



Statement for the Record of Michael Lissner Executive Director, Free Law Project

26 October 2021

House Committee on the Judiciary

“Judicial Ethics and Transparency: The
Limits of Existing Statutes and Rules”

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee:

Thank you for the opportunity to submit testimony on the important topic of judicial ethics and transparency.

I am writing as the executive director of Free Law Project, a 501(c)(3) non-profit organization in Oakland, California, that uses software, data, and advocacy to make the U.S. legal system more equitable, efficient, and accountable.

My testimony is divided into two sections. In the first, I discuss some experiences Free Law Project has had gathering data from the judicial branch and placing it online for the benefit of the public. I go into some depth about our work building the database of financial disclosure information that *The Wall Street Journal* used in its recent series on judicial conflicts.

In the second section, I make concrete recommendations to this Subcommittee that would fix the immediate problem of financial conflicts and ethical lapses in the judiciary, and make the branch more transparent so that it is more widely trusted and understood by the public.

Since our first days in 2010, Free Law Project has been focused on gathering legal information and placing it online for public access.

We host several archives of legal information, some of which are the largest of their kind. As an example, in 2014 we learned that federal circuit courts were only posting oral argument recordings on their websites for brief periods of time. We were told, and we observed, that recordings would be posted on court websites for a week or so, after which they would be removed as servers ran out of space.

To be frank, we found this appalling — in 2014, and still today, there is no good reason why recordings cannot be posted publicly and permanently. To address this, we began gathering oral argument audio from circuit court websites and posting it on our own. We still do this to this day, and we believe we now have the largest collection of oral argument recordings in the world.¹ The courts did a bad job; we fixed it.

A similar story unfolded in the creation of our financial disclosure database, which we officially launched a few weeks ago.² This database contains over 250,000 pages of judicial disclosure forms, covering over 1.5 million investment transactions by judges.³ It was this database that *The Wall Street Journal* used in its recent reporting,⁴ which, as the Subcommittee knows, demonstrated a groundbreaking revelation of ethical lapses in the judicial branch.

As with our database of oral arguments, we began the disclosure collection when we discovered that the reports were available, but that they were being systematically removed from public access. The availability is thanks to the Judicial Confer-

1 This collection can be accessed at <https://www.courtlistener.com/audio/>. At present, it has approximately 2.4 million minutes of oral argument recordings.

2 “Free Law Project Creates the First Online Database of Federal Judicial Financial Disclosures,” William Palin, 28 September 2021, <https://free.law/2021/09/28/announcing-federal-financial-disclosures/>.

3 This collection can be accessed at <https://www.courtlistener.com/financial-disclosures/>. Details of the information in the collection can be read at: <https://www.courtlistener.com/coverage/financial-disclosures/>.

4 See: “131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 28 Sept. 2021, <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421/>, “How the Journal Found Judges’ Violations of Law on Conflicts,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 28 Sept. 2021, <https://www.wsj.com/articles/how-the-journal-found-judges-violations-of-law-on-conflicts-11632833775/>, and “Federal Judges or Their Brokers Traded Stocks of Litigants During Cases,” Wall Street Journal, James V. Grimaldi, Coulter Jones, Joe Palazzalo, 15 October 2021, <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192/>.

ence itself, which, in 2017, created a new policy that allowed the disclosures to be released on "electronic storage devices...at no cost to the requestor."⁵ This is laudable, but the systematic removal of these records is due to §105(d) of the Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1824, which states that after a "six-year period [financial disclosure reports] shall be destroyed."⁶

Upon discovering the temporary availability of these records, we requested them all.

In 2017, we officially requested all the disclosures that were legally available. Since then, the judiciary's Financial Disclosure Office has delivered these disclosures to us on USB thumb drives. To date, we have received about 400 gigabytes of disclosure information covering 2011 to 2018. Despite timely requests, we still have not received information from 2019, 2020, or 2021. This is transparency delayed. It frustrates the purpose of the Ethics in Government Act. What might the public — and this subcommittee — have learned if those records were available now?

Until recently, each of the disclosures on these thumb drives came as a single, long image representing the many pages of a disclosure placed end-to-end like an ancient scroll.⁷ This made critical information like a judge's stock ownership or details of their financial transaction throughout the year very hard to read, not to mention completely inaccessible to the visually impaired.

To make sense of this, we dedicated significant resources to developing an open-source tool to convert the "scroll" files to PDFs and extract the information those PDFs contained.⁸ All of this extracted information formed the basis our new financial disclosure database.

As we worked on gathering these disclosures and making their contents available, we began seeking a media collaborator that could help analyze, understand, and explain what we had gathered. At *The Wall Street Journal*, we found the collaborators

5 "Report of the Proceedings of the Judicial Conference of the United States," United States Courts, 14 March 2017, https://www.uscourts.gov/sites/default/files/2017-03_0.pdf#page=12.

6 "Ethics in Government Act of 1978," 26 Oct. 1978, <https://www.govinfo.gov/content/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-app-ethicsing.pdf#page=15>.

7 The longest of these "scrolls" has 266 pages of disclosures: https://storage.courtlistener.com/us/federal/judicial/financial-disclosures/189/marvanne-trump-barry-disclosure.2011_1.pdf.

8 "Disclosure Extractor," Free Law Project, accessed 22 Oct. 2021, <https://github.com/freelawproject/disclosure-extractor>.

we needed. Using the data we had compiled, they were able to expose hundreds of ethical lapses in the judiciary.

Even *this* is surely a major undercount: The *Journals* work focused on district and appellate court judges, and excluded magistrate and bankruptcy judges; their work focused mainly on individual stock holdings, to the exclusion of the many other types of investments judges can hold; and their work was based on case captions (e.g., “Albatross v. Loon”), not full party lists, which would expose numerous other parties — and conflicts — in a case.⁹

The above explains the history of our database of financial disclosures, and how we came to collaborate with the *Journal*.

Unfortunately, these archaic practices and multi-year delays harm public confidence in the judiciary. As the saying goes, justice delayed is justice denied. The same is true for transparency. Today, we have no idea what new stories are hiding in the last three years of judicial financial disclosures.

Fortunately, it does not have to be this way. At this point in my testimony, I would like to shift gears and make a number of concrete recommendations based on our experience and these revelations.

Recommendations

1. **Ban all magistrate judges, bankruptcy judges, and Article III judges and justices from making or holding investments in individual stocks.**

Though politically difficult, *this* is the simple legislative fix. Instead of trying to hem in the ethical lapses exposed by the *Journal*, end them. The *Journal* makes clear that the judicial branch is unable to fix this problem technically. Meanwhile, judges repeatedly say they had no idea they were conflicted or that the conflicts were not material. It’s the clerk’s fault, or the conflict software; their spouse’s trust, or their investor’s action.

To the contrary, these lapses *do* matter, regardless of their size, why they exist, or how they came to be. They create both actual conflicts of interest

9 Please note that this last reason for the undercount is due to the PACER fee system, which requires journalists pay to access party lists. To properly analyze full party lists would cost hundreds of thousands of dollars in access fees. Once again, PACER fees have blocked transparency in the judicial branch.

and the appearance of conflicts of interest. Both attenuate trust in the impartiality of the judiciary.

The only way to eliminate this impropriety and to restore public trust is to simply end individual investments by judges and justices. With a lifetime appointment as an Article III judge, you do make sacrifices. Same if you are a magistrate judge appointed to a renewable eight-year term, or a bankruptcy judge appointed to a renewable 14-year term. This is a reasonable sacrifice to demand.

In the judiciary's own words, "A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."¹⁰

2. Rapidly place *all* judicial financial disclosures online.

Financial disclosure documents are currently completed by bankruptcy judges, magistrates, and Article III judges and justices. Unfortunately, getting timely access to these documents is currently not possible. As explained above, we are still waiting for disclosures from more than two years ago. This is too long to wait.

We are eternally grateful to the Financial Disclosure Office for its tireless work getting us these documents, but their process is far too complicated and their resources too few. The process must be simplified so that redactions can be made easily — or automatically — and so documents can be placed online routinely, without an organization like Free Law Project making an official request.

The best approach would be to transform this process from a paper-oriented one to a digital-first process. Other arms of the federal government, such as GSA's 18F, would be well suited to help with this work, and the Disclosure Office should be properly resourced so that it can do its part.

3. Make disclosures available in machine-readable formats.

Free Law Project spent tens of thousands of dollars writing software to make sense of the disclosure documents we received. For our organization, this has been a considerable expense.

¹⁰ *Guide to Judicial Policy*, Canon 2A, comment (Mar. 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

This expense is a key reason why conflict transparency has been elusive. The data should be available in spreadsheets or similar formats so that organizations like Free Law Project do not have to ever repeat this effort.

4. Nomination disclosures should be available from the Financial Disclosure Office before nomination hearings.

At present, judicial nominees must complete financial disclosure documents. These are essential transparency tools, but they are nearly impossible to obtain in advance of nomination hearings.

Like annual disclosures, these should be online for the public, in machine-readable format.

5. Repeal statutes requiring the destruction of financial disclosure reports.

To our knowledge, financial disclosure documents for sitting Supreme Court justices are not available in any location. As mentioned above, this is an unfortunate result of §105(d) of the Ethics in Government Act, which requires the destruction of disclosures older than six years.

Rapidly placing these documents online will make the destruction of them less problematic in the future, but there is no reason to keep the six-year destruction date on the books. The six-year time frame is a relic of a time when paper document storage had real costs. Digital record-keeping has no similar costs.

This section of the code should be removed.

6. Consider passing a public access law for the judiciary.

In researching these disclosures, we have been repeatedly stymied in our understanding by the absence of a FOIA-like public records law for the judicial branch. For example, there is a guide for completing financial disclosure forms, but it is unavailable to the public. We have asked for it but have been denied.

Although the common law right of access doctrine may make it theoretically possible to obtain such documents, in practice it lacks the timelines and bright-line rules that come with modern sunshine statutes. A proper public-access law is needed so that the judicial branch ceases to be the least transparent branch of our government.

We have researched this topic in some depth and have presented an analysis of our work to the FOIA Advisory Committee to the Archivist of the United States.

We invite members of this Subcommittee to review this work.¹¹

Subcommittee members, thank you for your time reading my remarks and recommendations. Like many of you, I have spent a considerable part of my life working to improve transparency, accountability, and trust in the judicial branch.

Through my efforts and those of others, Free Law Project has become a leading organization for gathering, preserving, and presenting legal information online. Although the work we do sometimes creates difficulty for the judicial branch, we firmly believe that our work enhances theirs.

Today, our work gathering financial disclosure information is bearing this out. Ethical lapses that have been under the covers for far too long have now been exposed. This subcommittee is taking action to fix the problem.

This work fortifies the judiciary and our democracy. Thank you.

I welcome any follow up questions or clarifications.



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Free Law Project

11 *“Our Presentation to the FOIA Advisory Committee on the Need for a Public Access Law for the Judicial Branch,”* Michael Lissner, Free Law Project, 4 March 2021, <https://free.law/2021/03/04/judicial-foia-presentation>.