

Testimony Submitted for the Record
House Committee on the Judiciary
Subcommittee on the Courts, Intellectual Property, and the Internet
Hearing on “Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules”
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Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, thank you for the opportunity to submit testimony regarding the ethics crisis currently surrounding the federal judiciary. At issue in this hearing is the ancient principle of equal justice: that “no one shall be judge in his own cause.”¹ This principle, articulated as early as the Code of Justinian in CE 529, is one of the foundations upon which the rule of law was constructed.² It is a principle of fundamental fairness, of equality under the law, and of due process. The reports that have emerged this month that hundreds of federal judges have presided over cases in which they have a material financial interest in one of the parties strike at the core of our system of laws. Your committee is faced with a critical task: responding fully and appropriately to this crisis of justice.

Citizens for Responsibility and Ethics in Washington (“CREW”) is a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance and the rule of law. The ethical crisis in which our judicial branch is currently embroiled demands a fundamental re-thinking of the responsibilities those who are entrusted with interpreting our laws owe to the people over whom they exercise their power. We strongly support the committee’s current draft legislation improving the scope of the judicial ethics regime and increasing the transparency of judicial financial disclosures, and we believe the committee should act on it quickly. We also believe that bolder action is necessary to combat the full scope of the issues highlighted by recent revelations. I write on behalf of CREW today to propose two additional complementary actions that Congress should take to respond to this crisis.

First, Congress should enact a blanket prohibition on all federal judges owning or trading any individual stocks or other financial instruments.

This prophylactic rule is the best way for Congress to ensure that federal judges are not violating their duty to preside over cases as disinterested arbiters of law and fact. Because members of the federal judiciary are appointed for life, and are removable only for grave constitutional offenses, an *ex ante* rule is preferable to an *ex post* disciplinary rule. The judicial ethics regime should prevent judges from ruling on cases that impact their stock portfolio by limiting the possibility for these conflicts of interest *before* any such violation occurs. The impeachment process is too arcane and weighty to ever function as a true check on anything but the most egregious of

¹ Justinian Codex, Book III, Title V (“ne quis in sua causa iudicet vel sibi jus dicat”) available at http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-3pdf/book%203-5.pdf.

² See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (identifying “a law that makes a man a Judge in his own cause” as an example of an act “contrary to the great first principles of the social compact”). See also Alexander Hamilton, Federalist 80 (noting that, “No man ought certainly to be a judge in ... any cause in respect to which he has the least interest or bias”).

constitutional wrongs. And any sort of judicial censure regulation could fall prey to bad actors refusing to abide by the judgement handed down by their peers.

A blanket ban has the additional benefits of being easy to understand and easy to enforce. Various judges responded to the *Wall St. Journal's* reporting with thin excuses for their conduct, citing, for example, “flawed internal procedures,” “misunderstanding,” “misspellings” resulting in inaccurate recusal lists, funds being managed by their spouses or their brokers, their clerks not exercising “due diligence,” or simply being “remiss.”³ Many of these explanations were likely made without malicious intent: it is clear, for example, that the current system by which the courts determine and disseminate recusal lists is deeply flawed. Evidently, for example, the current conflict screening regime relies on software that fails to identify potential conflicts due to minor misspellings in a company’s name and cannot process the relationship between a parent company and a subsidiary.⁴ It is also apparent that many judges do not fully understand the scope of their responsibility to avoid financial conflicts of interest. That is precisely why a blanket prohibition is so important: no federal judge, their brokers, managers, or spouses, could, in good faith, misunderstand such a rule.

We are not suggesting that judges or potential judges take a vow of poverty when they are sworn in. Far from it. There are various common mechanisms for investing money that do not present a conflict of interest risk. Specifically, we suggest that Congress require judges to place their assets in a qualified blind trust,⁵ or in a diversified mutual or index fund.⁶ There is no question that this type of structure would effectively prevent *ex ante* conflicts of interest in the judiciary.

Second, Congress should apply the federal criminal conflict of interest statute, 18 U.S.C. § 208, to the judiciary.

Section 208 functions currently as the *ex post* backstop to the executive branch ethics program. Specifically, it bars a federal government employee from participating in “particular matters” focused on the interests of a discrete and identifiable class of persons or identified parties. In the case of judges, Section 208 would apply to cases in which a judge has a financial interest in one of the parties (that is, a particular matter involving specific parties).

³ James V. Grimaldi, Coulter Jones and Joe Palazzolo, “131 Judges Broke the Law by Hearing Cases Where They Had A Financial Interest,” *Wall St. Journal*, Sep. 28, 2021, available at <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>; Coulter Jones, Joe Palazzolo and James V. Grimaldi, “Federal Judges or Their Brokers Traded Stocks of Litigants During Cases,” *Wall St. Journal*, Oct. 15, 2021, available at https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192?st=83tufdpgmt8787u&reflink=desktopwebshare_permalink&mod=article_inline.

⁴ According to a court official, for example, one judge presided over a case involving an Exxon Mobil subsidiary because the judge’s recusal list “listed only parent Exxon Mobil Corp. and not the unit, whose name includes the additional word “oil.”” Grimaldi, Jones and Palazzolo, *Wall St. Journal*, Sep. 28, 2021.

⁵ A “qualified blind trust” as generally defined in 5 C.F.R. § 2634.402(e).

⁶ This limitation would make judges no worse off than the vast majority of Americans. According to data from the Federal Reserve, only 13.9% of Americans are directly invested in individual stocks. Federal Reserve, “Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances,” September, 2017, available at <https://www.federalreserve.gov/publications/2017-September-changes-in-us-family-finances-from-2013-to-2016.htm>.

We believe that it is important to pair the *ex ante* ban on owning or trading individual financial interests with the Section 208 expansion. As we previously discussed, there are few mechanisms available to punish judicial misconduct; committed bad actors can thus serially evade ethical requirements as long as they do not commit grave constitutional offenses meriting impeachment. Applying the criminal laws to this type of conduct would serve as a powerful check on egregious ethical misconduct.

By combining the Section 208 expansion with the blanket ban on owning or trading individual stocks, Congress would create a simple, enforceable conflict of interest regime. The simplicity of the ban would enhance the effectiveness of the Section 208 expansion--and *vice versa*. Because the blanket ban does away with the confusing and unclear elements of the current recusal and reporting requirements in favor of a clear and concise bright line rule, knowingly violating that standard would make successful prosecution under the expanded Section 208 more likely--and thus would make the Section 208 expansion more impactful.

It is important to underscore that judges are already required to recuse themselves from any cases in which they have a financial interest in a party to a proceeding.⁷ The expansion would only add teeth to the existing regime, finally providing a mechanism by which judges could be held accountable for egregious violations of their ethical duties. And accountability is precisely what the existing legal regime lacks.

As the *Wall Street Journal's* reporting demonstrates, many judges feel empowered to brush off these egregious violations, admitting to being "remiss" and promising only to "do better" in the future. This type of cavalier attitude to these reports does more harm than good. With public confidence in the neutrality of the courts already shaken, these flippant comments from judges whose conflicts have been exposed undermine public hope for accountability and change moving forward. And this is precisely why fundamental, structural reforms such as those we have suggested are necessary.

The recent revelations of widespread conflicts of interest in the judiciary demands quick and meaningful action. The federal judiciary is tasked with upholding and executing fundamental principles of justice in our country, and granted the extraordinary privilege of lifetime tenure. Even more than Congress or the executive, the judiciary is the guardian of the rule of law--it is, as Alexander Hamilton explained, "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."⁸ Substantively, a conflicted judiciary violates the litigant's constitutional right to due process of law. That is an unthinkable violation, a strike against the foundational right to equality under the law. And such actions have a broader impact: they undermine the public's belief in the rule of law. Public confidence that the system of law is fair and just is critical to maintaining democratic governance.

CREW looks forward to working with your committee as you address this important issue.

⁷ 28 U.S.C. § 455.

⁸ Hamilton, Federalist 78.