Ford call option, and Judge Delta owns a share of Ford stock. Owning a call option means that Judge Gamma pays a premium for the right to purchase a share of Ford at a predetermined price.[228] If the price of Ford stock increases, the option to buy Ford shares at a predetermined, lower price is more valuable. If Ford's share price falls, the option is worth less money. These dynamics are quite similar to owning Ford shares outright. Furthermore, since options are usually far less expensive than shares, they are easily used to amplify gains or losses.[229] If Judge Gamma invests the same amount of money in options as he does in purchasing stock outright, his exposure to swings in the stock price is significantly larger. And yet, despite Judge Gamma's greater exposure in comparison to Judge Delta, who owns a share of stock, Judge Gamma's owning options does not convey an ownership interest and may not count as a financial interest.[230]

3. Liabilities and Investments in the Judge

The U.S. Code and the Code of Conduct are both silent on situations where a party has a financial interest in a judge.[231] For example, suppose a judge started a company named Greenacre Co. and that Acme Investments Ltd. ("Acme") was an early equity investor. The judge would not have a financial interest in Acme and would therefore be permitted to hear a case in which Acme was a party, despite the judge being a debtor to Acme.

A similar problem arises in the context of liabilities. If a party lends a judge money, this debt does not create a financial interest.[232] Of course, the ability to

227. 28 U.S.C. § 455(d)(4). A short position would still likely qualify as an "other interest" and the judge would have to recuse if the case outcome could "substantially affect" the value of the judge's position. *Id.*

228. *See supra* note 226 and accompanying text.

229. Using debt to acquire additional assets and thereby amplifying gains and losses is referred to as leverage. Harold Averkamp, *What Is Financial Leverage?*, ACCT. COACH, https://www.accountingcoach.com/blog/what-is-financial-leverage [https://perma.cc/5TJJ-5FYW]. For example, if an individual takes out a loan to purchase a piece of property, later sells that property for more than its initial value and the interest on the loan, pays off the remainder of the loan, and keeps a remainder as profit, they have successfully exercised financial leverage. *Id.*

230. One might think that since option prices should track stock prices, as convertible bonds do, the Code of Conduct might implicitly treat options as financial interests. However, that would, again, require the Code of Conduct to contradict its position in the case of ordinary bonds that an ownership stake in the company is required.

231. *See* § 455(d) (showing that no part of the recusal statute mentions a party having a financial interest in a judge); GUIDE TO JUDICIARY POLICY, ETHICS ADVISORY OPINIONS, *supra* note 171, at nos. 2–116 (revealing that not a single advisory opinion mentions a party having a financial interest in a judge).

232. *See supra* text accompanying notes 175–82, 231–33.

revise terms, forgive debts, or more strictly or loosely enforce covenants puts the lender in a position to directly affect the judge's financial situation. In most cases, there should be no real risk that such investments by parties in judges should influence judges. However, the same is true of equity (stock) investments by judges. The point of the recusal statute is to draw a bright line, thereby eliminating situations that might suggest impropriety even when no actual impropriety is present. We now show that the line is not as bright in practice as it is in theory.

E. *The Same Judges Are Inconsistent in Interpreting Recusal Standards*

The lack of legal clarity seen above leads to a wide range of different recusal standards across judges. The only point of clarity is that judges must recuse when they own stock in a party.[233] The Code of Conduct does not require recusal when judges own bonds issued by or financial derivatives tied to a party.[234] Still, some judges might agree with us that bonds constitute a disqualifying interest, taking a more conservative approach to the recusal statute and recusing when they own bonds. Interestingly, the same judge often applies a different standard in different cases.[235] That is, variation exists both across and within judges vis-à-vis recusal standards when judges have a nonequity financial relationship with a party.

Take Judge *A* from our lead example. He recused on June 12, 2012, because of his self-identified financial interest in Wells Fargo.[236] But at that the same time, Wells Fargo had another case in front of Judge *A* that he would dismiss with prejudice on November 20, 2012.[237] Similarly, Judge *B*, who recused on June 22, 2012, based on having a checking account, a savings account, and a line of credit at Wells Fargo,[238] was also presiding over another Wells Fargo case at the same time and awarded final judgment in favor of the bank on September 20, 2012.[239]

Likewise, Judge *N* recused in part due to financial ties to Morgan Stanley.[240] According to his 2011 disclosure, he invested in a Morgan Stanley

233. *See supra* note 181–82 and accompanying text.

234. *See supra* Section III.D.1.

235. *See, e.g.*, *supra* Section III.C; *infra* notes 236–46 and accompanying text.

236. Order of Recusal June 12, *supra* note 4, at 1–2.

237. *See, e.g.*, Order Denying *Ex Parte* Motion for Emergency Preliminary Injunction and/or Temporary Restraining Order Without Prejudice As Withdrawn, Gabriel v. Wachovia, No. 12-cv-00106 (D. Colo. Nov. 29, 2012) (reflecting that Judge *A* was taking action in the case as early January of 2012); Final Judgment, *Gabriel*, No. 12-cv-00106 (showing that Judge *A* continued on the case until its termination in November of 2012); Lepro, *supra* note 57.

238. *See* Notice of Disclosure, *supra* note 20, at 1; Lepro, *supra* note 57.

239. *See* Final Judgment, Lewis v. Wells Fargo Bank, NA, No. 11-cv-03387 (D. Colo. Nov. 7, 2012).

240. *See supra* notes 153–54 and accompanying text.

mutual fund in May and June of 2011.[241] While this investment—one that the recusal statute expressly states does not require recusal[242]—was sufficient to push Judge *N* to recuse himself from our illustrative case,[243] it did not stop him from deciding a separate Morgan Stanley case.[244] Indeed, Judge *N* began presiding over that case in March of 2011 and continued through September of that year.[245] Judge *N* made the "disqualifying" investment in the middle of that case, but did not recuse himself, even though the same conflict motivated another recusal.[246]

IV. THE NEED FOR AND CHALLENGES TO REFORM

So far we have pointed out that the current standards for recusal are unclear and make little sense.[247] Further, even when judges do have clear conflicts of interest, many judges often fail to recuse themselves.[248] Systems are not well designed to guide judges in conforming to standards or to allow parties or observers to monitor compliance.[249] We have also suggested that there should be a single, clear standard for all judges instead of the status quo that allows judges to recuse at their own discretion.[250] That standard should balance the damage recusals cause to random assignment (fairness) against the risk of perceived or actual bias (legitimacy).[251]

Reform could come from any of three places. First, Congress could revise the recusal statute. Second, courts (especially appellate courts) could find opportunities to provide a clear interpretation of the recusal statute. Finally, the Judicial Conference could amend the Code of Conduct. Each of these paths involves challenges. First, meaningful legislation is difficult to get through Congress.[252] Second, the judicial path is complicated since the decision to recuse is not easily reviewable; it is effectively impossible to prevent judges from

241. Judge *N*, FINANCIAL DISCLOSURE REPORT 2011 *supra* note 154, at 5, 7, 9.

242. 28 U.S.C. § 455(d)(4).

243. *See supra* notes 153–54 and accompanying text.

244. *See* Order Granting Motion to Dismiss and Remanding at 1, 6, Murphy v. Metrocities Mortg. LLC, No. 11-cv-02719, 2011 WL 5319917, at *1 (C.D. Cal. Sept. 27, 2011) [hereinafter Order Granting Motion to Dismiss and Remanding September 26].

245. *See* Notice of Removal at 1–2, *Murphy*, 2011 WL 5319917 (No. 11-cv-02719); Order Granting Motion to Dismiss and Remanding September 26, *supra* note 244, at 6.

246. *See* Notice of Removal, *supra* note 245, at 1–2; Order Granting Motion to Dismiss and Remanding September 26, *supra* note 244, at 6; Judge *N*, FINANCIAL DISCLOSURE REPORT 2011, *supra* note 154, at 5, 7, 9; Order to Reassign Case December 14, *supra* note 153, at 1.

247. *See supra* Section III.A.

248. *See supra* Part II.

249. *See supra* Section II.B.

250. *See supra* Sections III.B.1, III.C.

251. *See supra* Sections III.B–C.

252. *See generally, e.g.*, Sanford C. Gordon & Dimitri Landa, *Common Problems (or, What's Missing from the Conventional Wisdom on Polarization and Gridlock)*, 79 J. POL. 1433 (2017).

recusing too quickly.[253] The third option, a revision to the Code of Conduct, seems the most likely possibility, but such a revision would require judges implicitly rebuking their colleagues.[254]

The more pressing question now is not who could implement reform but what reforms are needed. We have three distinct proposals. First, we would bring greater transparency to the process and centralize case assignment. Second, we would establish a single bright-line standard for "financial interests" that would more closely track a reasonable person standard for bias. Finally, we propose a Recusal Failure List that would identify judges who either fail to recuse when they should or recuse when they should not.

A. *Improved Transparency and Centralized Case Assignment*

The first step in reforming the recusal system is to make the recusal process more transparent. Transparency would help parties and observers catch recusal failures early. Doing so requires improving both the information provided and the mechanisms through which parties and observers can acquire information and present it to the courts.

To that end, judicial financial disclosure reports should be more comprehensive. Currently, judicial disclosure reports have no place to include investors in enterprises controlled or managed by judges or their spouses.[255] Similarly, it is unclear whether the report would capture a judge's other business relationships. If we do want to require recusal from cases where a judge uses the brokerage or wealth management services of a party, that information would need to be disclosed as well. Essentially, the problem is that the current financial disclosure report does not fully capture the range of financial relationships that may cause concern.[256]

Second, these disclosures should be more public than the current system, which requires that court watchers formally request the disclosure, therefore immediately informing judges of the request.[257] Informing judges of those

253. *See supra* notes 202–04 and accompanying text. In theory, one could petition for mandamus to force the judge to hear the case.

254. The Code of Conduct mirrors the recusal statute. *See supra* note 138 and accompanying text. If the Judicial Conference rewrote the relevant section of the Code of Conduct, it would be pushing the standards beyond the recusal statutes, which might be a bridge too far. If they merely reinterpreted the Code of Conduct—for example, through a new advisory opinion—it would likely require overturning earlier opinions at a minimum.

255. *See generally, e.g.*, Judge *A*, FINANCIAL DISCLOSURE REPORT 2012, *supra* note 7 (including no section where a judge needs to disclose investors in enterprises controlled by themselves or their partners).

256. *See, e.g.*, *id.* The financial report requires judges to list only positions, agreements, noninvestment income, reimbursements, gifts, liabilities, and investments and trusts. *Id.* Additionally, the report provides a final, open section for additional information or explanations a judge may wish to add or disclose. *Id.*

257. *See supra* notes 49–52 and accompanying text.

requests may prevent parties from checking for conflicts in the first place.[258] Such an obstacle is counterproductive: judges and parties would benefit from greater disclosure. Well-meaning judges would be less likely to inadvertently participate in a case when they should not, and parties would be more confident that judges do not have a financial interest in the case.

Third, judges should file disclosures quarterly rather than annually. This change would improve the accuracy of data available to the public and also help judges stay on top of their recusal obligations. It is unsurprising that judges forget what companies they listed on their financial disclosure reports a year prior. If they reviewed their disclosures quarterly, they would be far less likely to inadvertently preside over on a case they should not.

Furthermore, stale reports pose a real problem. Many financial disclosure reports are not filed until May of the following year or later.[259] If a judge purchases stock in a company in January and that company appears before the same judge in March, that conflict may not be discovered for more than a year. This exacerbates the problem faced by parties who worry that a judge may have a conflict. If the only evidence of a financial interest is a report at least five months old—a May report announcing that a judge owned stock at the end of the previous year does not account for stock owned in the immediately preceding five months prior to filing—then parties will be hesitant to press the judge. Moving to quarterly financial disclosure reports would keep the information timely and useful.

Fourth, these financial disclosure reports should be formatted to be more usable by scholars and observers. At the time of this Article, 870 authorized federal judgeships existed.[260] There are simply too many reports to investigate by hand, and many disclosures are dozens of pages long.[261] To facilitate study and monitoring, reports should be completed and stored electronically in easily exported formats. The data could then be automatically transferred to subsequent reports, making it easier for judges to file more frequently.

Finally, the system would benefit from an anonymous reporting process for recusal failures. Lawyers who discover a potential conflict may be reticent to point it out to the judge. No matter how helpful their intent, lawyers may be rightly concerned that the judge will take their observation as an accusation. Instead, courts should institute an anonymous reporting system through which the parties or third-party observers can notify the judge, parties, and chief judge

258. *See supra* note 53 and accompanying text.

259. *See supra* notes 128–29 and accompanying text.

260. ADMIN. OFF. OF THE U.S. CTS., AUTHORIZED JUDGESHIPS 8 (2019), https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/U4TA-9DCX].

261. *See, e.g.*, Judge *G*, FINANCIAL DISCLOSURE REPORT 2009, *supra* note 80 (disclosing forty-nine pages of financial data).

of the potential conflict. This way, lawyers need not fear upsetting the judge when they report a possible recusal failure.

Once the disclosure process is more transparent, centralizing case assignment should become easier through clerks' offices removing conflicted judges from the pool. Judges would inform the clerk's office of the list of parties where the judge would have to recuse, and the clerk's office would remove the judge from the pool of possible jurists when those parties are involved.[262] This type of centralization is an excellent first line of defense and should be standard across the federal courts.

The clerk's office can screen cases where the judge has a current conflict, but if the judge buys stock during litigation, or a party that generates a recusal obligation is added to the case later on, ex ante review would be an insufficient check. The clerk's office would still be able to notify the judge of the conflict, and the judge could then divest,[263] although clerks may not catch every conflict, especially if judges exclude potential conflicts from their financial disclosure reports. Ultimately, recusal is still the judges' responsibility.

B. *A Single Standard*

Increasing trust in the judicial system requires a single, clear standard. Such a standard would prevent judges who are outliers from being perceived as more biased or as shirking work. The question at hand is how to draw the line. First, we think that the simplicity and clarity of requiring recusal over any financial interest, "however small," is worth keeping.[264] But taking that standard to the extreme, a judge whose spouse owns $50 in stock is simply not going to be influenced by that financial holding. However, given the wide variation in the wealth of judges and the different sizes of investments, it is impossible to articulate a perfect standard. Though the "however small" standard can be

262. *See supra* note 123 and accompanying text.

263. 28 U.S.C. § 455(f). That section reads as follows:

> 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, . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification. *Id.*

This language seems to target situations where judges learn, during the course of litigation, that they are conflicted. *See id.* (emphasis added) (specifying that this exception to disqualification applies "*after* substantial judicial time has been devoted to the matter" at hand). Most likely, they did not know of the financial interest when the case began. During the case, they "discover" they have a financial interest, and now if the position is divested, judges need not recuse. *Id.* The question is whether this language covers "the appearance" of a conflict created by judges' own actions during the case.

264. § 455(d)(4).

viewed as demanding, setting the bar at zero is simple and clear. We would maintain it.

The real question is what should be considered a "financial interest." In our view, the Judicial Conference should revise the Code of Conduct to classify as financial interests: (1) any financial asset, instrument, or position owned by the judge with a price that depends in whole or in part on the financial performance of the party; or (2) any asset, instrument, or position owned by a party that depends on the financial performance of the judge (or spouse or minor child living at home). These adjustments would bring bonds, short positions, options, and other financial interests previously not covered by the Code of Conduct into the automatic recusal category as well as instances where a party is an investor in a company owned or controlled by the judge. We would, however, leave the explicit exception for mutual funds. Judges should be allowed to make some investments without triggering recusal obligations, and mutual funds should be acceptable. Because these funds are intended to provide diversification, judges who invest in such funds are unlikely to pay attention to the individual securities in the funds. This limits both fairness concerns and legitimacy concerns from such investments.

The more challenging question is what to do with funds, liabilities, and accounts. The Code of Conduct already requires judges to "refrain from financial and business dealings that . . . involve the judge in frequent transactions or continuing business relationships with . . . persons likely to come before the court."[265] Certainly regular mortgage or card payments would qualify as "frequent transactions" and quite possibly as "continuing business relationships."

With that said, judges need to be able to purchase homes, hold checking accounts, and conduct other basic financial activities. Also, since large financial institutions (notably Bank of America, Wells Fargo, and J.P Morgan) are both frequent litigants and highly likely to provide financial services to judges,[266] forcing recusals on these grounds would undermine random assignment. The few judges who would not need to recuse would be overloaded with cases involving big banks. It would also be unfair to those banks (and those who litigate with or against them), since the pool of judges available to hear their cases would be quite different from the regular pool.[267]

Given these trade-offs, we think it wisest to follow the course set out by Congress[268] and create exceptions for ordinary financial services like checking accounts, mortgages on the primary residence, credit cards, and IRAs. We

265. GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT, *supra* note 34, at Canon 4(d)(1).

266. *See* JOHNSON & PARTON, *supra* note 23 (listing numerous examples of cases with these parties where the judge had a conflict).

267. *Cf.* Anderson et al., *supra* note 28, at 1206.

268. *See* 28 U.S.C. § 455(d)(4).

would, however, require judges to recuse when they have a brokerage account or use private wealth management services provided by a party. Similarly, we would prefer to see judges recuse when they have second mortgages or mortgages on investment properties. The difference to us is that brokerage and wealth management services create tighter relationships between the judge and the party due to regular communication with party employees. Similarly, these products provide ample opportunity for banks to provide benefits to judges (such as waiving fees) to possibly purchase goodwill. The point is not that they would be successful; rather, such a possibility risks the perception of bias. Similarly, a difference exists between a first mortgage on the family home and subsequent mortgages that may be putting additional strain on the judge's finances. Funding real estate speculation, for example, or using the second mortgage to fund some other business venture or financial need, may give the bank an interest in the judge. We think that interest creates too large a risk of perceived bias.

C. *Recusal Failure List*

Finally, we propose that judges who preside over cases while conflicted should be named on an annual list. While an automated system would do much to limit recusal failures, it is not a complete solution. Judges might purchase a financial interest after litigation begins, parties may be joined late, or other circumstances (like inheritance or marriage) might arise that change the makeup of the financial interests at the time of the original conflict check. Ultimately, it is the judge's responsibility to make sure that they are not conflicted. Naming judges who fail at this responsibility is a straightforward way to incentivize judges to do the right thing.

The Six-Month List has been quite effective in speeding up judgments.[269] Some scholars think it may be too effective[270] and are concerned that judges may be deciding motions or cases differently in order to get an opinion submitted in time. Complying with our annual list would not affect the outcome of any motion or case since compliance simply keeps a conflicted judge away from a case or a nonconflicted judge in it. The pressure imposed by the existence of the annual list operates before motions are filed.

An annual list would be strong medicine for district judges looking to be elevated to the circuit courts. Regular appearance on the annual list would be easy fodder for opponents of such a nomination in the Senate. Further, circuit courts could use the annual list to limit district judges' opportunities to sit by

269. *See* de Figueiredo et al., *supra* note 33, at 390–91.

270. *Id.* at 392, 437 (arguing that the incentive of the Six-Month List leads to faster disposition of cases and motions but increases the risk judges will make errors).

designation on panels.[271] Even if a district judge has given up on elevation, reputational and other professional incentives might be tied to keeping one's docket in compliance with the law and one's name off of the annual list. Therefore, a combination of improved processes applied to a clarified set of rules and enforced by such an annual list should be a marked improvement on recusal practice in the lower courts.

CONCLUSION

This Article reports the result of the first large-scale study of recusal practices by district judges. The study reveals several disconcerting results. First, dozens of judges have broken the law. In more than two hundred cases over a four-year period, district judges either ignored the statutory and ethical obligation to self-disqualify while owning stock in a party or failed in the statutory and ethical duty to be aware of their financial interests.[272]

This lack of compliance complicates the second and larger problem—the rules governing recusal are insufficient and unclear. Right now, a judge who owns stock in a party has a financial interest in that party, but a judge who takes a short position in the same stock has no such financial interest. If a judge (or the spouse or minor child) takes an equity interest in a party, the judge must recuse, but if the party invests in a company controlled by the judge, there is no financial interest. The recusal statute and Code of Conduct say the judge cannot own stock in the party, but they say nothing about when the party owns a financial interest with the potential to affect the judge. In addition to these obvious gaps, the lack of clarity leaves judges to work out their own recusal practices. As we demonstrated, judges use vastly different standards for recusal.

These divergent practices upset the random assignment of cases that is a key legitimating component of the judicial process. If judges recuse when they should not, they unfairly push work onto their colleagues and upset the probabilities parties face of encountering certain judges. Further, different recusal standards make outlier judges look bad. Those who are slow to recuse will appear as though they do not care about perceived bias. Those who are quick to recuse may appear timid or like they are shirking work.

We suggest the best solution to these problems is a sweeping transformation of the standards and transparency-enhancing institutional reforms. Ideally, Congress would take the lead, but the task may instead fall to the Judicial Conference as it promulgates updates to the Code of Conduct. Either way, procedures should be automated and transparency improved; in

271. *See* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J. L. REFORM 351, 361–62 (1995).

272. *See* JOHNSON & PARTON, *supra* note 23.

addition, there should be a single, comprehensive standard guiding judicial recusal due to financial relationships. Since judges frequently ignore the bright-line recusal rule around stock ownership, however, we do not think that reform of the rules will be sufficient. To this end, we propose that judges who fail to recuse when they should or who recuse when they should not be named on a publicly available annual list.

These findings and proposals are built on the first-ever study of a large set of district judges. Our findings are troublesome and surprising, and much work remains to better understand the extent of recusal failures and the effects of financial links between judges and parties. But we must face up to the fact that judges are breaking the law.