

# REINING IN RECUSALS

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As the spotlight on the Supreme Court shines brighter, the public has become increasingly aware of judicial misconduct and ethical issues. This increased awareness has also exposed the judiciary’s less-than-stellar record on handling such issues. Of these ethical issues, recusal decisions are a prominent cause for concern—especially in today’s hyper-politicized world.

When or whether to recuse is a sensitive and important question most judges are bound to face. Although some statutory guidance exists, that guidance is far from a model of clarity. Even where statutory guidance is facially clear, recusal problems still persist due to benign and technological errors, or—in some cases—a fundamental misunderstanding of what the statutes require.

Additionally, the rise of social media only complicates the vague statutory framework. And with more recent outspoken judges on the federal bench, new recusal questions emerge and unique recusal motions are sure to be filed. Recusal is not limited solely to judges but also affects judicial law clerks. That is, the actions of judicial law clerks affect the judges they clerk for. But guidance for judicial law clerks is varied and thin, which creates additional problems.

Moreover, recusal has become increasingly weaponized and used for strategic advantage by all three branches of government. Each branch has ways to influence or dictate recusal decisions, all of which threaten the sanctity of the judiciary.

What is a judge to do? This Article explores and highlights potential recusal-worthy issues for both judges and judicial law clerks. Further, it details how recusal has become weaponized and explains the dangers in permitting the proliferation of recusal weaponization. Finally, this Article proffers reforms to help prevent and curb recusal abuse by (1) changing the timing of appellate review of recusal decisions; (2) modifying the appellate standard of review for recusal decisions; and (3) suggesting methods to prevent recusal manipulation in the en banc process.

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## INTRODUCTION

*Instruments register only through things they're designed to register.*

—Leonard Nimoy as Spock<sup>1</sup>

Each day, the spotlight on judicial misconduct shines a bit brighter. Much of that attention has been focused on the Supreme Court, which has no enforceable ethics code—despite “[h]undreds of judges nationwide [who] believe that U.S. Supreme Court justices should be subject to an ethics code . . . [and] should set a ‘very high bar for the rest of [the judiciary] to emulate.’”<sup>2</sup> But “justices who keep blaming their colleagues and the press and the American public for broad declining trust in the [our judiciary] seem to have no comprehension of what kinds of

1. *Star Trek: The Naked Time* (NBC television broadcast Sept. 29, 1966).

2. Nate Raymond, *Most Judges in Survey Support U.S. Supreme Court Having Ethics Code*, REUTERS, <https://www.reuters.com/legal/government/most-judges-survey-support-us-supreme-court-having-ethics-code-2022-06-22/> (June 22, 2022, 3:37 PM).

behaviors appear to be inappropriate because they *actually are* inappropriate.”<sup>3</sup> Nor do they seem to think that the issue is serious.<sup>4</sup>

With such distrust in our nation’s highest court, it is no surprise that ethical issues permeate the judiciary. Just as the “Supreme Court communicates its policy directives to lower court judges”<sup>5</sup> through its opinions, the justices—for better or worse—are role models for the rest of the judiciary.<sup>6</sup> Though there are many, one pressing ethical issue that underscores the erosion of trust in the federal judiciary is recusal. Though this Article highlights examples from specific judges, the purpose is not to name and shame. Instead, the goal is to show how this ethical issue is a “product of the aggregate behavior of individuals in the legal profession, together with the profession’s institutional structures.”<sup>7</sup> That

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3. Dahlia Lithwick, *The Real Problem with the Second Alleged Leak at the Court*, SLATE (Nov. 22, 2022, 10:49 AM), <https://slate.com/news-and-politics/2022/11/alito-leak-hobby-lobby-real-problem.html> [https://perma.cc/6BSE-L97Y]. See, e.g., Brian Tyler Cohen (@NoLieWithBTC), TWITTER (Dec. 10, 2022, 3:47 PM), <https://twitter.com/noliewithbtc/status/1601695100081680386?lang=en> [https://perma.cc/BY9E-MYPS] (reporting that Justice Kavanaugh “was seen hanging out at a Republican party with Matt Gaetz, Sebastian Gorka, Sean Spicer, and Erik Prince”); Lydia Wheeler, *Kavanaugh Holiday Party Appearance Raises Ethics Questions (I)*, BLOOMBERG L., <https://news.bloomberglaw.com/us-law-week/kavanaugh-holiday-party-appearance-raises-more-ethics-questions> [https://perma.cc/PGQ4-99VU] (Dec. 12, 2022, 3:35 PM) (“US Supreme Court justices don’t often seem too concerned about appearances.”).

4. See Aliza Shatzman, *Chief Justice Roberts’ Year-End Report on the Federal Judiciary Leaves Much to Be Desired*, ABUSIVE DISCRETION (Jan. 2, 2023), <https://abusivediscretion.com/chief-justice-roberts-year-end-report-on-the-federal-judiciary-leaves-much-to-be-desired/> [https://perma.cc/HU5X-BLD8] (noting the lack of any substantive discussion of the various judicial ethics issues the Supreme Court faced recently in Chief Justice Roberts’s year-end report).

5. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 397 (2007).

6. See, e.g., Erwin Chemerinsky, *Remembering a Justice Who Cared*, TRIAL, May, 1999, at 92, 92 (“No Supreme Court justice in history is a better role model . . . than Harry Blackmun” with regard to “openly consider[ing] the human impact of the Court’s decisions”); Chief Judge Kaye, *A Life in the Law*, 30 SETON HALL L. REV. 752, 752 (2000) (“As the first woman appointed to the United States Supreme Court, Justice O’Connor is a true pioneer, a role model for women lawyers—a role model, indeed, for all lawyers.”); Debra Cassens Weiss, *Calls Mount for Binding SCOTUS Ethics Code After Anti-Abortion Crusader Alleges Hobby Lobby Leak*, ABA J. (Nov. 21, 2022, 10:52 AM), <https://www.abajournal.com/news/article/calls-mount-for-binding-scotus-ethics-code-after-anti-abortion-crusader-alleges-hobby-lobby-leak> [https://perma.cc/RA76-RTY4] (noting that the recent news about Justice Alito’s alleged Hobby Lobby leak presents “an opportunity for leadership from the justices” to “adopt a binding code of conduct” (quoting Alicia Bannon (@alicia\_bannon), TWITTER (Nov. 20, 2022, 11:31 AM), [https://twitter.com/alicia\\_bannon/status/1594382910085533697](https://twitter.com/alicia_bannon/status/1594382910085533697) [https://perma.cc/TT97-7GYQ])).

7. Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 601 (2020).

said, “[i]ndividual actions matter because of how interconnected the legal profession is.”<sup>8</sup> These individual examples help us understand the intricacies of recusal decisions and—potentially—what we can do as a legal community to systematically overhaul ethics codes and rules to mitigate these issues in the future.

This Article begins with a brief historical recap of the recusal statutes and then addresses three major recusal problems: (1) financial reporting; (2) the meaning of the “appearance of impartiality”; and (3) the rise of recusal weaponization. It concludes with a discussion of possible reforms to these issues, including the modification of local rules and the federal rules of appellate procedure, as well as proposed changes to the standards of review for recusal orders. Examining this issue is a first step toward improving our judiciary and rebuilding the public’s confidence in it. By realizing the structural framework that fosters this issue we can start rowing in the right direction toward meaningful ethical improvements.

### I. A RECUSAL RECAP

Recusal issues are not new. For a while, however, recusal issues were not a prominent focus of media or the legal community at large. The same cannot be said today. Many are familiar with recent questions about Justice Clarence Thomas’s failure to recuse in the January 6th cases due to his wife’s lobbying activities and alleged involvement with the insurrection.<sup>9</sup> Justice Elena Kagan faced similar criticism when she

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8. *Id.* at 602.

9. See Russell Wheeler, *Justice Thomas’s Failure to Recuse May Be Wrong but It’s Not Judicial Misconduct*, BROOKINGS (Mar. 29, 2022), <https://www.brookings.edu/articles/justice-thomass-failure-to-recuse-may-be-wrong-but-its-not-judicial-misconduct/> [<https://perma.cc/SF3U-KCMM>] (“Revelations that Justice Clarence Thomas’s spouse sent at least 29 messages to Trump aides about overturning the 2020 elections added to numerous examples of her sometimes outlandish partisan lobbying and Justice Thomas’s not recusing himself in cases involving matters about which she lobbied.”); Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM), <https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomasmust-recuse-in-insurrection-cases> [<https://perma.cc/ESP7-G95V>] (reporting about Virginia Thomas’s text messages to Mark Meadows and how “[t]hose texts have raised questions about what Justice Thomas knew about his wife’s activities, and when he knew it”). Justice Thomas is also known—despite his statements to the contrary—to associate with politicians in the Republican Party. For example, recently discovered e-mails show that Justice Thomas had lunch with Florida Governor Ron DeSantis in 2021. See Zachary Stieber, *Outlets Falsely Report Clarence Thomas Dined with Ron DeSantis Day Before Striking Down Roe v. Wade*, EPOCH TIMES, [https://www.theepochtimes.com/outlets-falsely-reportclarence-thomas-dined-with-ron-desantis-day-before-striking-down-roe-v-wade\\_4827254.html?welcomeuser=1](https://www.theepochtimes.com/outlets-falsely-reportclarence-thomas-dined-with-ron-desantis-day-before-striking-down-roe-v-wade_4827254.html?welcomeuser=1)

declined to recuse herself in *National Federation of Independent Business v. Sebelius*,<sup>10</sup> despite her prior involvement in the case as solicitor general.<sup>11</sup> Justice Ketanji Brown Jackson recused herself from the case involving Harvard’s “consideration of race in admissions.”<sup>12</sup> And, most recently, Justice Amy Coney Barrett was called to recuse herself from a gay rights case because of her affiliation with People of Praise, a Christian group with “staunch[] anti-gay beliefs.”<sup>13</sup> Although recusal may be most prominent at the Supreme Court, the issue also affects judges—and even law clerks—at all levels of the federal judiciary.<sup>14</sup>

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[<https://perma.cc/64GF-VM7D>] (Oct. 29, 2022) (noting e-mails “obtained by American Oversight indicate that DeSantis and [Justice] Thomas have been in regular contact” and met for lunch in 2021). See also William Vaillancourt, *New Emails Suggest Supreme Court Justice Clarence Thomas Was Communicating with Ron DeSantis — For Some Strange Reason*, ROLLING STONE (Feb. 4, 2022), <https://www.rollingstone.com/politics/politics-news/clarence-thomas-ron-desantis-communication-new-emails-1295354/> (noting that in an e-mail to the DeSantis administration, Virginia Thomas said her “husband has been in contact with [DeSantis] too on various things of late”).

10. 567 U.S. 519 (2012).

11. Ed Whelan, *Justice Kagan’s Non-Recusal in Obamacare Case*, NAT’L REV. (Oct. 21, 2016, 3:00 PM), <https://www.nationalreview.com/bench-memos/kagan-obamacare-recusal/> [<https://perma.cc/3PFA-AB9H>] (arguing that Justice Kagan was required to recuse under 28 U.S.C. § 455(b)(3) because she “was personally involved . . . in advising how to defend against challenges to Obamacare”); Eric Segall, *A Liberal’s Lament on Kagan and Health Care*, SLATE (Dec. 8, 2011, 4:07 PM), <https://slate.com/news-and-politics/2011/12/obamacare-and-the-supreme-court-should-elena-kagan-recuse-herself.html> [<https://perma.cc/YB2Q-KZYN>] (arguing similarly); Gabe Roth, SUPREME MYTHS, at 24:00–28:03 (Oct. 21, 2022, 4:45 AM) (downloaded using Apple Podcasts) (discussing Justice Kagan’s refusal to recuse and noting that Chief Justice John Roberts has suggested that justices are not bound by 28 U.S.C. § 455 or ethics rules under the separation of powers doctrine).

12. Kirk Carapezza, *Judge Ketanji Brown Jackson Pledges to Recuse Herself in Harvard Discrimination Case*, GBH NEWS, <https://www.wgbh.org/news/education/2022/03/24/judge-ketanji-brown-jackson-pledges-to-recuse-herself-in-harvard-discrimination-case> [<https://perma.cc/LP6S-JDJD>] (Oct. 19, 2023).

13. Stephanie Kirchgaessner, *Amy Coney Barrett Urged to Step Away from Gay Rights Case Because of Faith Affiliation*, GUARDIAN (Nov. 21, 2022, 3:00 AM), <https://www.theguardian.com/law/2022/nov/21/amy-coney-barrett-people-of-praise-lgbtq-303-creative-v-elenis> [<https://perma.cc/L5YT-QNJJ>]. See also Sarah Midkiff, *Did Amy Coney Barrett’s Religious Group Inspire The Handmaid’s Tale?*, REFINERY29, <https://www.refinery29.com/en-us/2020/09/10041073/amy-coney-barrett-people-of-praise-the-handmaids-tale> [<https://perma.cc/RH7R-8GWH>] (Sept. 22, 2020, 11:14 AM) (“[Justice] Barrett identifies as Catholic, but more specifically, she is affiliated with an ecumenical Christian Group, the People of Praise.”).

14. See, e.g., Josh Gerstein, *Trump Asks Judge to Recuse from Racketeering Suit Against Hillary Clinton*, POLITICO (Apr. 4, 2022, 5:36 PM), <https://www.politico.com/news/2022/04/04/trump-asks-judge-to-recuse-from-racketeering-suit-against-hillary-clinton-00022832> [<https://perma.cc/N68D-NY57>] (“Lawyers for former President Donald Trump are asking a federal [district court] judge

Despite two centuries of case law, it is unsurprising that recusal remains a concern given the numerous ambiguities in the recusal statutes.

“It has always been understood . . . that not all judges will decide every case with complete fairness—as a result, edicts designed to ensure judicial impartiality have been recorded since ancient days.”<sup>15</sup> For example, “[u]nder the Roman Code of Justinian, a party could disqualify a judge who was under suspicion of bias.”<sup>16</sup> Some, like Blackstone and English Parliament, believed that suspicion alone was insufficient; instead, Parliament decreed that recusal was only appropriate if a judge had a “pecuniary interest in a cause.”<sup>17</sup> These historical underpinnings established the framework for our modern recusal statutes.<sup>18</sup>

American recusal statutory law dates back to 1792, which at the time required “judges to recuse themselves when they ha[d] an interest in [a] suit, or ha[d] been counsel to a party.”<sup>19</sup> “The 1792 recusal statute was construed narrowly,” and “courts adopted the restricted English common law standard”<sup>20</sup> of what constituted an interest—*i.e.*, only cases in which

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appointed by President Bill Clinton to step aside from a suit . . . .”); Samantha Handler, *Cisco Finds Panel Skeptical of Judge Who Dropped \$2 Billion Hit*, BLOOMBERG L. (Apr. 4, 2022, 12:13 PM), <https://news.bloomberglaw.com/ip-law/cisco-seems-to-get-appeals-judges-agreement-on-need-for-recusal> [<https://perma.cc/BA6K-GHCK>] (reporting on Judge Henry Morgan of the Eastern District of Virginia refusing to recuse himself from a case in which his wife owned “100 shares of Cisco stock”); Katheryn Hayes Tucker, *‘That Is Unforgivable’: Law Professor Says 11th Circuit Chief Judge, Law Clerk Need to Address Racist Rant*, DAILY REP. (Oct. 15, 2021, 3:58 PM), <https://www.law.com/dailyreportonline/2021/10/15/law-professor-calls-for-mea-culpa-from-judge-and-law-clerk-over-racist-rant/?slreturn=20220324154101> [<https://perma.cc/7X4W-2EHV>] (describing Judge Pryor’s decision to hire a law clerk who allegedly made racist statements about Black people and the possibility law professor Jonathan Nash noted of “lawyers moving to recuse the law clerk”); Memorandum and Order Concerning Plaintiffs’ Motion to Recuse, *Veneklase v. City of Fargo*, 236 F.3d 899, 901 (8th Cir. 2000) (No. 98-2147) (Judge Kermit Bye declining to recuse under 28 U.S.C. § 455(a)).

15. Richard E. Flamm, *The History of Judicial Disqualification in America*, JUDGES’ J., Summer 2013, at 12, 12.

16. MATTHEW MENENDEZ & DOROTHY SAMUELS, BRENNAN CTR. FOR JUST., JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 3 (2016), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Judicial\\_Recusal\\_Reform.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Recusal_Reform.pdf) [<https://perma.cc/CT5H-DCRR>].

17. Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 753 (2010).

18. See *Liteky v. United States*, 510 U.S. 540, 543–44 (1994) (discussing judicial recusal “in England at the time of Blackstone” and the interplay with early American recusal statutes).

19. *Id.* at 544.

20. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 540 (2005).

a judge had a direct pecuniary interest.<sup>21</sup> In 1821, the early recusal statute was amended to “include all judicial relationship[s] or connection[s] with a party that would in the judge’s opinion make it improper to sit.”<sup>22</sup> And, in 1911, the bias provision was further expanded to require recusal “for bias in *general*”<sup>23</sup> in what is now codified at 28 U.S.C. § 144.<sup>24</sup>

“In 1948, the provision was recodified as 28 U.S.C. § 455”<sup>25</sup> and was transformed “from a challenge-for-cause provision to a self-enforcing disqualification provision that places the onus on the judge to determine whether [they] should recuse.”<sup>26</sup> As with the 1792 statute, the 1948 statute was also narrowly construed and its application was limited.<sup>27</sup> Although the recusal statute now allowed for parties to move for recusal, “courts rarely granted [recusal] motions, partly because they were considered on the merits by the very judge whose impartiality was being questioned.”<sup>28</sup> Additionally, “parties were understandably reluctant to even bring these motions”<sup>29</sup> out of fear of hostility and prejudice should the judge decide not to recuse and continue presiding over the case.

Further, in 1972, the Supreme Court acknowledged and approved of “the duty to sit” doctrine.<sup>30</sup> This doctrine posits that the “nature of a judgeship implies that the judge has a responsibility to hear and decide cases, one that should not be shirked for political or personal reasons.”<sup>31</sup> Although the duty to sit doctrine does not explicitly conflict with the recusal statutes, some have argued that—due to the ambiguous nature of

21. See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 610 (1947) (“Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.”).

22. *Liteky*, 510 U.S. at 544.

23. *Id.*

24. See 28 U.S.C. § 144 (“Whenever a party to any proceeding . . . makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice . . . such judge shall proceed no further . . .”).

25. Frost, *supra* note 20, at 540.

26. *Id.* at 541.

27. See Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 239 (1978) (“The specific mandatory grounds for disqualification were narrowly construed, and the discretionary ground rarely had bite.”).

28. Mason E. Lowe, *Reconsidering Recusals: The Need for Requirements for When Not to Recuse*, 59 LOY. L. REV. 947, 953 (2013).

29. *Id.*

30. See *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (mem.) (“Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*.”) (citations omitted).

31. Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 821 (2009).

the recusal statutes—the doctrine “encourage[s] judges to remain on cases from which they arguably should have recused themselves.”<sup>32</sup>

In response to the duty to sit doctrine and subjectivity criticisms, Congress amended Section 455 in 1974.<sup>33</sup> Today, Section 455 requires judges to recuse themselves: (1) “in any proceeding in which [their] impartiality might be reasonably questioned”; (2) where the judge “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts”; (3) where the judge previously “served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association . . . or the judge or such lawyer has been a material witness” in either private or government practice; (4) where the judge “individually or as a fiduciary, or [their] spouse or minor child . . . has a financial interest in the subject matter in controversy”; and (5) where the judge, their spouse, or a “person within the third degree of relationship” is (a) party to the proceeding, an officer, director, or trustee of a party; (b) acting as a lawyer in the proceeding, (c) is known to the judge to have an interest that could be substantially affected by the outcome, or (d) likely to be a material witness in the proceeding.<sup>34</sup>

Section 455 complements Section 144, which permits parties to move for a judge’s recusal by submitting an affidavit that “state[s] the facts and the reasons for the belief that bias or prejudice exists.”<sup>35</sup> “Judges examining the affidavit must accept the facts as true, but may evaluate the legal sufficiency of the affidavit.”<sup>36</sup> Unlike Section 455’s appearance of impartiality standard, “courts have imposed a ‘bias-in-fact’ standard” for motions under Section 144.<sup>37</sup> Section 144 challenges are also limited to “extrajudicial sources” or personal bias unlike Section 455, which according to the First and Second Circuits is limited to a

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32. Frost, *supra* note 20, at 541.

33. See Toni-Ann Citera, Note, *A Look at the Extrajudicial Source Doctrine Under 28 U.S.C. § 455*, 85 J. CRIM. L. & CRIMINOLOGY 1114, 1115 (1995) (“In 1974, responding to certain circuits’ articulation of a ‘duty to sit’ in close cases, and criticism of § 455’s subjectiveness, Congress amended § 455.” (footnote omitted)); H.R. REP. NO. 93-1452, at 5 (1974) (noting that “proposed legislation would remove the ‘duty to sit’ concept of present law” and was designed to “set[] up an objective standard, rather than the subjective standard”).

34. 28 U.S.C. §§ 455(a)–(b)(5)(iv).

35. 28 U.S.C. § 144.

36. Citera, *supra* note 33, at 1117.

37. *Id.* See, e.g., *United States v. El-Gabrowni*, 844 F. Supp. 955, 959 (S.D.N.Y. 1994) (explaining that Section 144 requires “a showing of bias in fact” and that § 144 does “not deal simply with appearances, as does Section 455(a)”).



“judge’s involvement in earlier judicial proceedings concerning parties to a present action.”<sup>38</sup>

## II. NO LAW, “JUST VIBES”: RECUSAL ISSUES

Recusal issues are nondiscriminatory. That is, they affect judges across the ideological spectrum.<sup>39</sup> For litigants, the decision to move for recusal presents a unique predicament because filing such a motion *could* poison the well should the judge decide not to recuse.<sup>40</sup> Recusal under Section 455 is problematic because parts of the statute are unclear. There is a lack of unifying standards or rules and enforcement mechanisms are basically nonexistent.<sup>41</sup> In other words, there is no law of recusal, “just vibes.”<sup>42</sup> This is true even among seemingly straightforward provisions of Section 455 such as the requirement to “make a reasonable effort” to inform themselves “about [their] personal and fiduciary financial interests.”<sup>43</sup> Other provisions of Section 455, like the impartiality,<sup>44</sup>

38. Citera, *supra* note 33, at 1117–19.

39. Although outside the scope of this Article, many of the recusal issues facing the federal judiciary also affect state judges. *See generally* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 53 VAL. U. L. REV. 1085 (2019) (examining state laws and judicial codes of conduct for recusal as they apply to state judges).

40. *See* R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833 (2005) (“[A]sking a challenged Justice [or judge] to rule on a motion to recuse puts that Justice [or judge] in a precarious position.”); Jeffrey T. Fiut, Comment, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1612–13 (2009) (“Parties may be discouraged “from seeking a judge’s recusal due to fear of inciting the judge” because “[r]ecusal motions are not like other procedural motions. They challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner: they speculate on her interests and biases; they may imply unattractive things about her.” (quoting JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 31 (2008))).

41. *See* Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 193–94 (2005) (“Unlike 28 U.S.C. § 144, the federal disqualification statute that applies only to district court judges, § 455 contains no procedural component to govern the enforcement of the statute’s substance. As a result, recusal procedure in the Supreme Court has evolved through case law and pure inertia.”) (footnotes omitted); *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 713 (7th Cir. 1986) (“[M]andamus is the only method of correcting a judge’s erroneous refusal to recuse himself under 28 U.S.C. § 455(a) . . .”).

42. This phrase was coined by the *Strict Scrutiny* podcast. *See* Kate Shaw, Melissa Murray & Leah Litman, *No Laws, Just Vibes*, STRICT SCRUTINY (Jan. 7, 2022) (downloaded using Apple Podcasts).

43. 28 U.S.C. § 455(c).

44. 28 U.S.C. § 455(a).

personal bias and prejudice,<sup>45</sup> and spousal/third-degree relationship provisions,<sup>46</sup> are even more enigmatic.

### A. *Financial Interests*

Unsurprisingly, Section 455 contains a provision prohibiting judges from presiding over cases in which the judge, their spouse, or minor children have a financial interest<sup>47</sup>—no matter how small that interest might be.<sup>48</sup> Yet judges and justices still run afoul of the financial provision. At its core, the financial interest prong raises three questions: First, what counts as a reasonable effort to inform oneself about a financial interest? Second, how malleable is the term “financial interest” under Section 455(d)(4)?<sup>49</sup> Last, how should enforcement of the provision be undertaken?

Regarding the first question, judges and justices seem to rely primarily on parties and journalists to flag financial interests, rather than conducting their own investigations. This is odd considering that the Federal Rules of Appellate Procedure (FRAP) require disclosure to highlight any potential financial interest conflicts as do the Federal Rules of Civil Procedure (FRCP).<sup>50</sup> FRAP Rule 26.1 and FRCP Rule 7.1 require “[a]ny nongovernmental cooperate party to a proceeding”<sup>51</sup> to “file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock.”<sup>52</sup> And some circuit courts take this a step further, requiring a certificate of interested persons by both parties and amicus filers, detailing stock ticker information, “a complete list of all . . . firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, *including*

45. 28 U.S.C. § 455(b)(1).

46. 28 U.S.C. § 455(b)(5).

47. 28 U.S.C. § 455(b)(4).

48. *See id.*

49. 28 U.S.C. § 455(d)(4).

50. *See* FED. R. APP. P. 26.1 advisory committee’s note to the 1989 adoption (“The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party’s related corporate entities that would disqualify the judges from hearing the appeal.”); FED. R. CIV. P. 7.1 advisory committee note to the 2002 adoption (“Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like.”).

51. FED. R. APP. P. 26.1(a).

52. *Id.* *See also* FED. R. CIV. P. 7.1(a)(1) (mirroring the language of FED. R. APP. P. 26.1(a)).

*subsidiaries, conglomerates, affiliates, parent corporations*, [and] any publicly held corporation that owns 10% or more of the party’s stock.”<sup>53</sup>

Despite these required disclosures, judges and justices have failed to recuse in cases in which they or their spouses had financial interests in the parties. In 2016, for instance, Chief Justice John Roberts initially failed to recuse himself in a major patent case despite owning \$250,000 in Thermo Fisher Scientific, the parent company of Life Technologies.<sup>54</sup> Only after the error was brought to his attention during oral argument did he recuse himself.<sup>55</sup> The year before, Justice Stephen Breyer said he did not “know his wife held stock in a company with a stake in a big energy case the court heard.”<sup>56</sup> “When he learned about it following a reporter’s inquiry, [his wife] immediately got rid of [the stock].”<sup>57</sup> And Justices Sonia Sotomayor and Neil Gorsuch “failed to recuse from a petition involving their book publisher, though the two [had] earned \$3.5 million combined from [the publisher] in the last few years.”<sup>58</sup>

A recent investigation by *The Wall Street Journal* uncovered 131 federal judges who “oversaw court cases involving companies in which they or their family members owned stock” between 2010 and 2020.<sup>59</sup> When *The Wall Street Journal* article broke, “judges offered all manner of reasons for the statutory violations, including flawed internal procedures, lack of awareness that their spouse’s holdings mandated

53. 11TH CIR. R. 26.1-1 to -2(a) (emphasis added).

54. See *Building Confidence in the Supreme Court Through Ethics and Recusal Reforms: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 36 & n.1 (2022) (statement of Gabe Roth, Executive Director, Fix the Court) [hereinafter Roth]; Amy Howe, *Roberts Recuses from December Patent Case*, SCOTUSBLOG (Jan. 4, 2017, 8:19 PM), <https://www.scotusblog.com/2017/01/roberts-recuses-december-patent-case/> [<https://perma.cc/5XEG-WURT>] (noting Chief Justice Roberts recused after he “had learned that the petitioner in the case, Life Technologies, was owned by Thermo Fisher Scientific – a company in which Roberts holds 1212 shares”).

55. See Roth, *supra* note 54, at 36 n.1.

56. Cristian Farias, *Justice Breyer Won’t Sit Out Big Energy Case Where He Had Conflict of Interest*, HUFFPOST (Oct. 17, 2015, 10:25 AM), [https://www.huffpost.com/entry/stephen-breyer-conflict-of-interest\\_n\\_562134eee4b08589ef472dd8](https://www.huffpost.com/entry/stephen-breyer-conflict-of-interest_n_562134eee4b08589ef472dd8) [<https://perma.cc/Z8QD-7G56>].

57. *Id.*

58. See Roth, *supra* note 54, at 36 & n.5. See also *Nicassio v. Viacom Int’l, Inc.*, 140 S. Ct. 630 (2019) (mem.) (noting that only Justice Breyer did not partake in the “consideration or decision of [the] petition”).

59. Monique Beals, *131 Federal Judges Failed to Recuse Themselves from Cases in Which They Had Financial Interest: Report*, THE HILL (Sept. 28, 2021, 10:12 AM), <https://thehill.com/regulation/court-battles/574244-131-federal-judges-failed-to-recuse-themselves-from-cases-in-which/> [<https://perma.cc/35DE-G8JQ>].

recusal and mistaken beliefs that shares held in an account run by a money manager were an exception.”<sup>60</sup>

Some of these judges’ lack of awareness was benign. At least five explained that they forgot to update their conflicts sheets.<sup>61</sup> Two others said that their conflict software failed to notify them of a conflict because the software only flags exact matches.<sup>62</sup> Other excuses were more puzzling. Two circuit judges were unaware that their spouse’s retirement accounts counted as a conflict.<sup>63</sup> Additionally, two judges claimed that they were simply performing administrative tasks or non-adjudicatory decisions which did not trigger Section 455.<sup>64</sup> Whether this is accurate is debatable. Finally, at least one judge appeared to completely misunderstand how Section 455(b) operates, explaining that “he’d notify the parties in a case about a potential conflict and . . . ‘if requested, [he] would recuse [himself] from the case.’”<sup>65</sup>

Second, the term “financial interest” may have additional meanings and ramifications outside of those listed under Section 455(d).<sup>66</sup> In 2010,

60. Randy Maniloff, *To Recuse or Not? Investigations Into Federal Judges’ Financial Interests Spark Debate*, ABA J., Feb./Mar. 2022, at 32, 32.

61. *See More Than 100 Federal Judges Failed to Recuse When They Owned Stock in a Litigant. What’s Their Excuse(s)?*, FIX THE COURT (Sept. 30, 2021), <https://fixthecourt.com/2021/09/100-federal-judges-failed-recuse-owned-stock-litigant-whats-excuses/> [<https://perma.cc/X3VX-GPW5>] (noting that Judges Leo Glasser, John Jones III, John Ross, Thomas Russell, and Aleta Trauger forgot to update their conflict sheets).

62. *See id.* (noting that Judge William Kuntz II said the software failed to mark a conflict and “according to Judge Edgardo Ramos (S.D.N.Y.), only exact matches get flagged by the conflict-check software”).

63. *Id.*

64. *Id.*

65. *Id.* Perhaps this is not shocking because even Justices Thomas and Alito appear—at best—oblivious to reporting requirements, albeit in a different context. *See* Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/5KSY-EB59>] (reporting on Justice Thomas’s failure to report an alleged \$500,000 trip, which likely violated financial disclosure laws); Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/X493-67XF>] (reporting on Justice Alito’s failure to report a flight and fishing vacation paid for by Paul Singer, who later had a case before the Court). *See also* 5 C.F.R. § 2634.304 (2023) (detailing reporting requirements for gifts). Or, consider Justice Gorsuch’s failure to name the party who purchased property in which he owned a twenty percent stake when that same party regularly appears before the Court. *See* Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579> [<https://perma.cc/R3VF-4FXE>].

66. 28 U.S.C. § 455(b).

after the Deepwater Horizon oil rig explosion, “numerous lawsuits were filed in the U.S. District Court for the Eastern District of Louisiana.”<sup>67</sup> Many of those cases were heard by Judge Carl Barbier, who held a small amount of debentures in two parties to the litigation—Halliburton and Transocean.<sup>68</sup> Judge Barbier declined to recuse, explaining that bond and debt instruments are not financial interests under Section 455 because they do not relay ownership or legal interests in the companies.<sup>69</sup> On appeal, the Fifth Circuit affirmed Judge Barbier’s decision on different grounds. The Fifth Circuit correctly identified that the advisory opinion from the Judicial Committee on Codes of Conduct upon which Judge Barbier relied “ignore[d] language from 28 U.S.C. § 455(b)(4),” namely that debt instruments “could nonetheless qualify as ‘financial interest[s] in the subject matter in controversy.’”<sup>70</sup> However, the circuit court did not decide whether the debt instruments qualified under this language as the parties failed to properly raise the issue.<sup>71</sup> Instead, the court agreed that the debt instruments did not create a financial interest in Halliburton or Transocean.<sup>72</sup> The court also declined to decide whether Judge Barbier’s debt instruments were “substantially affected by the proceedings” because Judge Barbier never ruled on that precise issue.<sup>73</sup>

As for penalties or enforcement of Section 455 violations, Congress has relied on preventative rather than punitive measures.<sup>74</sup> The recent

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67. Maniloff, *supra* note 60, at 32. See *In re Cameron Int’l Corp.*, 393 F. App’x 133, 134 (5th Cir. 2010) (per curiam) (“[N]umerous lawsuits have been filed in the Eastern District of Louisiana.”).

68. See *In re Cameron Int’l Corp.*, 393 F. App’x at 134 (noting Judge Barbier had over forty of these cases assigned to him and “he owned debt instruments issued by Halliburton and Transocean, two of the defendants in the instant proceedings” (footnotes omitted)).

69. *Id.*

70. *Id.* at 135–36 (first alteration added) (quoting 28 U.S.C. § 455(b)(4)).

71. *Id.* at 136 n.8.

72. *Id.* at 136.

73. *Id.* at 136 n.8.

74. Other high-level government employees and administrative law judges subject to annual financial disclosures, for example, are subject to \$200 late filing fees and possibly disqualification or divestiture. See *Financial Disclosure*, U.S. DEP’T OF JUST., <https://www.justice.gov/jmd/financial-disclosure> [<https://perma.cc/SF7T-N6MB>] (June 8, 2023); Dan C. McIntosh, *The Corrupt History Behind the Federal Financial Disclosure Reporting System*, PROCUREMENT LAW., Fall 2020, at 17, 17 (noting that employees who provide false information in their annual financial disclosure “risk disciplinary action from their agency, as well as a civil fine (up to \$60,517) and criminal penalties from the Department of Justice”). Whether such fines could or should be levied against federal judges who fail to timely or accurately report financial data is debatable. At least one circuit has found that it would be permissible. See *Duplantier v. United States*, 606 F.2d 654, 669 (5th Cir. 1979) (holding that civil penalties “which may be

Courthouse and Ethics Transparency Act “mandates the creation of an online database where the public can search federal judges’ and Supreme Court justices’ financial disclosures.”<sup>75</sup> This, of course, “would make it easier for the public to see if a member of the federal judiciary has a financial conflict of interest warranting recusal from hearing a case.”<sup>76</sup> Although this act will “help bring potential conflicts of interest to light and [may] bolster public trust in our judicial system,”<sup>77</sup> it is far from foolproof as it continues to shift the responsibility for recognizing financial conflicts of interest on parties rather than on judges or justices. It also does nothing to ensure that data submitted is accurate, complete,<sup>78</sup> or as detailed as other branches of government.<sup>79</sup> And it still gives judges the authority to redact information, albeit on the frontend instead of on the backend.<sup>80</sup>

That said, it is an improvement over the former method of seeking review of a judge’s annual financial disclosure report. Under the prior method, “requests by litigants . . . to review” a judge’s annual financial disclosure form were “sent to judges themselves to decide if anything

assessed against a judge for noncompliance with the financial disclosure provisions” do not violate the compensation clause of Article III).

75. Madeleine Carlisle, *You’ll Soon Be Able to Look Up Supreme Court Justices’ Wall Street Investments*, TIME (May 13, 2022, 3:44 PM), <https://time.com/6176657/supreme-court-justices-ethics-rules/> [<https://perma.cc/S4WD-MTB6>].

76. Nate Raymond & Moira Warburton, *Congress Approves Tougher Financial Disclosure Rules for U.S. Judges*, REUTERS, <https://www.reuters.com/world/europe/congress-poised-subject-us-judges-more-financial-disclosure-2022-04-27/> (Apr. 27, 2022, 4:09 PM).

77. *Id.* (quoting Press Release, Sen. Chris Coons, Coons, Cornyn Bill to Apply STOCK Act Requirements to Federal Judges Heads to President’s Desk (Apr. 28, 2022), <https://www.coons.senate.gov/news/press-releases/coons-cornyn-bill-to-apply-stock-act-requirements-to-federal-judges-heads-to-presidents-desk> [<https://perma.cc/X4Y5-RWPG>]).

78. Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821, 841 (2021), <https://www.yalelawjournal.org/forum/supreme-court-reform-and-american-democracy> [<https://perma.cc/3ZFB-RJA4>] (“Justices also routinely omit items from their financial disclosures without penalty.”).

79. *See Financial Disclosures*, FIX THE COURT, <https://fixthecourt.com/fix/financial-disclosures/> [<https://web.archive.org/web/20220523113247/https://fixthecourt.com/fix/financial-disclosures/>] (explaining that the current process to receive financial disclosures is lengthy and “the justices are not required to fill out as much detail in their reports as top officials in other branches, such as certain travel records and stock transactions”).

80. *See* Debra Cassens Weiss, *New Law Toughens Stock Disclosure Requirements for Federal Judges; Separate Ethics Bill Faces ‘Steep Climb,’* ABA J. (May 17, 2022, 8:35 AM), <https://www.abajournal.com/news/article/new-law-imposes-tougher-stock-disclosure-requirements-on-judges-separate-ethics-bill-faces-steep-climb> [<https://perma.cc/2KMS-6CKS>].

need[ed] to be redacted and [could] take months or longer to fulfill.”<sup>81</sup> Congress has also recognized that additional measures are needed. It has advanced a “separate ethics bill . . . [that would] adopt disclosure rules for gifts, travel and income” and mandate “review panels of judges or justices to review denied requests for recusal.”<sup>82</sup>

### B. Impartiality

The first provision of Section 455 may be the most ambiguous part of the statute. Section 455(a)’s “catch-all disqualification test was fashioned to enhance public confidence in judicial impartiality by focusing on public perceptions, rather than the substantive rights of the parties or defects in the administration of justice caused by partial judges,”<sup>83</sup> but nothing in the statute defines the phrase.<sup>84</sup> Ambiguity is just one of “[m]any shortcomings [that] infect[s] the catch-all category of recusal.”<sup>85</sup> As retired Judge Raymond J. McKoski explains, “rather than filling th[is] void, courts have specifically advised judges *not* to rely on case precedent when deciding whether to”<sup>86</sup> recuse, and ethics committees have “largely abdicated on the issue,” and the test, although objective in theory, has become subjective in practice.<sup>87</sup> This subjectivism may explain why recusal under Section 455(a) is seldomly granted.<sup>88</sup> A sampling of Section 455(a) cases on Westlaw from May 30,

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81. Nate Raymond, *U.S. Judiciary Approves Automating Release of Judges’ Financial Disclosure Reports*, REUTERS, <https://www.reuters.com/legal/litigation/us-judiciary-approves-automating-release-judges-financial-disclosure-reports-2022-03-15/> (Mar. 15, 2022, 2:55 PM).

82. Weiss, *supra* note 80. Another possible financial disclosure being considered by Congress is a requirement for judges to list the source of their spouses’ income, which may increase recusal motions. That said, given their highly discretionary nature, it is unclear whether this would result in more recusals. See Hailey Fuchs, *Activists Push for Disclosure of Client and Income of Judges’ Spouses*, POLITICO (Oct. 20, 2022, 5:01 AM), <https://www.politico.com/news/2022/10/20/judicial-activists-income-judges-spouses-00062670> [<https://perma.cc/CGK3-JXF8>] (noting that Gabe Roth, founder of Fix the Court, “said disclosures could help encourage jurists to recuse themselves from cases that present an appearance of a conflict”).

83. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 428 (2014) (footnote omitted).

84. See *id.* at 434 (noting that the phrase has been described as “vague,” “elusive,” “abstract,” and “ambiguous” (footnotes omitted)).

85. Raymond J. McKoski, *Rewriting Judicial Recusal Rules with Big Data*, 2020 UTAH L. REV. 383, 387 (2020).

86. *Id.* (emphasis added).

87. *Id.*

88. Cf. Aman McLeod, *Caperton v. A.T. Massey Coal Co.: A Ten-Year Retrospective on Its Impact on Law and the Judiciary*, 124 W. VA. L. REV. 67, 76 (2021)

2019 to November 1, 2023 reveals only three successful recusal motions or instances of sua sponte recusal under Section 455(a).<sup>89</sup>

Additional data suggests the following three broad categories under which parties have sought recusal under Section 455(a): (1) court conduct; (2) relationships; and (3) former positions. As explained below, this data provides some clarity in defining the scope of Section 455(a), which may assist judges or legislatures in articulating a clearer standard for recusal under Section 455(a).

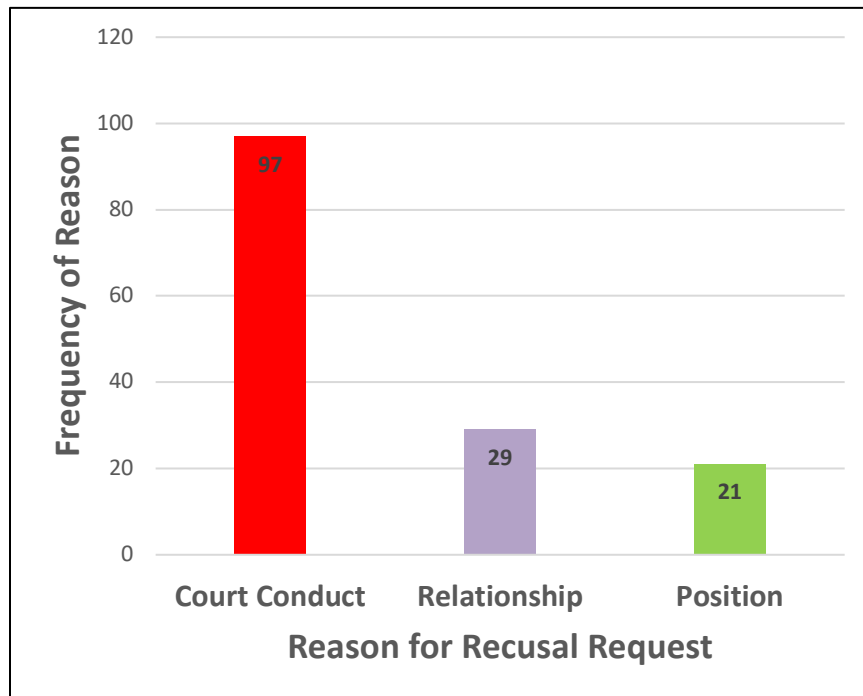


Figure 1. *Recusal Decisions Under § 455(a)*  
(May 30, 2019–November 1, 2023).<sup>90</sup>

(explaining that Chief Justice Roberts has noted “that many litigants were not deterred by a *low chance of success*” (emphasis added)).

89. *United States v. Davis*, 801 F. App’x 75, 78 (4th Cir. 2020) (noting the district court judge’s sua sponte recusal because she represented the defendant “two decades before the trial”); *United States v. Atwood*, 941 F.3d 883, 884 (7th Cir. 2019) (holding that the district court judge’s failure to recuse for ex parte communications was not harmless error); *Clark v. Kapila*, 612 B.R. 808, 816 (S.D. Fla. 2019) (holding that a judge “abused his discretion in failing to recuse himself as soon as his fiancé was contacted by and engaged in recruitment discussions with Appellee’s counsel”).

90. Data taken from Westlaw by searching “recus! or disq! /15 impart! /15 percept! or reason” and filtering under “federal jurisdiction” from May 30, 2019 to November 1, 2023. This search yields 135 cases, but I have excluded cases discussing recusal of Article I judges, such as military courts, and cases that merely discussed these



## 1. COURT AND COURT-ADJACENT CONDUCT

During the past three years, the most frequent reason cited for recusal under Section 455(a) is alleged improper court conduct.<sup>91</sup> “Court conduct” includes ex parte communications, comments made during proceedings or in orders, negative judicial rulings, referencing extrajudicial material, and other public facing comments or activities.

*a. Ex Parte Communications*

Improper ex parte communications typically arise in criminal cases, and it is one of the few subcategories that have resulted in recusal.<sup>92</sup> In these cases, courts have examined the frequency, content, character of the communication, and whether it was disclosed, when deciding if recusal or reassignment is appropriate.<sup>93</sup> But even when ex parte communications were found to be improper, recusal or reassignment was seldomly granted, as most courts have found such errors harmless under the three-factor test in *Liljeberg v. Health Services Acquisition Corporation*.<sup>94</sup>

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reasons in passing. Twelve cases involved mixed reasons under Section 455(a). The total number of recusal motions or cases dealing with recusal under Section 455(a) likely exceeds the number captured by this search, but the search attempts to focus on cases in which the vague language is cited and further defined. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1147 & n.176 (2021) (noting “significant sampling bias risks for empirical work at the circuit-level using commercial databases—biases that researchers have acknowledged at the district court level”).

91. *See supra* Figure 1.

92. *See, e.g., Atwood*, 941 F.3d at 886 (vacating the defendant’s sentence and remanding to a different judge when the judge made improper ex parte communication with the U.S. Attorney’s Office).

93. *See id.* at 884–86 (noting that the judge had contacted the U.S. Attorney’s Office “over 100 times since taking the bench” over “mostly . . . ministerial matters,” and demonstrated that the judge was “cheering on Office employees and addressing them by nicknames”); *In re Scott*, 627 B.R. 134, 141–42 (B.A.P. 8th Cir. 2021), *aff’d*, No. 21-2102, 2022 WL 792094 (8th Cir. Mar. 16, 2022) (per curiam) (denying a motion to disqualify when the judge “innocently answered the telephone” while his office was unstaffed during COVID-19, provided “publicly available dial-in information” for an upcoming hearing, and “promptly informed all parties” of the call at the hearing). In some cases, the person to whom the ex parte communications were made can be a relevant factor—for example, communications between a district court judge and a special master. *See, e.g., Ark. Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 404 F. Supp. 3d 486, 516 (D. Mass. 2018) (declining to recuse for ex parte communications between a judge and a special master when the communications focused on procedural/administrative matters rather than substantive issues).

94. 486 U.S. 847 (1988). The three factor test examines (1) “the risk of injustice to the particular parties”; (2) “the risk that the denial of relief will produce injustice in other cases”; and (3) “the risk of undermining the public’s confidence in the judicial process.” *Id.* at 864.

*b. Prior Judicial Rulings*

Recusal for negative judicial rulings and comments is an extremely high bar.<sup>95</sup> As the Eighth Circuit has explained, “where a party seeks recusal based on ‘in court conduct,’ that party must show ‘that the judge had a disposition so extreme as to display clear inability to render fair judgment.’”<sup>96</sup> Here, the crux of the inquiry appears to be whether (1) there is a basis for the judge’s comments; (2) the comments were made during discussion of mandatory subjective factors, such as “the nature and circumstances of [an] offense and the history and characteristic of the defendant”<sup>97</sup> in sentencings;<sup>98</sup> and (3) the forum in which the comments were made (*i.e.*, in or outside of judicial proceedings).<sup>99</sup> Even under these factors ambiguity persists. Some circuits have imposed strict standards by requiring recusal when a judge makes public comments to the press regarding a pending case beyond the explanation of judicial procedures.<sup>100</sup> Other circuits, however, have taken a more nuanced approach by requiring some proof that the judge actually made the public comments and whether the alleged comments were accurately reported.<sup>101</sup>

*c. Social Media and Public-Facing Activities*

The rise of social media and public appearances only complicates matters. As a result, we may soon see increases in recusal motions for

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95. See, e.g., *United States v. Lopez*, 974 F.2d 50, 52–53 (7th Cir. 1992) (affirming a sentence when the district court made “indecorous remarks,” including referring to the defendant as a “turkey,” sentencing him to the maximum, saying he must like American prisons, and telling the defendant to “stay the Hell” out of the district after his release).

96. *Oden v. Shane Smith Enters., Inc.*, 27 F.4th 631, 633 (8th Cir. 2022) (quoting *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006)). See also *Liteky v. United States*, 510 U.S. 540, 551 (1994) (“A favorable or unfavorable predisposition can also deserve to be characterized as ‘bias’ or ‘prejudice’ . . . [when] it is so extreme as to display clear inability to render fair judgment.”).

97. 18 U.S.C. § 3553(a)(1).

98. See, e.g., *United States v. Schneider*, No. 10-29, 2018 WL 10638567, at \*2 n.1 (E.D. Pa. Feb. 6, 2018) (noting that the judge’s comments that the defendant was “a monster” and “an evil man” were not grounds for recusal when stated during sentencing and based on supporting evidence).

99. See, e.g., *United States v. Ciavarella*, 716 F.3d 705, 719 (3d Cir. 2013).

100. *In re Boston’s Child. First*, 244 F.3d 164, 168–72 (1st Cir. 2001). The First Circuit also notes that this is not necessarily a blanket standard and that there is a “continuing need for a case-by-case determination.” *Id.* at 172.

101. See *Ciavarella*, 716 F.3d at 719.

public comments and ideological stances made by judges in editorials,<sup>102</sup> social media,<sup>103</sup> conventions,<sup>104</sup> and law review articles.<sup>105</sup> Recently, a number of conservative judges—including Judge James Ho of the Fifth Circuit and Judge Elizabeth Branch of the Eleventh Circuit—publicly voiced their decisions to boycott the hiring of clerks from Yale and Stanford due to the schools’ alleged “rampant ‘cancel culture.’”<sup>106</sup> Judge Ho made a speech at a Federalist Society event on his war against “woke-ism” and cancel culture.<sup>107</sup> Given these judges’ public, and

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102. See, e.g., Avalon Zoppo, *GOP Lawmakers Cast Doubt on Special Committee Probing Judges’ Controversial Law Clerk Hiring*, NAT’L L.J. (Aug. 25, 2022, 11:25 AM), <https://www.law.com/nationallawjournal/2022/08/25/gop-lawmakers-cast-doubt-on-special-committee-probing-judges-controversial-law-clerk-hiring/?slreturn=20220930161617> (noting the debate over whether Judge Jon Newman should recuse himself in the second investigation into the hiring of Crystal Clanton by Judge Pryor and Judge Corey Maze because Judge Newman wrote a 1991 editorial “opposing Clarence Thomas’ appointment to the U.S. Supreme Court”).

103. See, e.g., John G. Browning, *Ethical Risks in Judicial Use of Social Media*, ABA (Feb. 11, 2022), [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2022/january-february/ethical-risks-judicial-use-social-media/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/january-february/ethical-risks-judicial-use-social-media/) (noting that a district court judge was almost forced to recuse himself from a case due to his Twitter activity).

104. See, e.g., Jacqueline Thomsen & Nate Raymond, *Conservative U.S. Judge Mocks Federalist Society’s Critics at Annual Convention*, REUTERS (Nov. 10, 2022, 1:06 PM), <https://www.reuters.com/legal/government/conservative-us-judge-mocks-federalist-societys-critics-annual-convention-2022-11-10/> (noting that Chief Judge Pryor “mocked criticism by a U.S. senator and others who say the [Federalist Society] has captured the judiciary”).

105. See, e.g., Caroline Kitchener, Robert Barnes & Ann E. Marimow, *The Controversial Article Matthew Kacsmaryk Did Not Disclose to the Senate*, WASH. POST, <https://www.washingtonpost.com/politics/2023/04/15/matthew-kacsmaryk-law-review/> (Apr. 15, 2023, 6:45 PM) (reporting on an anti-LGBTQIA+ article that Judge Kacsmaryk wrote but then removed his name from and swapped in two others).

106. Nate Raymond & Karen Sloan, *Trump-Appointed Judges Behind Yale Boycott Agree to Speak at School*, REUTERS, <https://www.reuters.com/legal/government/trump-appointed-judges-behind-yale-boycott-agree-speak-school-2022-10-20/> (Oct. 20, 2022, 6:48 PM). See also James Gordon, *Federal Judges Announce They Will Refuse to Hire Clerks from Stanford Law School After Woke Students and Diversity Dean Ambushed Conservative Member of the Bench: ‘They Terrorize People into Submission and Self-Censorship,’* DAILY MAIL, <https://www.dailymail.co.uk/news/article-11929519/Federal-judges-announce-refuse-hire-clerks-Stanford-Law-School-woke-students.html> [<https://perma.cc/6773-VGVT>] (Apr. 2, 2023, 3:01 AM).

107. See Elizabeth Stauffer, *Wokeism Threatens to Destroy America’s Foundation. We Must Not Let It*, RESTORING AM. (Oct. 5, 2022, 6:00 AM), <https://www.washingtonexaminer.com/restoring-america/patriotism-unity/wokeism-threatens-to-destroy-americas-foundation-we-must-not-let-it> [<https://perma.cc/67LS-A7HR>] (noting Judge Ho’s “keynote address at the Kentucky Chapters Conference of the Federalist Society” was titled “Agreeing to Disagree — Restoring America by Resisting Cancel Culture”); James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1 (2022); James C. Ho & Elizabeth L. Branch,

arguably open political statements,<sup>108</sup> “you could make a pretty good case from [Judge] Ho’s public statements that his impartiality can reasonably be questioned if you’re a brand new Yale Law student who has to argue before him.”<sup>109</sup> Likewise, Chief Judge William Pryor’s recent statements at a Federalist Society convention and “decision to publicly mock liberals, journalists[,] and academics” was called “speech ‘unbecoming’ of a sitting judge.”<sup>110</sup> Should any of the people mocked by Chief Judge Pryor—or any open critic of the Federalist Society for that matter—ever find themselves before him, it would be fair for them to question his impartiality.<sup>111</sup>

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*Stop the Chaos: Law Schools Need to Crack Down on Student Disruptors Now*, NAT’L REV. (Mar. 15, 2023, 6:30 AM), <https://www.nationalreview.com/2023/03/stop-the-chaos-law-schools-need-to-crack-down-on-student-disrupters-now/> (“We don’t disagree—we destroy. We don’t talk—we tweet. We live in a culture of cancellation, not conversation. We don’t engage with one another—we expel people from social and economic life. It’s unsustainable—and, we fear, existential.” (cleaned up)).

108. See Lydia Wheeler, *Judge Ho Risks Recusal Calls from Yale Graduates over Boycott*, BLOOMBERG L. (Oct. 13, 2022, 10:00 AM), <https://news.bloomberglaw.com/us-law-week/judge-ho-risks-recusal-calls-from-yale-graduates-over-boycott> (quoting Indiana University Maurer School of Law Professor Charles Geyh as stating that Judge Ho’s comments are “essentially an unvarnished act of politicizing the position in a way to score points in a public debate”). Some have also argued that the judges who joined the boycott have violated Judicial Canons 2B and 3B(3), but the likelihood of any action on this is doubtful. See Steven Lubet, *The Wrong Way to Combat Cancel Culture*, THE HILL (Oct. 19, 2022, 9:00 AM), <https://thehill.com/opinion/judiciary/3694807-the-wrong-way-for-a-judge-to-combat-cancel-culture/> [<https://perma.cc/GYW9-G5AB>] (arguing Judge Ho “abused his office by using clerkship hiring to bully a law school into compliance with his non-judicial agenda”).

109. Wheeler, *supra* note 108. Judges Branch and Ho have recently signaled they may call off their boycotts. Nate Raymond, *Trump-Appointed Judge in Yale Clerk Boycott Condemns ‘Cancel Culture’ at Harvard Event*, REUTERS, <https://www.reuters.com/legal/government/trump-appointed-judge-yale-clerk-boycott-condemns-cancel-culture-harvard-event-2023-01-11/> (Jan. 10, 2023, 6:23 PM). Both Judge Ho and Judge Branch “wrote in the National Review that law schools should punish students who participate in ‘disruptive tactics’”—speaking directly to Stanford Law School students’ protest to Judge Kyle Duncan’s appearance at a Federalist Society event. Seth Stern, *Judges Want ‘Disruptive’ Law Students Flagged to Employers*, BLOOMBERG L. (Mar. 15, 2023, 9:56 AM), <https://news.bloomberglaw.com/us-law-week/judges-want-schools-to-flag-disruptive-students-to-employers> [<https://perma.cc/42W2-CJHU>]. This further undermines their appearance of impartiality.

110. Thomsen & Raymond, *supra* note 104.

111. To his credit, Chief Judge Pryor later sat down with one of the journalists he mocked. See Mark Joseph Stern, *I Called the Federal Judge Who Mocked Me to the Federalist Society*, SLATE (Dec. 11, 2022, 7:00 PM), <https://slate.com/news-and-politics/2022/12/federalist-society-judge-william-pryor-interview.html> [<https://perma.cc/8YNR-RGUL>] (noting that Chief Judge Pryor “gamely answered [the reporter’s] questions, though many of his responses repeated familiar talking points”).

*d. Opinion Language*

Relatedly, we may also see an uptick in recusal motions based on judges' use of language in opinions on contentious legal issues such as immigration, abortion, and LGBTQIA+ issues. In the Ninth Circuit, Judge Lawrence VanDyke's self-concurrence in *Green v. Miss United States of America, LLC*<sup>112</sup> provides a recent example. As one reporter pointed out, Judge VanDyke "refuse[d] to use ANY pronouns when referring to the transgender plaintiff, presumably to avoid using she/her pronouns for a transgender woman."<sup>113</sup> Judge VanDyke's avoidance of the plaintiff's pronouns may not explicitly appear to reflect a lack of impartiality, but when combined with his history of anti-LGTBQIA+ advocacy and rhetoric, one could see why LGTBQIA+ litigants might question his impartiality.<sup>114</sup> Similarly, in the Fifth Circuit, Judge Kyle Duncan went out of his way to avoid using a transgender litigant's pronouns—going so far as to say doing so would "unintentionally convey [the court's] tacit approval of the litigant's underlying legal position"<sup>115</sup> and might "raise delicate questions about judicial impartiality."<sup>116</sup>

Similar examples can be found in the Eleventh Circuit from Chief Judge Pryor and Judge Elizabeth Branch. In *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*,<sup>117</sup> Chief Judge Pryor "repeatedly used the word 'abortionists'—21 times in a

112. 52 F.4th 773 (9th Cir. 2022).

113. Mark Joseph Stern (@mjs\_DC), TWITTER (Nov. 2, 2022, 12:37 PM), [https://twitter.com/mjs\\_DC/status/1587861362109202433](https://twitter.com/mjs_DC/status/1587861362109202433) [<https://perma.cc/NYY3-9MFF>].

114. See Letter from Vanita Gupta, President & CEO, Leadership Conf. on Civ. & Hum. Rts., to U.S. Ct. of Appeals for the Ninth Cir. (Oct. 29, 2019) (on file with the Leadership Conference on Civil & Human Rights) (detailing Judge VanDyke's op-eds, amicus briefs, speeches, and advocacy against LGBTQIA+ rights).

115. *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020). As one reporter noted, Judge "Duncan's claim to impartiality fails on its own terms. . . . By pointedly choosing to refer to Jett as a man, and then explaining his decision to do so in a published opinion, Duncan does not convey that he is an impartial judge with no view on trans rights. To the contrary, he rather emphatically conveys that he has chosen a side — and it's not the side of LGBTQ rights." Ian Millhiser, *Trump Judge Lashes out at a Transgender Litigant in a Surprisingly Cruel Opinion*, VOX (Jan. 17, 2020, 8:10 AM), <https://www.vox.com/2020/1/17/21067634/trump-judge-transgender-cruel-kyle-duncan-united-states-varner> [<https://perma.cc/H7MD-XPXJ>]. This is unsurprising considering that Judge Duncan "was a prominent anti-LGBTQ lawyer before joining the bench." *Id.* Moreover, in citing concerns about impartiality Judge Duncan appears to have forgotten about a provision of the Code of Conduct for United States Judges that requires judges to "be patient, dignified, respectful, and courteous to litigants . . . with whom the judge deals in an official capacity." *Id.* (quoting CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (2019)).

116. *Varner*, 948 F.3d at 256.

117. 40 F.4th 1320 (11th Cir. 2022).

16-page opinion—instead of the terms ‘plaintiffs’ or ‘appellees,’ as they were identified in the case caption, or the name of the lead plaintiff,”<sup>118</sup> which could signal a lack of impartiality on reproductive rights issues.<sup>119</sup> And Judge Branch’s choice to refer to undocumented immigrants as “aliens” in *Murugan v. United States Attorney General*<sup>120</sup> could demonstrate a lack of impartiality in immigration cases.<sup>121</sup>

Judge Stephanos Bibas argues that these “disrespectful” opinions tend to undercut the judge’s authoritativeness.<sup>122</sup> Instead of relying on the law, they “seem[] to be all about the judge’s musings” and ambitions.<sup>123</sup> As legal writing expert Ross Guberman has stated, “Consciously or not, judges reveal much about their mindset in how they refer to the parties, characterize disputed facts, and frame counterarguments.”<sup>124</sup> Of course, the chances that any party will successfully obtain recusal for this type of perceived impartiality is low. That said, judges concerned with the appearance of impartiality should be cognizant and careful with their

118. Katheryn Hayes Tucker, *‘Shocking and Unprofessional’: Harsh Language in Abortion Ruling Sparks Backlash*, DAILY REP. (July 21, 2022, 6:47 PM), <https://www.law.com/dailyreportonline/2022/07/21/shocking-and-unprofessional-harsh-language-in-abortion-ruling-sparks-backlash/>.

119. *See id.* (“Judges refer to parties by their names or roles in an appeal ([i.e.] ‘plaintiffs’) no matter what they think of the merits of their arguments. But not William Pryor. Completely unprofessional,” Corey Rayburn Yung, a professor at the University of Kansas School of Law, said on Twitter.”). We saw similar language from Judge Matthew Kacsmaryk in the abortion pill litigation. *See All. for Hippocratic Med. v. FDA*, No. 22-CV-223-Z, 2023 WL 2825871, at \*1 n.1 (N.D. Tex. Apr. 7, 2023) (arguing that it is “unscientific” to use the word “fetus” and jurists should instead use “unborn human” or “unborn child” after citing legal philosophers as support for this proposition).

120. 10 F.4th 1185 (11th Cir. 2021).

121. *Id.* at 1190 n.2. As Judge Martin’s dissent points out, the use of the term “noncitizen” is the equivalent of the statutory term “alien” and other non-archaic and less dehumanizing terms were available and could be used “without sacrificing clarity or precision.” *See id.* at 1197 n.1 (Martin, J., dissenting). Notably, the Supreme Court—including its conservative justices—have signed on to an opinion using the term noncitizen. *See Santos-Zacaria v. Garland*, No. 21-1436, 2023 U.S. LEXIS 1891, at \*2 (May 11, 2023).

122. Nate Raymond, *‘Judges Gone Wild’: Trump-Appointed Judge Says Too Many Write for Twitter*, REUTERS, <https://www.reuters.com/legal/government/judges-gone-wild-trump-appointed-judge-says-too-many-write-twitter-2022-11-02/> (Nov. 2, 2022, 3:37 PM).

123. *Id.*

124. Tucker, *supra* note 118.

language,<sup>125</sup> lest they “create[] a controversy where there is none.”<sup>126</sup> After all, it costs nothing to be respectful to parties in a case.<sup>127</sup> And, just as well, the most impartial way to handle such issues may be to refer the parties as appellant/appellee or petitioner/respondent or by their name.<sup>128</sup>

*e. Extrajudicial Source Doctrine*

The most defined subcategory under court conduct recusals is the extrajudicial source doctrine. Under this subcategory, findings or conclusions derived from extrajudicial sources can be evidence of bias. While “[t]he existence of an ‘extrajudicial source’ is ‘a significant (and often determinative) . . . factor’ in deciding recusal matters. . . . ‘the presence of extrajudicial facts, without something more, does not show bias.’”<sup>129</sup> Generally, to determine whether a source is extrajudicial, courts have examined whether the information was gathered “‘within the normal day-to-day activities of a judge’ or her staff.”<sup>130</sup> For example, researching and citing documents from an electronic case management file (ECF)—even if not from the present case—is not extrajudicial.<sup>131</sup> But having a law clerk visit the scene of an accident and report their observations to the judge is extrajudicial,<sup>132</sup> as are online searches outside of ECF.<sup>133</sup>

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125. Even Judge Ho of the Fifth Circuit has recognized that how we refer to parties may result in the loss of “a degree of confidence in the integrity and impartiality of the judiciary.” *Lefebure v. D’Aquila*, 15 F.4th 670, 672 (5th Cir. 2021) (quoting 2 COMM. ON CODES OF CONDUCT ch. 2, § 220, No. 72 advisory opinion (JUD. CONF. U.S. 2009)) (noting this in the context of referring to retired judges who have returned to practice).

126. *United States v. Varner*, 948 F.3d 250, 260 (5th Cir. 2020) (Dennis, J., dissenting).

127. Notably, the Supreme Court has taken the approach to use a party’s preferred pronouns. See Abe Asher, *SCOTUS Makes Landmark Decision Recognising Transgender Person’s Pronouns*, INDEPENDENT (May 14, 2023, 6:07 AM), <https://www.the-independent.com/news/world/americas/us-politics/supreme-court-clarence-thomas-trans-b2338557.html> [<https://perma.cc/SGD7-PGLH>]; *Santos-Zacaria v. Garland*, No. 21-1436, 2023 U.S. LEXIS 1891, at \*6 (U.S. May 11, 2023).

128. Cf. *Varner*, 948 F.3d at 260 (Dennis, J., dissenting) (“I think it not necessary to use any pronoun in properly disposing of this appeal.”).

129. *United States v. Brocato*, 4 F.4th 296, 302 (5th Cir. 2021) (second omission added) (first quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994); then quoting *Tejero v. Portfolio Recovery Assocs.*, 955 F.3d 453, 463 (5th Cir. 2020)).

130. *Id.* at 303 (quoting *Tejero*, 955 F.3d at 464).

131. *Id.* at 303–04.

132. *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593, 594–96 (5th Cir. 1977).

133. *Brocato*, 4 F.4th at 303–04 (finding that an online search of an obituary was extrajudicial); *Sovereign Mil. Hospitaller Ord. of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of Knights Hospitallers of Sovereign Ord. of Saint John of*

## 2. RELATIONSHIPS

Judicial relationships are the second most common rationale under Section 455(a) recusal motions.<sup>134</sup> The judicial relationships subcategory focuses on connections between judges and persons outside of the confines of Section 455(b)(5). For example, relationships with people previously employed by a party,<sup>135</sup> communications about a case with family members whose interest in the case are unclear,<sup>136</sup> and more recently recusals based on the president who appointed the judge.<sup>137</sup> These areas are generally well defined and relationships outside the confines of Section 455(b)(5) have seldomly, if ever, provided a cause to recuse in the past three years.

One less defined relationship under this subcategory, however, is former law clerks. Given the strong relationship between judges and clerks, there is an open question of whether a judge should recuse when a former clerk is counsel in a case or how much time between the clerkship and appearance in a case is required. Approaches on this issue vary from strict to lax. The Supreme Court, for instance, prohibits former clerks from participating in any case filed before the Court until two years have passed.<sup>138</sup> Likewise, the Eastern District of Missouri expressly prohibits former law clerks from “appearing before a judge for

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*Jerusalem, Knights of Malta*, 702 F.3d 1279, 1296 (11th Cir. 2012) (remanding for the district court to determine to “what extent the district court relied on its own, extra-record Internet research into similarly named organizations” in a trademark case).

134. See *supra* Figure 1. One infamous relationship example is *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009). In *Caperton*, the Supreme Court held that a judge should have recused himself when a party had contributed \$3 million towards the judge’s election campaign. *Id.* at 884–87. It is doubtful, however, that if this case were decided today the same result would occur because Chief Justice Roberts and Justices Thomas and Alito dissented. See *id.* at 890–902 (Roberts, C.J., dissenting).

135. See, e.g., *Mayton v. Casas*, 857 F. App’x 794, 798 (5th Cir. 2021) (affirming the district court’s denial of a recusal motion when the district court judge was married to a former police officer who retired before the facts of the case arose).

136. See, e.g., *United States v. Chastain*, 979 F.3d 586, 591, 594 (8th Cir. 2020) (affirming the district court judge’s decision not to recuse when the district court judge traded text messages with his brother about the defendant’s sentencing status).

137. See, e.g., *Trump v. Clinton*, 599 F. Supp. 3d 1247, 1249–50 (S.D. Fla. 2022) (declining to recuse because the judge was appointed by former President Clinton, the husband of Hillary Clinton, the defendant); Katie Anthony, *Meghan Markle’s Sister Tried to Have a Federal Judge Dismissed from Her Lawsuit Against the Duchess Because They Were Appointed by Obama*, INSIDER (June 22, 2022, 9:03 AM), <https://www.insider.com/meghan-markle-sister-tried-to-have-judge-dismissed-from-lawsuit-2022-6> (explaining that Judge Honeywell denied a motion to recuse that was based on her appointment by President Obama).

138. S. Ct. R. 7 (“No employee of this Court shall practice as an attorney or counselor . . . in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation . . .”).



whom they have served for a period of one year, in order to avoid the appearance of impropriety.”<sup>139</sup> Other courts rely on whatever time period is customary for the district, usually ranging from one to two years.<sup>140</sup> Some courts do not define a set number of years, but encourage a general “insulation period.”<sup>141</sup> Courts agree that permanent recusal in cases in which former clerks are counsel is not wise because it would be a “serious impediment to [a clerk’s] future employment,” especially in areas that have a single district court judge.<sup>142</sup> It would also place an “obvious limitation on [a federal judge’s] recruit[ment] of talented law clerks in the future.”<sup>143</sup>

It is also debatable whether a judge or a law clerk must recuse when a law clerk’s future employer, former employer, or someone else related to the law clerk appears in the case. Some courts, like the Southern District of Alabama, have found that both the judge and their law clerk should recuse themselves from participating in cases that involve the clerk and the clerk’s former or future employer.<sup>144</sup> The Eleventh Circuit’s decision in *Parker v. Connors Steel Co.*<sup>145</sup> suggests the same. In *Parker*, the Eleventh Circuit concluded, in part, that the district court judge’s refusal to recuse when his law clerk’s father was counsel in a case was harmless error.<sup>146</sup> The court, however, refused to affirmatively determine whether this relationship alone was sufficient to warrant recusal in future cases.<sup>147</sup>

The Eleventh Circuit, like other courts, has also held that motions for recusal should be denied if the conflicted law clerk has not

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139. *Gould v. United Bhd. of Carpenters & Joiners of Am.*, No. 21-CV-1187, 2022 WL 1262486, at \*3 (E.D. Mo. Apr. 28, 2022).

140. *See, e.g., Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 (S.D. Fla. 1977) (noting that the “custom in this district is for a recusal period of one year”); *United States v. Hofschulz*, No. 18-cr-145, 2020 WL 832899, at \*4 (E.D. Wis. Feb. 20, 2020) (explaining the court’s “practice of recusing itself from cases involving former law clerks for two years after the conclusion of the clerkship”).

141. *See United States v. Hollister*, 746 F.2d 420, 425 (8th Cir. 1984) (district court judge was not required to recuse when the prosecutor was a former law clerk who completed her clerkship three months before the trial).

142. *MMG Fin. Corp. v. Midwest Amusement Park LLC*, No. 06-C-929, 2009 WL 3245288, at \*2 (E.D. Wis. Oct. 7, 2009).

143. *Id.* (quoting *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 (S.D. Fla. 1977)).

144. *See, e.g., Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 88–90 (S.D. Ala. 1980).

145. 855 F.2d 1510 (11th Cir. 1988).

146. *Id.* at 1527–28.

147. *See id.* at 1524–25. Oddly enough, the district court judge routinely dropped footnotes denoting which law clerk prepared the order and also allowed his clerks to hold hearings and then report back to him on the results of the hearing. *Id.* at 1523 & n.8.

substantively participated in a case since the conflict arose.<sup>148</sup> This still leaves the question open to some interpretation, namely what counts as substantive participation and what happens when the conflict is discovered later in the course of the proceedings. The answer to these questions is likely that ministerial functions and perhaps some administrative-based orders (*i.e.*, unopposed or consent orders for continuations, discovery extension, etc.) are not causes for recusal,<sup>149</sup> and that recusal is not required if the clerk ceases involvement immediately after discovering a conflict. At a certain point, however, recusal may be warranted even if the clerk timely notifies the judge and ceases working on the case, for instance if the conflict first arises during a trial.<sup>150</sup>

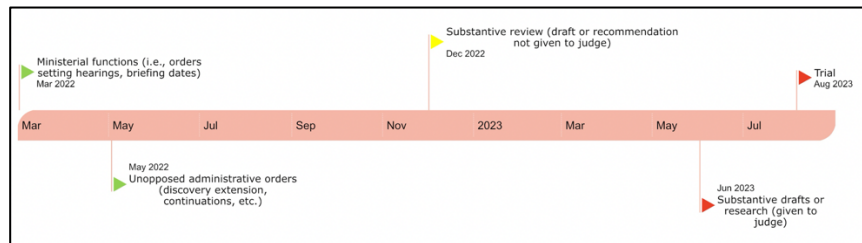


Figure 2: Law Clerk Conflict Recusal Effect on Judge.<sup>151</sup>

148. See *In re Fundamental Long Term Care, Inc.*, 602 B.R. 363, 364 (Bankr. M.D. Fla. 2019) (“[T]he Eleventh Circuit Court of Appeals has generally held that the motion should be denied if there has been no substantive participation by the law clerk since the conflict arose, and if there is no showing of actual bias by the judge.”); *Valdez v. Motyka*, No. 15-cv-0109, 2021 WL 6197286, at \*2 (D. Colo. Dec. 30, 2021) (collecting cases stating that a judge’s recusal is not warranted if the judge’s conflicted clerk has not substantively participated in the case).

149. See *United States v. Martinez*, 446 F.3d 878, 881, 883 (8th Cir. 2006) (holding that recusal was not warranted when a law clerk who previously had assisted in the defendant’s prosecution had to serve as a courtroom deputy during a hearing on the defendant’s motion to withdraw his guilty plea); *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1312 (10th Cir. 2015) (noting that the conflicted clerk “did not assist the court in preparing the dispositive order in the case,” and recusal was not necessary); *Doe v. Cabrera*, 134 F. Supp. 3d 439, 450 (D.D.C. 2015) (finding that recusal was not warranted when the conflicted clerk “neither conducted legal research” nor “provide[d] any advice to the Court or” co-clerk “as to the merits of any motion or any other matter”). For clerks and judges erring on the side of caution, the clerk’s involvement with a case should cease immediately when a conflict is discovered. See *First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 985 (9th Cir. 2000) (recusing when a law clerk who had accepted employment with defense counsel continued to take phone calls on procedural matters and marked up a substantive memorandum).

150. See, *e.g.*, *In re Turner*, 80 B.R. 618, 619 (Bankr. D. Mass. 1987) (noting that a “judge recused himself in the midst of the trial upon discovering that a partner in the law firm with whom his law clerk had accepted employment was a major witness in the case”).

151. Green flags denote that the judge need not recuse if a clerk conflict is discovered. Yellow flags denote that judges should consider recusal if a clerk conflict is

The impact of law clerk behavior on judicial recusal can occur even when the clerk properly recuses herself from a case. One prominent example is *Doe v. Cabrera*.<sup>152</sup> There, a law clerk properly recused herself from a case because her father was a partner at a law firm representing a defendant in a case before Judge Reggie Walton.<sup>153</sup> After Judge Walton ruled favorably for the defendant on a discovery motion, the law clerk texted an associate and her father that “the associate . . . was going to ‘owe’ her an alcoholic beverage.”<sup>154</sup> The text was allegedly sent in jest, but it created the appearance that she had somehow influenced Judge Walton’s decision.<sup>155</sup> Unsurprisingly, the plaintiff filed a motion for recusal under Section 455(a). Judge Walton denied the motion, explaining that (1) there was no imputation of actual bias; and (2) there was no appearance of partiality because the clerk had no actual involvement in the case.<sup>156</sup>

It also remains to be seen whether a party could successfully move for recusal based on a clerk’s prior statements. In January 2022, Northern District of Alabama Judge Corey Maze and Chief Judge Pryor of the Eleventh Circuit faced criticism for their decision to hire Crystal Clanton.<sup>157</sup> Clanton “made headlines for a[n alleged] text stating, simply but emphatically, ‘I HATE BLACK PEOPLE. Like fuck them all...I hate blacks. End of story.’”<sup>158</sup> According to reporters, “[n]umerous sources who worked with Clanton detailed how she would exchange racist remarks regularly with other [Turning Point USA] staffers.”<sup>159</sup> The judicial council of the Second Circuit tossed a misconduct complaint

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discovered. Red flags denote the need for the judge to recuse if a clerk conflict is discovered. This is a hypothetical lifecycle of a case based on my experience as a district court clerk. The events can happen slower or quicker as each case is different.

152. 134 F. Supp. 3d 439 (D.D.C. 2015).

153. *Id.* at 441–43.

154. *Id.* at 444.

155. *Id.*

156. *See id.* at 444–55.

157. *See* Tucker, *supra* note 14; Debra Cassens Weiss, *Federal Judges Who Hired Law Clerk Accused of Racist Statements Won’t Face Misconduct Complaints*, ABA J. (Jan. 18, 2022, 4:19 PM), <https://www.abajournal.com/news/article/federal-judges-who-hired-law-clerk-accused-of-racist-statements-wont-face-misconduct-complaints> [https://perma.cc/CZ6Y-AUMH].

158. Kali Holloway, *She Said ‘I HATE BLACK PEOPLE’—Now She’s a Rising GOP Star*, DAILY BEAST, <https://www.thedailybeast.com/she-said-i-hate-black-peoplenow-shes-a-rising-gop-star> [https://perma.cc/2TUP-92P5] (Nov. 23, 2021, 12:00 AM).

159. Caleb Ecarma, *EXCLUSIVE: Clarence Thomas’s Wife Hired Ex-TPUSA Staffer Known for Saying ‘I Hate Blacks,’* MEDIAITE (Sept. 6, 2018, 12:57 PM), <https://www.mediaite.com/online/exclusive-clarence-thomas-wife-hired-ex-tpusa-staffer-known-for-saying-i-hate-blacks/> [https://perma.cc/YU5Q-ZSRV].

against the two judges.<sup>160</sup> Although the judicial council concluded that the judges “committed no misconduct in performing due diligence and then determining to hire [Clanton] based on the information before them,”<sup>161</sup> it did “not consider whether the information the judges elicited and received regarding their hiring decisions was accurate.”<sup>162</sup>

Later in 2022, “the Judicial Conduct and Disability Committee . . . said more investigation is needed.”<sup>163</sup> The special committee was going to further investigate whether Clanton made the alleged remarks, but recently declined to revisit its initial decision.<sup>164</sup> Just as a judge’s language in a judicial ruling is a reflection on their mindset, the same is true of the clerks they decide to hire.<sup>165</sup> If Clanton’s remarks are ever substantiated, it would not be surprising for Black litigants to request her and/or Chief Judge Pryor’s recusal. After all, “it would be reasonable to question these judges’ impartiality in cases where race, religion, or national origin plays a role, which is the statutory standard for disqualification.”<sup>166</sup>

Relatedly, judges who hire Blackstone fellows as interns should also be concerned about the appearance of impropriety.<sup>167</sup> “The Blackstone program is run by Alliance Defending Freedom [(ADF)], a legal

160. Weiss, *supra* note 157.

161. *Id.*

162. *Id.*

163. Bill Rankin, *Judicial Committee to Investigate Hiring of Controversial Law Clerk*, ATLANTA J. CONST. (July 8, 2022), <https://www.ajc.com/news/crime/judicial-committee-to-investigate-hiring-of-controversial-law-clerk/MERNW36PMJHFVE7H62CYRS5SOQ/>.

164. *See id.* (“At a minimum, . . . there should have been an attempt to interview Clanton and the witnesses who have been identified to have first-hand knowledge of the events in question.”). After this article was written, the Second Circuit council ultimately declined to revisit its decision dismissing the complaint because it found that its first decision was final and conclusive. *See* Jacqueline Thomsen, *Judges Win Dismissal of Inquiry over Clerk Accused of Racism*, BLOOMBERG L. (Nov. 2, 2023, 9:51 AM), [https://news.bloomberglaw.com/us-law-week/no-further-investigation-for-judges-over-clerk-accused-of-racism# \[https://perma.cc/AX39-4S7G\]](https://news.bloomberglaw.com/us-law-week/no-further-investigation-for-judges-over-clerk-accused-of-racism# [https://perma.cc/AX39-4S7G]).

165. *Cf.* FED. JUD. CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES § 2.1, at 5 (3d ed. 2017) (“Because of the close association between judges and law clerks, your professional and personal actions reflect on your judge and ultimately on the judiciary as a whole.”).

166. Letter from Members of Congress to the Honorable John G. Roberts, Jr. & the Honorable Charles Wilson (Nov. 10, 2021), [https://hankjohnson.house.gov/media-center/press-releases/house-chairs-urge-judiciary-investigate-hiring-law-clerk-history-racist \[https://perma.cc/HXB5-H5S4\]](https://hankjohnson.house.gov/media-center/press-releases/house-chairs-urge-judiciary-investigate-hiring-law-clerk-history-racist [https://perma.cc/HXB5-H5S4]) (requesting an investigation into “[w]hether these judges’ hiring decisions warrant their recusal from specific matters likely to come before them”).

167. The same argument applies equally to any liberal-minded group, but to our knowledge, such a group does not exist—at least not one with the prominence and track record as the Blackstone Fellowship Program.

advocacy group”<sup>168</sup> known for its anti-LGBTQIA+ stances and far-right activism.<sup>169</sup> Interns who participate in the summer program are awarded a scholarship and either have arranged housing or receive a housing stipend.<sup>170</sup> Substantive beliefs aside, these clerks should recuse themselves from any cases where ADF is a party or otherwise involved in the suit. Moreover, one could argue that a judge who hires interns from this program creates the appearance of impropriety, and violates judicial ethics rules, because they are accepting the services from interns who are paid by ADF.<sup>171</sup> The Guide to Judiciary Policy states that “judges are advised against appointing volunteer externs who are provided payments by law firms before, during or after the externship that are dependent on the individual serving as a judicial extern, for instance through a starting date deferral program that included such a restriction.”<sup>172</sup> Although ADF is not a law firm, the same principle applies because the scholarship here functions much like a salary advance that “could undermine the public confidence in the integrity and independence of the court, and is contrary to Canon 4B and 4E of the [Judicial] Employee Code.”<sup>173</sup>

### 3. FORMER POSITIONS AND ISSUE RECUSAL

The last subcategory of Section 455(a) motions relates to the judge’s former positions and advocacy on hot-button issues.<sup>174</sup> Typically, this

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168. Emma Brown & Jon Swaine, *Amy Coney Barrett, Supreme Court Nominee, Spoke at Program Founded to Inspire a ‘Distinctly Christian Worldview in Every Area of Law,’* WASH. POST (Sept. 27, 2020, 9:02 PM), [https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b\\_story.html](https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b_story.html).

169. See *Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [https://perma.cc/JE3C-JNGK]. See also ELLIE MYSTAL, *ALLOW ME TO RETORT: A BLACK GUY’S GUIDE TO THE CONSTITUTION* 29 (2022) (noting that the Blackstone Legal Fellowship “teach[es] people how to use the law to support evangelical causes”).

170. *What Is Blackstone?*, BLACKSTONE LEGAL FELLOWSHIP, <https://blackstonelegalfellowship.org/what-is-blackstone/> [https://perma.cc/4MX3-RF3H].

171. See *id.* (noting that the program helps fellows “secure a summer legal internship”).

172. 2 COMM. ON CODES OF CONDUCT ch. 2, § 220, No. 83 advisory opinion (JUD. CONF. U.S. 2009).

173. *Id.* Whether the scholarship money functions as an indirect gift, such that these types of externships create violations of 5 U.S.C. §§ 7353(a) or (b)(2)(B), is an open question.

174. Although outside the scope of this Article, issue recusal also affects judges and quasi-judicial boards beyond Article III courts. See Burton J. Fishman, *Is the NLRB*

subcategory falls under Sections 455(b)(1) and (2), but occasionally courts discuss this issue under Section 455(a)'s catch-all provision. For example, one pro se party sought to recuse a judge because she "was the chief judge of the court while [the party's earlier case] was ongoing and because [his current] suit name[d] two of [the current judge's] colleagues on th[e] court as defendants."<sup>175</sup> Others have argued that a judge's positions and past legal advocacy can cause the appearance of impropriety.<sup>176</sup>

The Fifth Circuit recently determined that a district court judge was not required to recuse himself from a case involving the arrest of a transgender woman even though he had previously advocated against equal rights for LGBTQIA+ persons while working for the State of Texas.<sup>177</sup> The Fifth Circuit reasoned that there was no appearance of impropriety because the statements he made while "Deputy Attorney General only involved pertinent legal issues . . . and reflected no personal animus against LGBTQ people."<sup>178</sup> The Fifth Circuit also emphasized that the judge "answered, during the judicial confirmation process, that he would set aside his personal beliefs and apply binding precedent when asked about the legal treatment of LGBTQ individuals."<sup>179</sup> Whether a judge's former legal advocacy is cause for recusal has become a point of contention during recent judicial confirmations.<sup>180</sup>

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*Sinking in Place?*, HR DAILY ADVISOR, <https://hrdailyadvisor.blr.com/2018/05/24/nlr-sinking-place/> [<https://perma.cc/6BMU-YE85>] (May 24, 2018) (detailing recent challenges to NLRB board members based on previous advocacy work); Letter from Joshua Stager, New Am.'s Open Tech. Inst., to Maria Cantwell, Chair, Senate Comm. on Com., Sci. & Transp. (Feb. 8, 2022), [https://newamericadotorg.s3.amazonaws.com/documents/Sohn\\_Letter\\_2.8.22.pdf](https://newamericadotorg.s3.amazonaws.com/documents/Sohn_Letter_2.8.22.pdf) [<https://perma.cc/CW23-U28T>] (arguing that companies are "trying to weaponize the recusal process to silence government officials with backgrounds in consumer advocacy," such as Federal Trade Commission Chair Lina Khan).

175. See, e.g., *Verogna v. Johnstone*, 583 F. Supp. 3d 331, 336 (D.N.H. 2022).

176. See, e.g., *Jackson v. Valdez*, 852 F. App'x 129, 132-33 (5th Cir. 2021).

177. *Id.* at 131-34.

178. *Id.* at 133-34.

179. *Id.* at 134.

180. See *About Judicial Nominations: Historical Overview*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/nominations/judicial-nominations-overview.htm> [<https://perma.cc/3AGV-7S8W>] (noting that Justice Louis D. Brandeis was "an outspoken advocate for progressive causes" and his nomination "sparked controversy and led the Judiciary Committee to hold lengthy public hearings").

### C. Weaponizing Recusal

Although the concept is not new, recusal weaponization has evolved from traditional litigant judge shopping into an alarming issue.<sup>181</sup> Today, recusal weaponization is used by executive agencies,<sup>182</sup> state legislatures,<sup>183</sup> and even judges themselves.<sup>184</sup>

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181. See Stephen Wasby, *Forcing Recusal as a Form of Judge Shopping*, 18 JUST. SYS. J. 204, 204 (1995) (“As part of their judge shopping, lawyers may seek a judge’s recusal.”). Cf. Stephanie Francis Ward, *Recusal Refusal: Motions, Motorcycles and the Mississippi Supreme Court Create Controversy*, ABA J. E-REPORT, Feb. 20, 2004, at 1 (“The recusal mechanism must be guarded carefully to check its use as a weapon to be wielded in a campaign to maneuver onto more favorable fields of battle.”). Relatedly, there is arguably an appearance of impropriety when judges hear cases connected to politicians to whom they have donated. See Mark Joseph Stern (@mjs\_DC), TWITTER (Mar. 3, 2023, 3:46 PM), [https://twitter.com/mjs\\_DC/status/1631757976263446528](https://twitter.com/mjs_DC/status/1631757976263446528) [<https://perma.cc/32CN-CBXK>] (reporting that a judge who had previously donated \$500 to Senator Josh Hawley, “could issue a nationwide ban on mifepristone” in a case where Senator Hawley’s wife was the lead lawyer). Or, when they are hand-picked by a party in districts where a single judge hears all cases. See Tierney Sneed, *DOJ Ramps up Its Allegations That Texas Is ‘Judge-Shopping’ in Cases Against Biden*, CNN, <https://www.cnn.com/2023/03/03/politics/justice-department-texas-judge-shopping/index.html> [<https://perma.cc/M8HV-8HJ4>] (Mar. 7, 2023, 2:38 PM) (noting Texas Attorney General Ken Paxton’s decision to file cases against the Biden Administration in districts where Trump-appointed judges hear all cases).

182. See Burton J. Fishman, *NLRB Has Fallen, and It Can’t Get Up*, HR DAILY ADVISOR, <https://hrdailyadvisor.blr.com/2019/01/31/nlr-has-fallen-and-it-cant-get-up/> [<https://perma.cc/3V2N-VJMR>] (Jan. 31, 2019) (discussing the NLRB’s “issue recusal” ethics standard that challenged a Board member’s “‘right’ to vote . . . because his 1,000-lawyer firm represented one of the parties in the case”); Tammy Dee McCutchen, *The NLRB and Weaponization of Recusal Motions*, FEDERALIST SOC’Y (Jan. 6, 2020), <https://fedsoc.org/commentary/fedsoc-blog/the-nlr-and-weaponization-of-recusal-motions> [<https://perma.cc/9GHE-8M55>] (defining the issue recusal standard as: “[i]f your prior employer represented a party in a prior case addressing the same legal issue, you must recuse yourself on any case addressing the same issue”). These sources argue that the NLRB Inspector General issued a decision that it was unethical for a NLRB member to participate in certain cases. See Fishman, *supra*; McCutchen, *supra*. Because inspectors general are removable for cause by presidents, arguably they too could be “weaponized” to file ethics decisions that could pressure agency adjudicators to recuse. See 5 U.S.C. §§ 3(a)–(b). I give no opinion on whether this has actually happened.

183. See, e.g., Mara Silvers, *The Newest Twist in the Fight Between the Legislature and the Judiciary*, MONT. FREE PRESS (May 13, 2021), <https://montanafreepress.org/2021/05/13/the-latest-twist-in-the-fight-between-the-legislature-and-the-judiciary/> [<https://perma.cc/XF3Z-NLJL>] (explaining the Montana state legislature’s issuance of subpoenas on Montana Supreme Court justices and motion for recusal).

184. See, e.g., *Recent Decisions*, JUD. CONDUCT REP., Spring 2010, at 3, 3 (noting the censure of a New York state judge who “had disqualified himself from cases in which parties were represented by law firms that included legislators as a tactic to force the legislature to pass a judicial pay raise, encouraged other judges to recuse

## 1. EXECUTIVE RECUSAL WEAPONIZATION

Executive recusal weaponization occurs within administrative agencies—not with federal judges.<sup>185</sup> But the strong deference afforded to agency actions and limited review of agency decisions by federal judges creates a powerful tool for the executive branch to shape judicial decisions.<sup>186</sup> Most “administrative recusal standards take the form of regulations,” but “at least five agencies rely exclusively on guidance documents for their recusal standards, and another five use a combination of regulations and guidance documents.”<sup>187</sup> Presidents can direct agencies and agency heads to rescind or establish guidance documents via executive orders.<sup>188</sup> Presidentially appointed agency heads that are not inferior officers<sup>189</sup> can shape or approve these guidance documents.<sup>190</sup> It is unclear whether recusal standards meet the Administrative Procedure Act’s notice and comment requirement under Section 553(b).<sup>191</sup>

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themselves, denigrating those who refused, and made public comments about pay raise litigation”).

185. Also note that Section 455 “does not apply to administrative adjudicators.” Louis J. Virelli III, *An Ethical Gap in Agency Adjudication*, 69 BUFF. L. REV. 1329, 1355 (2021).

186. Whether this form of recusal weaponization will remain effective largely depends on the Supreme Court’s nullification or disregard of deference to administrative agencies. See James Romoser, *In an Opinion that Shuns Chevron, the Court Rejects a Medicare Cut for Hospital Drugs*, SCOTUSBLOG (June 15, 2022, 2:24 PM), <https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/> [<https://perma.cc/Z47Z-W5DU>] (noting that the Supreme Court chose to ignore *Chevron* in *American Hospital Association v. Becerra*, 142 S. Ct. 1986 (2022), and “[r]ather than a single, decisive blow or a continued death by a thousand cuts, the court might simply snuff out *Chevron* with the silent treatment”); Amy Howe, *Opinion Analysis: Justices Leave Agency Deference Doctrine in Place – with Limits (Updated)*, SCOTUSBLOG (June 26, 2019, 1:20 PM), [scotusblog.com/2019/06/opinion-analysis-justices-leave-agency-deference-doctrine-in-place/](https://www.scotusblog.com/2019/06/opinion-analysis-justices-leave-agency-deference-doctrine-in-place/) [<https://perma.cc/KV9J-H9SU>] (explaining the Court’s imposition of further limitations on *Auer* deference in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)).

187. Louis J. Virelli III, *Recusal in Administrative Adjudication*, 64 ARIZ. L. REV. 135, 175 (2022) (footnote omitted).

188. See KATE R. BOWERS, CONG. RSCH. SERV. LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 3–5 (2021) (noting President Obama’s and Trump’s executive orders that directed agencies to take action with respect to guidance documents).

189. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 877–78 (1991) (“[T]he Constitution limits congressional discretion to vest power to appoint ‘inferior Officers’ to three sources: ‘the President alone,’ ‘the Heads of Departments,’ and ‘the Courts of Law.’” (quoting U.S. CONST. art II, § 2, cl. 2)).

190. See BOWERS, *supra* note 188, at 4 (noting that several executive orders required that “significant guidance documents” receive “approval by the agency head or a component head appointed by the President”).

191. See Virelli, *supra* note 187, at 176 (“[R]ecusal standards may meet the procedural-rule exception to notice and comment under APA § 553(b).”).



Moreover, challenging recusal standards promulgated through guidance documents would prove difficult,<sup>192</sup> if not impossible, under *Bennett v. Spear*.<sup>193</sup> First, it is unclear whether guidance documents are considered “‘final agency action[s]’ under the *Bennett* test.”<sup>194</sup> Second, “a challenger seeking review of a guidance document must demonstrate that the document at issue qualifies as a legislative rule.”<sup>195</sup> But recusal standards likely do not qualify as legislative rules because they do not operate with the force of law<sup>196</sup>—especially if they leave the decisionmakers (*i.e.*, administrative law judges or boards) with discretion.<sup>197</sup> Litigants who have challenged recusal standards in agency guidance documents on the basis that these recusal standards are inconsistent with due process or agency regulations have largely been unsuccessful.<sup>198</sup>

Given this framework, it is easy to imagine a president directing agencies, such as the Social Security Administration or the Equal Employment Opportunity Commission,<sup>199</sup> to draft guidance documents that might require the recusal of administrative law judges or board members appointed by a prior administration from the opposing political party. For example, this guidance might require administrative law judges recuse themselves if their “prior employer represented a party in a prior case addressing the same legal issue.”<sup>200</sup> If successful, this tactic

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192. See Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 373 (2008) (“[R]egardless of whether the agency issued its decision as a draft or a final guidance document, it is unclear whether a challenger would be able to obtain judicial review.”).

193. 520 U.S. 154 (1997).

194. McKee, *supra* note 192, at 373 n.6.

195. *Id.* at 401.

196. See *Child. ’s Hosp. of the King’s Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018) (“By contrast, ‘a substantive or legislative rule . . . has the force of law, and creates new law or imposes new rights or duties.’” (quoting *Jerri’s Ceramic Arts, Inc. v. Consumer Prod. Safety Comm’n*, 874 F.2d 205, 207 (4th Cir. 1989))).

197. See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (“The second criterion is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.” (quoting *Am. Bus Ass’n v. United States*, 627 F.2d 525, 529 (1980))).

198. See, e.g., *Penoza v. Berryhill*, 738 F. App’x 435, 436 (9th Cir. 2018) (holding that the Social Security Administration’s recusal procedures were not inconsistent with due process or its regulations).

199. See Virelli, *supra* note 187, at 175–76 (noting the Social Security Administration and Equal Employment Opportunity Commission set recusal standards in guidance documents only).

200. McCutchen, *supra* note 182.

could further the political agenda of the sitting president and indirectly constrain the federal judiciary from doing anything to stop it.<sup>201</sup>

Equally problematic is the idea that federal district and circuit courts could mirror this approach by enacting similar recusal standards in their local rules or internal operating procedures. For example, at least one district court has a local rule that provides for review by the chief judge when the presiding judge refuses to voluntarily recuse.<sup>202</sup> It is not far-fetched to imagine a situation in which a chief judge would allow—either consciously or subconsciously—deep-seated disagreements to influence their review of recusal motions.<sup>203</sup> For instance, some judges have been outspoken against other judges on issues such as immigration and sentencing.<sup>204</sup>

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201. This argument assumes that administrative law judges and board members actually comply with the guidance document. It also assumes that deference to judicial agencies remains in place, which I am skeptical of due to the leanings of certain justices on the Supreme Court. *See, e.g.*, Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/business/dealbook/gorsuch-nomination-puts-spotlight-on-agency-powers.html> (noting Justice Gorsuch’s questioning of *Chevron* deference). *See also supra* note 186 and accompanying text.

202. *See, e.g.*, *Johnson v. Miller*, No. C21-5539, 2021 WL 3617178, at \*1 (W.D. Wash. Aug. 16, 2021) (“Under the Local Rules of this District, a motion for recusal is addressed first to the presiding judge, and if the judge does not recuse voluntarily, the matter is referred to the chief judge for review.” (citing W.D. WASH. L.C.R. 3(e))).

203. *Cf.* Elizabeth K. Lamphier, *Justice Run Amok: Big Money, Partisanship, and State Judiciaries*, 2011 MICH. ST. L. REV. 1327, 1361 (“Some contend that a full court review of recusal motions will escalate partisanship by allowing recusal to be used as a political weapon by state supreme court majorities to prevent minority justices with divergent ideological stances from sitting on a case.”); Carrie Campbell Severino, *Re: Chief Justice Roberts and Recusal*, NAT’L REV. (Jan. 3, 2012, 9:14 PM), <https://www.nationalreview.com/bench-memos/re-chief-justice-roberts-and-recusal-carrie-severino/> [<https://perma.cc/BE2L-N53Y>] (noting Chief Justice Roberts’s opposition to outside review of recusal decisions because it “would essentially weaponize the recusal process by giving some other entity or set of individuals the ability to force justices to recuse themselves”).

204. *See* Justin C. Van Orsdol, *Cooking the Books: The Art of Judicial Gamesmanship*, 74 RUTGERS U. L. REV. 1099, 1131 (2022) (explaining how Judge Nelson of the Ninth Circuit expressed a desire to remove district court Judge Chen from an immigration case dealing with President Trump’s travel ban). *See also* William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957, 958–59 (1999) (discussing an opinion from the D.C. Circuit that accused a district court judge of “having ‘wreaked havoc in the administration of justice’ by ‘knowingly’ abusing his discretion in sentencing a defendant in a drug case to forty-one months in prison rather than the seventy to eighty-seven months recommended by the sentencing guidelines” (quoting *United States v. Webb*, 134 F.3d 403, 409 (D.C. Cir. 1998))).

## 2. LEGISLATIVE RECUSAL WEAPONIZATION

Not to be outdone, legislatures can also use recusal as a sword. Between 2021 and 2022, the Montana state legislature attempted to do just that. In 2021, lawmakers proposed a law that would replace the Montana Judicial Nominating Commission and authorize the governor to appoint judges in a “longer-term effort by Republican lawmakers to remake what it considers an activist judiciary and to appoint more conservative judges.”<sup>205</sup> Lawmakers alleged that Montana Supreme Court justices were “improperly taking sides on political issues”<sup>206</sup> and subpoenaed the justices’ emails and internal documents to prove that the justices “ha[d] expressed opinions about”<sup>207</sup> the proposed law. The subpoenas were issued after “lawmakers learned that some internal judicial emails had been deleted by [the Montana] Supreme Court Administrator . . . after [lawmakers] had requested them.”<sup>208</sup>

After the justices “blocked subpoenas issued to them directly, . . . [t]he court also denied repeated motions from the attorney general’s office asking all justices to recuse themselves over an alleged conflict of interest.”<sup>209</sup> The state legislature then appealed to the United States Supreme Court, asserting that the Montana Supreme Court justices violated its Fourteenth Amendment due process rights by failing to recuse themselves.<sup>210</sup> In March 2022, the Supreme Court of the United States declined to grant certiorari.<sup>211</sup> Although the Montana legislature was unsuccessful, other lawmakers—either at the state or federal level—could employ similar tactics. These tactics could be used against outspoken federal judges across the ideological spectrum, especially considering the

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205. *Montana Legislature Withdraws Subpoenas for Judicial Emails*, AP (June 23, 2021, 4:04 PM), <https://apnews.com/article/montana-subpoenas-technology-email-legislature-697ece4213c95b94b456ce1b07ebec9f> [<https://perma.cc/85JQ-73A3>].

206. Mike Dennison, *MT Supreme Court Quashes Subpoena Seeking Internal Judiciary E-Mails*, KTVH, <https://www.ktvh.com/news/montana-politics/mt-supreme-court-quashes-subpoena-seeking-internal-judiciary-e-mails> [<https://perma.cc/2QDU-8EPT>] (Apr. 12, 2021, 7:52 PM).

207. *Id.*

208. *Id.*

209. Mara Silvers, *SCOTUS Denies Legislature’s Request to Hear Judicial Case*, MONT. FREE PRESS (Mar. 21, 2022), <https://montanafreepress.org/2022/03/21/scotus-wont-hear-legislature-case-against-montana-judiciary/> [<https://perma.cc/67CS-B7NL>].

210. *See id.* (“[T]he request said that the state Legislature had its Fourteenth Amendment due process rights infringed on when the state justices declined to recuse themselves.”).

211. *See id.* (“The U.S. Supreme Court has denied the Montana state Legislature’s request that it take up a high-profile separation of powers case stemming from Republican subpoenas of judicial documents during the 2021 legislative session.”).

slew of new controversial laws on abortion,<sup>212</sup> voting rights,<sup>213</sup> and gun control.<sup>214</sup> Because of Section 455(a)'s ambiguity, and given enough pressure, some judges may feel inclined to recuse based on prior statements or advocacy.<sup>215</sup>

### C. JUDICIAL RECUSAL WEAPONIZATION

Surprisingly, judges have also used recusal as a weapon to thwart or to punish state legislatures. In 2009, the “New York State Commission on Judicial Conduct censured a judge who had disqualified himself from cases in which parties were represented by law firms that included legislators as a tactic to force the legislature to pass a judicial pay raise.”<sup>216</sup> At the time, New York judges had not received a pay raise in over ten years.<sup>217</sup> Over eleven e-mails, one New York state judge encouraged his fellow judges to recuse themselves; he argued that “this [was] the only weapon [they had]” and explained that there were “enough lawyers in the senate who would be very unhappy if their cases could not be heard and their firms started letting them go.”<sup>218</sup>

A similar tactic could be employed by federal judges to delay laws from going into effect or to stall a likely appeal of law they wish to keep

212. See Nate Raymond, *Trump-Appointed Judge Defends Rulings Unpopular with ‘Cultural Elites,’* REUTERS, <https://www.reuters.com/legal/government/trump-appointed-judge-defends-rulings-unpopular-with-cultural-elites-2022-06-07/> (June 7, 2022, 2:29 PM) (discussing Fifth Circuit Judge James Ho’s former remarks on abortion).

213. See Harper Neidig, *Senate Panel Advances Voting Rights Advocate’s Confirmation for Appeals Court Seat*, THE HILL (Aug. 5, 2021, 10:32 AM), <https://thehill.com/homenews/senate/566496-senate-panel-advances-voting-rights-advocates-confirmation-for-appeals-court/> [<https://perma.cc/9MU3-CJNP>] (discussing Senator Mike Lee’s opposition to Judge Myrna Pérez’s nomination to the Second Circuit based on her alleged accusations that her opponents on election laws were “being racist and evil”).

214. See Sean J. Kealy, *The Second Amendment as Interpreted by Congress and the Court*, 3 NE. U. L.J. 225, 276 n.234 (2011) (noting that before he was appointed, Judge Heartsill Ragon of the Western District of Arkansas “was an outspoken proponent of federal gun control”).

215. This is not to say that all judges will recuse or even that they should recuse based on comments or past advocacy work. The argument here is simply that a legislative attack, via subpoenas and recusal motions, could be used against federal judges and might have a chilling effect of causing some judges to recuse.

216. See *Recent Decisions*, *supra* note 184, at 3.

217. *Id.*

218. See *id.* at 3, 6 (noting one e-mail that stated, “I remain convinced that the only weapon in our arsenal is recusal on all cases where a firm has a legislator or a relative of a legislator in a firm” and another e-mail that stated, “I really believe this is the only weapon we have ... there are enough lawyers in the senate who would be very unhappy if their cases could not be heard and their firms started letting them go” (omission in original)).

in effect.<sup>219</sup> Consider the following hypothetical: Suppose a liberal city within a conservative state, such as one within the Fifth or Eleventh Circuit, enacted a law outlawing AR-15s and requiring all AR-15 owners to surrender these guns. The AR-15 owners file a suit in federal district court challenging the constitutionality of the law and alleging a takings claim. Assume the district judge assigned to the case either previously advocated for tougher gun control laws while in practice or had some connection to the case not expressly covered under Section 455. The judge knows that on appeal the circuit court would likely reverse their decision and effectively end the suit because the law grants of cert at the Supreme Court. The judge could delay ruling on the case and decide to recuse under Section 455(a) at the last minute. This would cause the case to be transferred to another district judge, stretching the process out even longer and potentially repeating the process. If delayed long enough, and assuming no preliminary injunctions were granted, the law might go into effect long enough causing some AR-15s to be surrendered.<sup>220</sup>

This scenario could be employed by judges of either liberal or conservative persuasions, and not much—if anything—could be done to stop them. Certainly, there would be pressure to rule timely on the case under the Civil Justice Reform Act,<sup>221</sup> but generally there are no long-lasting ramifications from not ruling timely. The challengers could seek a writ of mandamus from the relevant court of appeals, but that process can be lengthy, taking upwards of two years.<sup>222</sup> Even seeking the writ could only serve to further the delay.<sup>223</sup>

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219. Cf., e.g., *United States v. Rodriguez*, 641 F. Supp. 3d 898, 912–13 (S.D. Cal. 2022) (recusing under a Ninth Circuit standard and because the judge was “unable to brush aside [his] insights, experience, and long-held conclusions”).

220. Such a scenario may be even more likely given the Supreme Court’s decision in *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that now forces courts to “assess[] the lawfulness of [gun laws] by scrutinizing whether [they] comport[] with history and tradition.” *Id.* at 2128. Fallout from this case has forced courts to find gun laws prohibiting possession of firearms with removed serial numbers constitutional. See, e.g., *United States v. Price*, 635 F. Supp. 3d 455 (S.D. W. Va. 2022).

221. 28 U.S.C. § 476.

222. See, e.g., *In re Johnson*, 814 F. App’x 881, 881 (5th Cir. 2020) (per curiam) (denying a writ of mandamus but ordering the district court to rule on a case within sixty days when the case had “been pending before the district court for over two years”). Cf. *In re Brown*, 409 F. App’x 591, 593 (3d Cir. 2011) (holding that mandamus relief was not warranted when the district court judge had not ruled on the plaintiff’s objections to the magistrate judge’s order for “approximately seven months”); *In re Carrascosa*, 671 F. App’x 856, 858–59 (3d Cir. 2016) (declining to grant a writ of mandamus when a habeas petition had been pending for eleven months because the case had been reassigned to the current district court judge “only seven months ago”).

223. See, e.g., *Brown v. United States*, No. 10-CV-666, 2012 WL 2930055, at \*1 (N.D. Ga. July 18, 2012) (noting that the Eleventh Circuit concluded that the

A somewhat similar ploy was used by the Fifth Circuit in *United States v. Nixon*<sup>224</sup> and *Comer v. Murphy Oil USA, Inc.*<sup>225</sup> In *Nixon*, “[t]he Fifth Circuit ha[d] previously required the inclusion of disqualified judges in the determination of a quorum for en banc hearings.”<sup>226</sup> Relying on its own local rule, the “Fifth Circuit declined to even vote on hearing [the] case en banc where eleven of fourteen judges had recused themselves.”<sup>227</sup> By not granting a rehearing en banc, the Fifth Circuit preserved the earlier panel decision in the case.<sup>228</sup>

Likewise, in *Comer*, the Fifth Circuit first “reversed a district court dismissal” but then “vacated that decision by granting a rehearing en banc.”<sup>229</sup> However, the circuit court was not able to hold the en banc rehearing because of a judge’s last-minute recusal, which effectively reinstated the initial dismissal.<sup>230</sup>

As one scholar noted, the late recusal in *Comer* “could paint a particularly troubling picture to a skeptical observer”<sup>231</sup> because “most of the conflicts which would have required [the judge’s] recusal should have been detectable before the initial vote on whether to grant rehearing en banc.”<sup>232</sup>

Moreover, recusal could also be weaponized at the Supreme Court.<sup>233</sup> Title 28, Section 1 of the United States Code requires a total of

petitioner’s petition for mandamus likely contributed to the delay in ruling on his habeas petition).

224. 827 F.2d 1019 (5th Cir. 1987) (per curiam).

225. 718 F.3d 460 (5th Cir. 2013).

226. Alex B. Rothenberg, Note, *Decision by Recusal: Comer v. Murphy Oil USA Lets Naysayers and Disqualified Judges in the Fifth Circuit Determine the Outcome of Case Without a Hearing*, 85 TUL. L. REV. 1131, 1135 (2011).

227. *Id.*

228. See 5TH CIR. R. 41.3 (“Unless otherwise expressly provided, the granting of rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.”).

229. William Montgomery, *Polluter Disgorges: Climate Accountability and the Law of Unjust Enrichment*, 35 TUL. ENV’T L.J. 165, 175 (2022).

230. *Id.*

231. Patrick A. Woods, *Reversal by Recusal? Comer v. Murphy Oil U.S.A., Inc. and the Need for Mandatory Judicial Recusal Statements*, 13 U.N.H. L. REV. 177, 194 (2015).

232. *Id.* See also R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 323–24 (2017) (noting that Judge Elrod “recused herself from the case due to mysterious ‘new circumstances’” and that the other judges’ recusals “raised suspicions of a deliberate dodge or even political corruption” (footnote omitted)).

233. See Ryan H. Nelson, *The One Thing the Dissenting Justices Could Do to Save Roe*, SLATE (June 1, 2022, 10:06 AM), <https://slate.com/news-and-politics/2022/06/abortion-save-roe-v-wade-justices-supreme-court-filibuster.html#:~:text=To%20save%20Roe%2C%20the%20dissenting,participate%2>

six judges to constitute a quorum.<sup>234</sup> If a conservative justice retired and was replaced by a liberal justice, what would stop a minority bloc of four liberal justices from recusing in cases to prevent the Court from deciding the merits of a case?<sup>235</sup> True, such use of recusal has not happened before at the Supreme Court as far as we know.<sup>236</sup> But given the current climate and lack of ethical constraints on the justices, such a situation is not entirely implausible.<sup>237</sup>

### III. REFORMS

Scholars have proposed various reforms to the recusal process ranging from “(1) requiring that independent judges hear recusal motions; (2) mandating written disqualification decisions; (3) the preemptory disqualification of trial judges; and (4) granting lay panels

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in%20a%20supreme%20filibuster [https://perma.cc/XV5H-DAH8] (arguing that the liberal justices could have recused themselves in *Dobbs* to “deny the Supreme Court a quorum, preventing the end of *Roe*”). See also Guha Krishnamurthi, *Sitting One Out: Strategic Recusal on the Supreme Court*, 11 CALIF. L. REV. ONLINE 387, 390 (2020), <https://web.archive.org/web/20220706162839/https://www.californialawreview.org/strategic-recusal-supreme-court/> (“[S]itting out’ can be used effectively by the four-Justice minority. There is a significant chance that sitting out a case would allow the four-Justice minority to affirm the lower-court decision below.”).

234. 28 U.S.C. § 1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

235. Although not used as a delay tactic, this type of situation has happened in the past. See *N. Am. Co. v. SEC*, 320 U.S. 708, 708–09 (1943) (mem.) (transferring a case to a “special docket” and postponing all further proceedings when four justices disqualified themselves, creating “the absence of a quorum” under 28 U.S.C. § 321). See also *United States v. Aluminum Co. of Am.*, 320 U.S. 708, 708–09 (1943) (mem.); *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190, 1190 (1983) (mem.); *United States v. Hatter*, 532 U.S. 557, 558 (2001) (noting that when the case was previously before the Court, “due to absence of a quorum, the Court could not consider either the merits or whether to consider those merits through a grant of certiorari”).

236. Lack of quorum, however, has happened thirty-six times since 1946. See, e.g., *Weidrick v. Biden*, 143 S. Ct. 368 (2022) (mem.); *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 1028 (2008) (mem.). The number of thirty-six recusals is taken from Westlaw by searching: lack! /5 quorum and filtering the jurisdiction to the Supreme Court.

237. To be clear, I am not advocating for the use of this tactic. Nor do I believe that the current liberal justices would be inclined to use recusal as a weapon, especially given Justices Sotomayor and Kagan’s concerns over the future of the Court’s legitimacy. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining how the majority’s decisions “breache[d] a core rule-of-law principal” and “undermine[d] the Court’s legitimacy”). I merely flag the issue as a potential loophole under the current absence of any mandatory or enforceable ethical constraints for the justices.

the authority to decide recusal issues.”<sup>238</sup> Newer proposals have introduced concepts such as implementing big data to produce “[p]redictive algorithms” to overcome bias and remove challenged judges from the recusal decision process.<sup>239</sup> Each solution is open to criticism, and the best approach may be some combination of these proposals.<sup>240</sup> Other possible reforms or adjustments to the timing of recusals, the appellate standard of review of recusal orders, and quorum rules may provide alternative or conjunctive opportunities to rein in potential recusal misconduct.

### A. *Tinkering with Recusal Timing*

With regard to timing, appellate courts generally do not permit immediate interlocutory review of recusal decisions because they are not final orders and rarely satisfy the collateral order doctrine.<sup>241</sup> Congress, however, could modify 28 U.S.C. § 1292(a) to include recusal orders. The Supreme Court, at one time, suggested that the traditional appellate process for recusals is insufficient, stating:

To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a*

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238. McKoski, *supra* note 85, at 401–05 (detailing and critiquing common reform measures).

239. *See id.* at 405–10.

240. I do not agree with proposals for preemptory challenges because they (1) invite judge shopping (especially in smaller districts); and (2) contradict the “duty to sit” doctrine. *See* Jeffrey Cole, *Jilting the Judge: How to Make and Survive a Motion to Disqualify*, LITIGATION, Winter 2008, at 48, 50 (“The legislative history of the 1974 amendments, however, makes it equally clear that the amendments were not intended to establish a regime of ‘disqualification on demand’—a kind of preemptory judicial strike. . . . And notwithstanding the abolition of the duty to sit concept, courts continue to stress that there is as much obligation for a judge not to grant a recusal motion when there is no basis to do so as there is to grant the motion when it is soundly based.”).

241. *See, e.g., Yomi v. Becerra*, No. 22-3136, 2022 WL 2824255, at \*1 (10th Cir. July 19, 2022) (“[T]his court’s case law is clear that ‘[a]n order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable.’” (first alteration added) (quoting *In re Syngenta AG MIR 162 Corn Litig.*, No. 20-3006, 2020 WL 4192067, at \*1 (D. Kan. May 12, 2020))); *Lowe v. Hamlett*, No. 21-6861, 2022 WL 205687, at \*1 (4th Cir. Jan. 24, 2022) (per curiam), *cert. denied*, *Lowe v. Clarke*, 143 S. Ct. 148 (2022) (mem.) (“The district court’s order denying recusal is neither a final order nor an appealable interlocutory or collateral order.”); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 635 (1987) (“Equally rare is successful interlocutory review pursuant to the collateral order doctrine.”).



*judgment of it in a reviewing tribunal is precarious.* It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.<sup>242</sup>

Although this statement was made in reference to recusal under Section 144, the same sentiment holds true for recusal under Section 455.<sup>243</sup>

Of course, any interlocutory appeal of a recusal order should be done swiftly to mitigate delaying a case—especially in time sensitive matters (*e.g.*, cases with pending motions for temporary restraining order or preliminary injunctions). And there must also be some sort of mechanism to guard against frivolous motions and delay tactics. Some have argued that ethical penalties, sanctions, and reputational risks already safeguard against such concerns.<sup>244</sup> Whether those protections alone provide adequate protection today is questionable.<sup>245</sup> Recent election cases indicate that attorneys are not dissuaded from filing frivolous recusal motions.<sup>246</sup>

One curative measure here may be to require appellants challenging recusal orders to post a supersedeas bond, similar to that required under Federal Rule of Civil Procedure 62(b).<sup>247</sup> “[T]he purpose of [a

242. *Berger v. United States*, 255 U.S. 22, 36 (1921) (emphasis added).

243. See JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 33 (2008), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Fair-Courts-Setting-Recusal-Standards.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Fair-Courts-Setting-Recusal-Standards.pdf) [<https://perma.cc/ZW2K-UCRB>] (arguing that “encouraging or requiring appellate courts to accept interlocutory orders in a timely manner” is positive reform). See also Stempel, *supra* note 241, at 646 (“[N]eutral review of recusal matters must precede decision on the merits, thereby preventing the tainted Justice and institutional inertia from fixing a result subject to criticism.”).

244. Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 132–33 (2009) (“When frivolous motions are filed, courts may impose sanctions and award fees. In addition to the risks of ethics complaints and sanctions, practical considerations guard against frivolous recusal litigation . . . .” (footnotes omitted)).

245. See, *e.g.*, *Palin v. N.Y. Times Co.*, 604 F. Supp. 3d 208, 216 (S.D.N.Y. 2022) (“It is hard to see how Palin’s recusal motion is anything but frivolous, and it is hereby denied.”).

246. See, *e.g.*, *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, No. 20-CV-266, 2020 WL 8513885, at \*1 (M.D. Ga. Dec. 31, 2020) (finding a motion to recuse “mere speculation, unsupported by any facts that would support a finding of partiality” when the movant sought to recuse Judge Gardner because she is “the sister of Stacey Abrams, a Georgia politician and voting rights activist who was the Democratic candidate in the 2018 Georgia gubernatorial election and has since engaged in various highly-publicized efforts to increase voter registration and turnout for the 2020 general election in Georgia”).

247. FED. R. CIV. P. 62(b) (“At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court

supersedeas] bond is to ‘secure the appellees from any loss’ resulting from [a] stay.”<sup>248</sup> Appellees should also have this protection under our interlocutory recusal procedure. In time-sensitive cases involving more than monetary injuries, the case may need to continue while the circuit court considers the appeal, or the case may need to be temporarily reassigned—at random—to another district court judge. In short, the stakes for filing frivolous and/or dilatory recusal motions should be exceedingly high to curb such practices.

### *B. Rethinking the Standard of Review*

As for the standard of review, the Seventh and Eighth Circuits’ de novo standard offers a prudent approach.<sup>249</sup> Specifically, these circuits review the district court’s factual findings for clear error and legal conclusion de novo.<sup>250</sup> Not only does the shift to de novo review mitigate against due process concerns under the abuse of discretion process,<sup>251</sup> it also encourages district court judges to write more thoroughly detailed and reasoned orders because under de novo review a “district court’s findings of fact and conclusions of law are required to be ‘sufficiently detailed to establish that the careful de novo review prescribed by Congress has in fact taken place.’”<sup>252</sup> To meet this standard, judges may then be persuaded to push for or to utilize additional avenues to support

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approves the bond or other security and remains in effect for the time specified in the bond or other security.”).

248. *Allied Premier Ins. v. United Fin. Cas. Co.*, No. EDCV 18-88 (KKx), 2020 WL 1277760, at \*1 (C.D. Cal. Feb. 27, 2020) (quoting *Vahora v. Valley Diagnostics Lab’y, Inc.*, No. 16-cv-01624, 2019 WL 5960204, at \*1 (E.D. Cal. Sept. 13, 2019)).

249. *See United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022) (“Indeed, we stand alone as the only circuit to employ a de novo standard of review to § 455 recusal decisions; every other circuit reviews them for abuse of discretion.”). *But see Holloway v. United States*, 960 F.2d 1348, 1351 n.8 (8th Cir. 1992) (explaining that the Eighth Circuit usually uses the abuse of discretion standard, but “[i]n some cases, however, . . . [has] conducted de novo review”).

250. *See Walsh*, 47 F.4th at 498.

251. *See* Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); Stempel, *supra* note 241, at 661–62 (same).

252. *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1264 n.27 (11th Cir. 2008) (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Bell*, 603 F.2d 945, 950 (D.C. Cir. 1979)). This is so because the abuse of discretion standard is very deferential, whereas de novo is not. *See, e.g., Kelley v. United States*, No. 10 Civ. 2937, 2011 WL 1642516, at \*5 (S.D.N.Y. Apr. 26, 2011) (“Decisions on recusal motions are reviewed for abuse of discretion, a highly deferential standard of review.”).

their decisions—like relying on big data or seeking outside advice from already-established advisory committees at the administrative office or the Committee on Codes of Conduct of the Judicial Conference of the United States.<sup>253</sup> Moreover, de novo review is already employed by district court judges reviewing recusal orders from magistrate judges.<sup>254</sup> This proposal merely unifies the standard of review throughout each level of the federal judiciary.

### C. *Cleaning up the Comer Quorum Conundrum*

Appellate courts are not immune to recusal problems. At the appellate level, recusal decisions are arguably more sensitive and impactful—at least in en banc situations. This is because of the quorum issues discussed in Section II.C and because, “[p]ractically speaking, the courts of appeals are the courts of last resort for the vast majority of cases.”<sup>255</sup> To prevent quorum manipulation via recusal, appellate courts should formulate a protective mechanism. The lack of a quorum effectively stalls the case and can produce results—like *Comer*—where the Fifth Circuit “lack[ed] the power to reinstate the panel decision it

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253. See *Ethics Policies*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies> [<https://perma.cc/UBS2-7ZP9>] (noting that the Judicial Conference Committee “provide[s] ethical guidance for judges and judicial employees and assist in the interpretation of the codes of conduct and ethics regulations that apply to the judiciary”). Big data is already used in part for financial conflicts. See *Administrative Oversight and Accountability*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability#:~:text=Oversight%20mechanisms%20work%20together%20to,the%20management%20of%20public%20resources> [<https://perma.cc/UWS2-69ZP>] (“Every judge is required to develop a list of personal and financial interests that would require recusal, which courts use with automated conflict-checking software to identify court cases in which a judge may have a disqualifying conflict of interest under 28 U.S.C. § 455 or the Code of Conduct for United States Judges.”).

254. See, e.g., *Edwards v. Georgia*, No. 19-CV-04101, 2020 WL 5815925, at \*1–2 (N.D. Ga. Aug. 24, 2020) (reviewing de novo a report and recommendation on a recusal motion), *appeal dismissed*, No. 20-13633-G, 2021 WL 1170484 (11th Cir. Feb. 8, 2021); *Opsahl v. Jaimet*, No. 09-2567, 2010 WL 419959, at \*1 (D. Minn. Jan. 29, 2010) (“The court reviews the report and recommendation de novo, and considers Opsahl’s motions to disqualify the magistrate judge and to add a § 1983 conspiracy claim against Jaimet and additional defendants.”).

255. Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2004 (2014).

[could] no longer rehear”<sup>256</sup> and “affirm[ed] [a] district court opinion that the panel reversed.”<sup>257</sup>

### 1. PANEL PROTECTION

The most straightforward fix to the *Comer* problem is to prohibit circuit courts from vacating panel decisions when they decide to take a case en banc.<sup>258</sup> As Professor Bruhl notes, “one credible objection to that approach is that the court might not want the panel decision to be valid after it has been voted en banc; after all, the panel decision might have been taken en banc because the majority of the court disagrees with it.”<sup>259</sup> Alternatively, he proposes courts (1) adopt Ninth Circuit Rule 35-3 which de-publishes the panel opinion;<sup>260</sup> or (2) allow the “en banc vote continue to vacate the panel decision but amend the rule so that the subsequent loss of a quorum automatically reinstates the panel opinion but in unpublished non-precedential form.”<sup>261</sup> Of these two approaches, the latter is likely more palatable, as it would be less of a departure from existing rules that automatically vacate the panel opinion.

### 2. REQUANTIFYING A QUORUM

Another potential fix to the *Comer* problem—and the overall effects of recusal on quorums—would be to avoid it from the beginning by adopting a different definition of a quorum in en banc cases. As Judge James Dennis suggested in his *Comer* dissent, the proper reading of quorum under Section 46(d) in such cases,

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256. Recent Case, *Civil Procedure — Quorum Requirements — Fifth Circuit Leaves Panel Decision Vacated Upon Loss of En Banc Quorum*. — *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (*En Banc*)., 124 HARV. L. REV. 624, 624 (2010).

257. *Id.*

258. Aaron-Andrew P. Bruhl, *Responding to the Loss of an En Banc Quorum (Update: PrawfsBlawg gets Results!?)*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY: POPULAR MEDIA (May 20, 2011, 5:03 PM), [https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1378&context=popular\\_media](https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1378&context=popular_media).

259. *Id.*

260. *Id.* See also 9TH CIR. FED. R. APP. P. 35-3 circuit advisory committee note to Rules 35-1 to -3. (“When the Court votes to rehear a matter en banc, the Chief Judge will enter an order so indicating. The vote tally is not communicated to the parties. The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.”).

261. Bruhl, *supra* note 258.

is a majority of “all circuit judges in regular active service,” a category that has to exclude disqualified judges because the alternative would be absurd. Therefore, . . . “all circuit judges in regular active service” under § 46(c) simply means the . . . judges who are not disqualified, and a quorum is a majority of those judges.<sup>262</sup>

Notably, Judge Dennis’s interpretation is shared by the advisory committee notes to FRAP 35.<sup>263</sup> At first glance one might question whether Judge Dennis’s quorum definition renders the quorum requirement meaningless. But as Judge Dennis explains,

This reading of the statute does not render the quorum requirement meaningless; it only defines a quorum as a majority of the nondisqualified active judges. A majority of the qualified active judges still must be present in order for the court to conduct business. Thus, a quorum can be lost through circumstances other than disqualification, such as illnesses or family emergencies that may render judges temporarily unable to participate.<sup>264</sup>

This reading of the quorum requirement nullifies appellate recusal weaponization. Moreover, it permits cases to proceed en banc, which helps develop case law on cases of exceptional importance and maintains uniform case law in the circuit courts.<sup>265</sup>

When Justice Scalia declined to recuse in *Cheney v. United States District Court for the District of Columbia*,<sup>266</sup> he emphasized that “the consequence [was] different” at the Supreme Court because when “[t]he

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262. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1058–59 (5th Cir. 2010) (Dennis, J., dissenting) (quoting 28 U.S.C. § 46(c)).

263. FED. R. APP. P. 35 advisory committee’s note to the 2005 amendment (“The case majority approach represents the better interpretation of the phrase ‘the circuit judges . . . in regular active service’ in the first sentence of § 46(c). The second sentence of § 46(c)—which defines which judges are eligible to participate in a case being heard or reheard en banc—uses the similar expression ‘all circuit judges in regular active service.’ It is clear that ‘all circuit judges in regular active service’ in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of ‘the circuit judges . . . in regular active service’ in the first sentence of § 46(c) is that it, too, does not include disqualified judges.” (omissions in original) (cleaned up)).

264. *Comer*, 607 F.3d at 1059 n.4 (Dennis, J., dissenting).

265. See FED. R. APP. P. 35(a)(1)–(2).

266. 541 U.S. 913 (2004).

Court proceeds with eight Justices, [it] rais[es] the possibility that, by reason of a tie vote, it will find itself *unable to resolve the significant legal issue presented by the case*.<sup>267</sup> Given the low probability of a grant of certiorari by the Supreme Court, Justice Scalia's emphasis of a "different consequence" is also present in en banc cases. This also aligns with the Supreme Court's declaration that courts have an "absolute duty . . . to hear and decide cases within their jurisdiction."<sup>268</sup> As Judge Dennis noted, litigants also have due process rights to ensure their cases are heard, and "[t]he right to appeal would be of little value if the courts of appeals were not required to render decisions in cases that are properly brought before them."<sup>269</sup>

### 3. SAVING GRACE WITH SENIOR JUDGES

One might also be able to side-step some of the recusal quorum debacle by amending 28 U.S.C. § 46(c) to allow senior judges to vote in en banc polls, at least in cases where they would otherwise be qualified to sit for the en banc hearing (or rehearing).<sup>270</sup> In 2010, a similar bill for the Supreme Court was introduced by Senate Judiciary Committee Chairman Patrick Leahy.<sup>271</sup> It would have allowed "a majority of the active Justices . . . to designate a retired Justice to substitute for a recused Justice."<sup>272</sup> Another solution, as proposed by Judge Dennis and Judge W. Eugene Davis in *Comer*, would be to permit circuit courts to request another circuit judge to sit by designation under 28 U.S.C. § 291.<sup>273</sup> Likewise, we could permit retired Supreme Court justices to sit by designation under 28 U.S.C. § 294 and/or encourage Supreme Court justices to ride circuits again in these situations.<sup>274</sup>

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267. *Id.* at 915.

268. *United States v. Will*, 449 U.S. 200, 215 (1980).

269. *Comer*, 607 F.3d at 1060–61 (Dennis, J., dissenting).

270. This would "reduce[] the incongruence of allowing a senior judge to participate in a panel decision but not to have a voice in a decision to rehear the case en banc." Van Orsdol, *supra* note 204, at 1146.

271. Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83–84 (2011).

272. *Id.* at 83.

273. *Comer*, 607 F.3d at 1064–65 (Dennis, J., dissenting).

274. See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1726–51 (2007) (noting the benefits of renewing circuit riding). At the time his article was written, Judge Stras was a law professor.

## 4. PROHIBITING RECUSED JUDGES FROM EN BANC VOTING

A related reform would be to prohibit recused circuit judges from voting on decisions to hear (or rehear) cases en banc. FRAP 35 permits two possible voting scenarios: (1) the “absolute majority approach” and (2) the “case majority approach.”<sup>275</sup> The difference being that under the absolute majority approach, disqualified or recused judges are allowed to vote and “counted in the base in calculating whether a majority of judges have voted to hear a case en banc,” but are not permitted and are not counted in the case majority approach.<sup>276</sup>

As the advisory committee notes explain, the case majority approach is preferable for two reasons. First, on a fundamental level, allowing a recused judge to vote for en banc hearings defeats the purpose of the recusal itself (at least partially). Second, the absolute majority approach “can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit’s active judges disagree.”<sup>277</sup> As Judge Julie Carnes of the Eleventh Circuit explains, the absolute majority approach presents multiple issues and “[b]y insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of the judges in active service.”<sup>278</sup>

## CONCLUSION

“Public confidence in the Supreme Court has been lower over the past 16 years than it was before.”<sup>279</sup> And confidence of the judiciary as a whole fairs just slightly better.<sup>280</sup> “[T]he power of the courts lies in the

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275. FED. R. APP. P. 35 advisory committee’s note to the 2005 amendment. As the committee notes indicate, seven circuits use the absolute majority approach and the remaining six use the case majority approach. *Id.*

276. *Id.*

277. *Id.*

278. *Gulf Power Co. v. Fed. Commc’ns Comm’n*, 226 F.3d 1220, 1224 (11th Cir. 2000) (per curiam) (Carnes, J., concurring in part and dissenting in part).

279. Jeffrey M. Jones, *Confidence in the U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/L2SH-BXNW>].

280. *See Do Americans Have Confidence in the Courts?*, WILLOW RSCH. (Mar. 27, 2019), <https://willowresearch.com/american-confidence-courts/> [<https://perma.cc/48CF-FQG7>] (“Only about one-third of Americans today express confidence in the courts and the judiciary in general.”); Megan Brenan, *Americans’ Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx> [<https://perma.cc/9GX6-CF8J>] (reporting that in 2021, 54% of those polled had a “great

public's trust that court decisions are fair and impartial."<sup>281</sup> "Even erroneous public perception can still weaken the courts."<sup>282</sup> "Judicial misconduct breaks down the very fibre of what is necessary for a functional judiciary—citizens who believe their judges are fair and impartial."<sup>283</sup> Clearly something needs to be done before we reach the point of no return and people start ignoring the courts altogether.

At its core, recusal—as with other judicial misconduct issues—is a collective action problem. And, as Professor Leah M. Litman and Deeva Shah so eloquently stated, "[p]roblems of collective action are notoriously difficult to solve."<sup>284</sup> But difficulty does not equal impossibility. So, what do we do?

First, we must come to grips with the reality that our current recusal statutes and methodology are flawed. After all, our general ethical framework seems poorly designed to register misconduct or recusal abuse—so much so that one could easily think it was not designed to register violations at all. And, as easy as it is to point fingers at a few bad actors, this is an insufficient remedy. Of course, judges who flout ethical standards for recusal deserve to be called out, but these judges represent only a fraction of the problem. Those of us who stand by and do nothing implicitly endorse this conduct, allowing this misconduct to further erode the public's trust in our judicial system. That is, the legal community as a whole must take ownership of the problem.

Second, we must strategize and develop proposals to curb recusal misconduct. There is no single definitive answer here. Legal scholarship offers one avenue; congressional action through ethics reform bills offers yet another. What matters in these early stages of reform is to keep the conversation open and moving. We must also recognize this is not a

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deal/fair amount of trust" for the judicial branch, down from 67% in 2020 and an average of 68% from 1997 to 2021).

281. Shira J. Goodman, *The Danger Inherent in the Public Perception That Justice Is for Sale*, 60 *DRAKE L. REV.* 807, 818 (2012). See also *The Consequences of Perjury and Related Crimes: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 54–55 (1998) (statement of Judge Gerald B. Tjoflat) ("The system of justice depends on three things in order to function as its framers intended. The first thing is an impartial judiciary. . . . It is like a three-legged stool in a way. If one of the legs . . . break[s], then the stool collapses.").

282. Michael McSherry, Note, *Incentivizing Moral Development in Law School: The Benefits of Personal Moral Growth Moving Forward*, 13 *U. ST. THOMAS L.J.* 134, 152 (2016).

283. David J. Sachar, *Judicial Misconduct and Public Confidence in the Rule of Law*, UNDOC, <https://www.unodc.org/dohadecclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html> [https://perma.cc/RB74-NXZU] (cleaned up).

284. Litman & Shah, *supra* note 7, at 643.



political issue. As part of the legal community, we should all be open to exploring different ideas and fixes.

Third, we have to take action. Talk is cheap. Action, of course, comes in many forms. One could start or get involved with legal transparency and accountability projects.<sup>285</sup> One could lobby their congressman. Litigants can call out recusal-worthy conduct by filing recusal motions. The road to judicial reform is long and winding, especially with sensitive topics like recusal.

Last, we must recognize that we will never truly eliminate recusal issues. Judges are human after all, and threading the needle between the appearance of impartiality and the duty to sit doctrine is no easy task. That said, we must remain vigilant and committed to improving our federal judiciary, lest we find ourselves right back where we started. Recusal abuse, as a subset of judicial misconduct, is a serious problem and threat to our democracy. It does not have to be. And by turning a collective action problem into a collective solution, we can regain the public's confidence in our judicial system.

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285. See, e.g., LEGAL ACCOUNTABILITY PROJECT, <https://www.legalaccountabilityproject.org> [<https://perma.cc/9C6H-Z58U>] (“A better judiciary makes a better society.”); FIX THE COURT, <https://fixthecourt.com> [<https://perma.cc/KR2D-G4R2>].

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