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Invested in the Outcome: When the Judge Owns Stock in the Victim of the Crime

Andrew L. Wright

A federal judge owns one thousand shares of stock in a major metropolitan bank that are worth $10,000. Gun drawn, a masked man robs the bank, making off with the contents of its vault. After FBI agents catch the robber, the United States Attorney charges him with bank robbery. May the judge preside over the criminal case?

The federal judicial disqualification statute does not provide a clear answer. Instead, the law imposes on judges with this potential conflict of interest the duty to decide whether their "impartiality might reasonably be questioned." Does a judge's stock ownership in the victim of a crime make it reasonable to question the judge's impartiality?

Few federal courts have addressed this question. Those that have disagree over whether the general impartiality requirement of 28 USC § 455(a) prohibits such stock ownership. Moreover, those courts that have held that a judge's stock ownership may require disqualification disagree over the precise dollar value of

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2 28 USC § 455(a). Canon 3E of the Model Code mimics this language: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Model Code Canon 3.

3 Compare United States v Nobel, 696 F2d 231, 235-36 (3d Cir 1982) ("We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding because the strict overarching standard imposed by [28 USC §] 455(a) requires that the appearance of impartiality be maintained.") with United States v Sellers, 566 F2d 884, 888 (4th Cir 1977) (holding that judge's interest was too "remote" to merit disqualification despite dissent's view that the interest was "substantial").
stock necessary to give rise to a § 455(a) violation.  

This Comment argues that a judge's ownership of stock in a victim should require disqualification from the criminal trial in all instances. Even if the criminal trial will not affect the financial well-being of the company, the judge's partial ownership of the victim gives rise to the appearance of impropriety, if not actual bias. For example, a judge who owns stock in the victim may have a psychic interest as well as a financial one in the outcome of the case. To resolve the current ambiguity in the law and aid judges in making the recusal decision, the courts should adopt a rule of automatic disqualification. Such a rule would help ensure that criminal defendants receive fair trials and protect public confidence in the justice system while imposing only a minimal burden on the courts.

Part I of this Comment examines the ambiguous language of the judicial disqualification statute's impartiality requirement and the resulting split among the federal circuits over whether a stockowning judge must disqualify himself. Part II examines the

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4 Compare United States v Ravich, 421 F2d 1196, 1205 (2d Cir 1970) (deeming a stock interest of between $10,000 and $15,000 “not merely unsubstantial but nonexistent” under an earlier version of § 455), with Nobel, 696 F2d at 235–36, (discussing Ravich's holding and “conclud[ing] otherwise” on grounds that an interest of between $10,000 and $15,000 could lead to a reasonable apprehension of partiality).

5 This Comment uses the terms “disqualification” and “recusal” interchangeably. These terms once had distinct meanings — recusal meant withdrawal at the judge's discretion and disqualification meant exclusion by force of law — but that distinction no longer exists. See Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U Chi L Rev 236, 237 n 5 (1978), citing John P. Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 L & Contemp Prob 43, 45 (1970); see also Mark T. Coberly, Caesar's Wife Revisited — Judicial Disqualification After the 1974 Amendments, 34 Wash & Lee L Rev 1201, 1201 n 5 (1977). Today, “disqualification is mandated in virtually all cases where recusal is appropriate.” Comment, 46 U Chi L Rev at 237 n 5.

6 Commentators have previously argued the benefits of a rigid rule of automatic disqualification when the judge has a financial interest in a party. See, for example, Seth E. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case W L Rev 662, 699 (1985); Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv L Rev 736, 746–47 (1973). However, no one has yet advanced applying such a rule to a judge who owns stock in the victim of a crime and who is assigned to try the alleged criminal. One author, in fact, has argued against a per se rule for a judge's indirect financial interest. Id at 752–53 (deeming such a rule “inappropriate” on remoteness and administrability grounds).

This Comment addresses only the problem of stock ownership in the victim of a crime. It does not discuss the issue of stock ownership in a company whose stock price might be affected by the disposition of a trial to which another company is a party. See, for example, In re Placid Oil Co, 802 F2d 783, 786–87 (5th Cir 1986) (recusal not required where judge owned stock in company in same industry as party). It also does not address the problem of a judge who is a member of an extremely large class of consumers that might benefit from the disposition of the trial. See, for example, In re New Mexico Natural Gas Antitrust Litigation, 620 F2d 794, 796 (10th Cir 1980) (judge's financial interest as an energy consumer in lower energy rates not sufficient to require recusal).
problems posed by such stock ownership and advances five arguments for adopting a rule requiring a stock-owning judge to disqualify himself automatically.

I. THE CURRENT LEGAL CONFLICT: MUST A JUDGE WHO OWNS STOCK IN THE VICTIM OF THE CRIME DISQUALIFY HIMSELF?

A judge's ownership of stock in the victim might initially seem to fall under the province of the financial interest provision of the disqualification statute. This provision requires a judge to recuse himself when he knows that he, or a family member, has a financial interest in a party or subject before him.\(^7\) However, the courts have recognized that an interest in the crime victim is neither an interest in a party nor an interest in the subject matter of the case.\(^8\)

Even if the party and subject matter disqualification provisions do not apply, two other provisions do. First, courts still must abide by the general disqualification provision of § 455(a). This provision holds that: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."\(^9\) Second, 28 USC § 455(b)(4) requires a judge to disqualify himself if he possesses any interest that could be "substantially affected by the outcome of the proceeding." Neither of these two provisions specifically addresses the stock ownership problem considered here, and the federal circuits have disagreed over whether either or both require disqualification in such a situation.\(^10\)

The Fourth Circuit has most openly embraced the position that stock ownership in the victim does not require judicial disqualification. In *United States v Sellers*, a bank robbery case, the court held that the trial judge did not abuse his discretion by...
refusing to disqualify himself despite the fact that he and his family owned stock in the victim bank.\textsuperscript{12} Even the fact that the judge's brother served as chairman of the bank's board of directors and its holding company\textsuperscript{13} did not require recusal.\textsuperscript{14} Rather, in a ruling that commentators have criticized,\textsuperscript{15} the Fourth Circuit held that the judge’s interest was too “remote.”\textsuperscript{16}

The Sellers ruling followed two opinions in the early 1970s from the Second and Fifth Circuits, which held that a judge who owns a “small” amount of stock in a corporation victimized by a crime need not recuse himself.\textsuperscript{17} In United States v Ravich,\textsuperscript{18} the judge in a bank robbery trial disclosed that he owned 325 shares of stock in the bank, worth between $10,000 and $15,000.\textsuperscript{19} On appeal, the Second Circuit held that the trial judge did not abuse his discretion by declining to disqualify himself “considering [that] the amount [of stock] was so small.”\textsuperscript{20}

On similar facts, the Fifth Circuit in United States v Harris\textsuperscript{21}

\textsuperscript{12} Id at 885–87.

\textsuperscript{13} There is arguably no meaningful distinction between a holding company which owns all of the bank's stock and the bank itself. Id at 888 n 6 (Butzner concurring in part and dissenting in part).

\textsuperscript{14} Id at 887.

\textsuperscript{15} See, for example, Donald R. Fretz, Rodney A. Peeples and Thomas C. Wicker, Ethics for Judges 27 (National Judicial College of the ABA 1982) (advising judges to disqualify themselves in Sellers-like situations).

\textsuperscript{16} 566 F2d at 887. The court explained that because the trial judge owned “less than 1/25th of 1%” of the bank's stock, “any interest the judge might possibly have in the case is so remote as to be for all practical purposes non-existent.” Id. The Seventh Circuit, quoting Sellers, has noted with approval this size-of-the-interest based analysis. United States v Lampe, 1996 US App LEXIS 26177, *10–11 (7th Cir) (observing that judge's stock ownership in bank allegedly robbed by defendant was “peripheral and inconsequential,” but not reaching merits of issue because improperly preserved for appeal).

\textsuperscript{17} United States v Ravich, 421 F2d 1196 (2d Cir 1970), and United States v Harris, 458 F2d 670 (5th Cir 1972), were decided before the redrafting of 28 USC § 455 in 1974. The pre-1974 version of the statute provided:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 USC § 455 (1970), amended by Pub L No 93-512, 88 Stat 1609 (1974). At least one court thought that this earlier version of § 455 allowed a judge greater leeway than the current version when deciding whether to recuse himself. See Nobel, 696 F2d at 235. The redrafting has not affected how courts analyze this problem: Sellers, decided under the modern version of the statute, cited Ravich with approval. Sellers, 566 F2d at 887.

\textsuperscript{18} 421 F2d 1196 (2d Cir 1970).

\textsuperscript{19} Id at 1205.

\textsuperscript{20} Id at 1205–06. The judge's holdings represented .0072% of the bank's 5,391,527 shares. Id at 1205.

\textsuperscript{21} 458 F2d 670 (5th Cir 1972).
followed the Ravich court's approach and looked to the size of the judge's interest. The Harris court also came to the same ultimate conclusion, observing that:

[T]he fact that the trial judge owned a small amount of stock in the holding company that had some control over the group of banks of which the burglarized bank was a member, a fact which the trial judge disclosed at trial, does not, in our opinion, render him personally biased.

Both Harris and Ravich rest on the rationale that the judge did not hold a financial interest of sufficient size to merit disqualification, but neither court said how much stock would necessitate disqualification. Moreover, neither court considered the argument that even a small, indirect financial interest in the outcome might reasonably invite questions about the judge's impartiality.

The Third Circuit has rejected the reasoning of Sellers and its predecessors. In United States v Nobel, the court held that a judge who owns "a substantial interest" in the victim of a crime must disqualify himself. Like the judge in Ravich, the trial judge had owned stock in the victim worth between $10,000 and $15,000. However, the Nobel opinion emphasized that a judge must maintain "the appearance of impartiality," and explained that stock ownership in the victim undermines this goal. On this basis, the Nobel court rejected Ravich and held that "a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding." The court based this ruling on the importance of main-

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22 Id at 678.
23 Id.
24 696 F2d 231 (3d Cir 1982).
25 Id at 235–36. Section 455 prohibits a judge from possessing an "interest that could be substantially affected," but is silent as to whether a judge may possess a substantial interest. 28 USC § 455(b)(4) (1994). The court's consideration of whether a "substantial interest" existed is thus incorrect. See Virginia Electric & Power Co v Sun Shipbuilding & Dry Dock Co, 407 F Supp 324, 330 (E D Va 1976) (noting "the drastic literal difference between a 'substantial interest' and 'any . . . interest that could be substantially affected'"). The Nobel court's use of the term "substantial interest" probably stems from the language of the pre-1974 version of 28 USC § 455. See note 17. The Nobel court's analysis is surprising, however, since Nobel was decided in 1982, almost a decade after the redrafting. One could perhaps attribute use of the term to reliance on the pre-1974 treatments of this issue which employed a substantiality test.
26 696 F2d at 235–36 & n 8.
27 Id at 235.
28 Id at 235–36.
taining public confidence in the judiciary:

[O]ne of the principal functions of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impersonality of judicial decisionmaking. We adopt the view that . . . the strict overarching standard imposed by [28 USC §] 455(a) requires that the appearance of impartiality be maintained.\textsuperscript{29}

The Fifth Circuit has also embraced a version of the Third Circuit's argument favoring disqualification. The court addressed the issue in First National Bank of Louisville v Lustig,\textsuperscript{30} a case involving insurance fraud committed by a former employee of a bank.\textsuperscript{31} Sureties of the bank argued that the court should set aside the former employee's guilty plea because the judge who accepted the defendant's plea owned between $100,000 and $200,000 of stock in the bank.\textsuperscript{32} In its ruling, the court "express[ed its] dismay at [the judge's] failure to automatically recuse himself from [the] criminal case in light of his substantial interest in" the bank.\textsuperscript{33} The Fifth Circuit, albeit in dicta, suggested that § 455 "clearly disqualified" the judge from hearing the criminal case.\textsuperscript{34}

The Ninth Circuit addressed this division among the federal courts in United States v Rogers.\textsuperscript{35} Kent Rogers pled guilty to defrauding the Bank of America, and the court sentenced him to eight years in prison and ordered him to repay $70.7 million to the bank.\textsuperscript{36} Rogers appealed his sentence and, on remand, the same judge who had originally sentenced Rogers eliminated the restitution order.\textsuperscript{37} The judge had, between the time Rogers re-

\textsuperscript{29} Id at 235–36 (citation omitted). The Third Circuit, however, did not reverse the defendant's conviction. Id at 238. It held that the parties had waived their right to object to the judge's financial interest under 28 USC § 455(e) because after the judge had disclosed his financial position, counsel neither requested further information nor objected at any time during the five-day trial. Id at 236. See also Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 24.9.2 at 715–716 (Little, Brown 1996).
\textsuperscript{30} 96 F3d 1554 (5th Cir 1996).
\textsuperscript{31} Id at 1559.
\textsuperscript{32} Id at 1561 & n 5. The judge offered to recuse himself but both parties declined. Id at 1561.
\textsuperscript{33} Id at 1574.
\textsuperscript{34} 96 F3d at 1561 n 6.
\textsuperscript{35} 119 F3d 1377, 1383 (9th Cir 1997).
\textsuperscript{36} Id at 1379.
\textsuperscript{37} Id.
ceived his first and second sentences, inadvertently acquired a financial interest in Bank of America. The Ninth Circuit, in its review of the case, held that the judge’s stock ownership at the time of the second sentencing was a “limited financial interest” that did “not appear to raise a reasonable question of impartiality.” Noting that the judge’s resentencing did not include a restitution order, the court reasoned that “the resentencing of Rogers could not have had any possible financial impact on the Bank of America.” Thus, the court concluded no reasonable person “would objectively conclude that the judge’s impartiality might reasonably be questioned.”

Thus, the federal circuit courts which have addressed the issue of a judge’s ownership of stock in the victim of a crime have failed to adopt a consistent approach. Several circuits permit a judge to try a case in which he owns even a substantial amount of stock in the victim of a crime. Two circuits do not allow a judge to own a “substantial” amount of stock in the victim, but neither has explained what “substantial” means. This confusion indicates the need for adopting a clear rule to address the problem presented by a judge’s stock ownership.

II. AUTOMATIC DISQUALIFICATION FOR JUDGES WHO OWN STOCK IN THE VICTIM OF A CRIME

There are several compelling reasons for requiring automatic disqualification of a judge from a criminal trial when the judge owns stock in the victim of the crime. First, a judge’s stock ownership creates a conflict of interest in violation of § 455(b)(4): the judge can benefit financially from his own rulings because of their effects on the corporation’s revenues, which in turn may influence the value of the corporation’s stock. Additionally, a judge’s stock ownership might influence his decisionmaking because of psychic, rather than financial, interests such as loyalty to the company. The drafters of the disqualification statute intended to eliminate such conflicts of interest. Second, even if no actual bias exists, the conflict of interest present when the judge owns stock in the victim gives rise to the appearance of impropriety in violation of §

38 Id at 1379. As a result of a merger between two banks, the judge acquired stock in Bank of America. Id. In addition, Bank of America took over a lease on some of the judge’s property during the merger. Id. The Ninth Circuit did not disclose the value of the judge’s stock and property. Id at 1379–80.
39 119 F3d at 1384.
40 Id.
41 Id.
455(a). The appearance of impropriety contradicts the legislative intent of the disqualification statute by undermining public faith in the integrity of the justice system. Third, a trial before a judge with a financial or other interest in the outcome may compromise a defendant’s constitutional right to a fair trial. Fourth, empirical evidence indicates that judges often do not know when to recuse themselves and would prefer a bright line rule. Finally, establishing a bright line rule requiring automatic disqualification would impose minimal cost. These considerations, taken together, indicate that a rule mandating automatic disqualification would be preferable to the current discretionary standard.

A. Conflict of Interest

28 USC § 455(b)(4) requires a judge to disqualify himself if he possesses any interest, not just a financial one, that could be "substantially affected by the outcome of the proceeding." According to this provision, a judge may possess a "substantial interest" in the company victimized by a crime and still preside at the criminal trial, so long as that interest cannot be "substantially affected." Thus, the size-of-the-interest test employed by some federal courts lacks statutory foundation. These courts incorrectly focused on how much stock a particular judge owned rather than whether any financial interest of the judge’s, however small, could be "substantially affected by the outcome of the proceeding.

A judge can reap financial benefit, to consider just one kind of prohibited interest, when presiding over the trial of a person accused of victimizing a corporation in which the judge owns stock. For example, a judge who owns stock in a bank which is robbed might realize a substantial financial benefit by ordering restitution or meting out particularly harsh sentences that send a message to others contemplating similar crimes against the bank. Yet the federal courts have occasionally ignored this pos-

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43 For the difference between a “substantial interest” and an interest that is “substantially affected,” see note 25.
44 See, for example, United States v Sellers, 566 F2d 884, 887 (4th Cir 1977).
45 See note 25.
47 While potential criminals may not necessarily be deterred by the prospect of winding up in any one judge’s courtroom, news of harsh sentences for a particular type of crime
sibility of judicial self-dealing, especially when the amount of stock owned was small. These courts have turned a blind eye to the fact that a stock-owning judge is literally invested in the outcome.

While all judges — and indeed all members of the general public who have bank accounts — might have an interest in seeing bank robbers convicted, a "person who has substantial holdings in a bank that is the victim of a robbery has an interest that is different from the general public in seeing the criminal convicted." The judge may be seeking to effect deterrence for "his" company. Like surveillance cameras or a security-company logo conspicuously displayed on a company's place of business, a history of severe penalties for those caught victimizing a corporation can deter future crimes. As a result, corporate money that would otherwise be spent on deterrence and losses from crimes could be fed back into the corporation's treasury, thereby raising its stock price.

Even if a judge cannot benefit financially from his stock ownership in the victim, bias may remain. The judge may possess another type of prohibited interest in the disposition of the case beyond the mere fiscal. For example, a judge's sense of loyalty to the company in which he owns stock may influence him to punish more severely those who harm the company. Such feel-

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48 The judge may be seeking to effect deterrence for "his" company. See, for example, Sellers, 566 F2d at 888.
49 Id at 884, 888.
50 Id.
51 Hence the existence of signs warning "Shoplifters Prosecuted to the Full Extent of the Law."
52 Commentators have been slow to recognize that a judge's bias against a criminal defendant can take forms beyond a desire to reap financial benefit. For example, one commentator analyzed the Nobel court's decision not to require disqualification strictly in the context of possible financial benefit. Leslie W. Abramson, Specifying Grounds for Judicial Disqualification in Federal Courts, 72 Neb L Rev 1046, 1073 n 96 (1993) ("Without a connection to the judge's financial interest, the case did not draw his interest into the subject matter of the controversy.").
54 Revenge may stem from an emotional desire for vengeance or from a rational calculus of the benefits realized from future deterrence. In the case of the former, acts of revenge subordinate rational cost calculations, while in the latter, acts of revenge reflect a systematic approach to deterring future aggression. See Richard A. Posner, Law and Literature 27-33 (Harvard 1988) (discussing the rational and emotional strains of the
ings can infect a judge's decisionmaking in spite of the judge's best efforts to maintain impartiality.\textsuperscript{55}

A biased judge has many opportunities to harm a defendant during a criminal trial. While sentencing provides perhaps the most troubling example of such an opportunity, bias can also infect discretionary rulings, such as those on the admissibility of evidence, to which an appellate court would accord deference on appeal. Alternatively, a judge attempting to avoid even the appearance of impropriety might overcompensate and be too lenient toward the defendant.\textsuperscript{56}

Congress intended 28 USC § 455 to reflect zero tolerance for financial interests, "however small."\textsuperscript{57} Congress explained that this policy would avoid "uncertainty and ambiguity about what is a "substantial" interest."\textsuperscript{58} Congress's discussion of the irrelevance of the size of the financial interest exposes as erroneous the size-based rationale embraced by the Sellers, Ravich, Harris and Rogers courts as justification for not requiring disqualification.\textsuperscript{59}

That the judge who owns stock in the victim technically does not possess an interest in a party or in the subject matter in controversy does not imply that the judge should succeed in avoiding disqualification. The disqualification statute explicitly recognizes that a judge can have a financial interest in a case "other" than those defined narrowly as "in a party to the proceeding" or in "the subject matter in controversy, yet the courts have virtually ignored this provision.\textsuperscript{60}

Finally, 28 USC § 455 itself reflects a preference for recusal even when a judge's financial interest is minimal. For example,
28 USC § 455(b)(4) requires the disqualification of a judge when he or a family member has even the slightest financial interest in a party. Thus, the statute reflects a preference for accepting the occasional unnecessary disqualification as the price for a clear rule ensuring strict avoidance of even the possibility of partiality. To vindicate this Congressional policy, financial interests rooted in a judge’s ownership of stock in a crime victim should receive the same treatment. Automatic disqualification of a judge who owns stock in a victim would serve this goal.

B. Appearance of Impropriety

Even if § 455(b)(4) does not require disqualification of a judge who owns stock in the victim of a crime, the judge’s interest may still violate the general impartiality requirement of § 455(a). This is true even if the judge does not harbor any actual bias against the defendant. The judge, by virtue of his partial ownership of the victim, has a different relationship with the defendant than do other members of the non-stock-owning general public.

The judge’s stock ownership is thus problematic because it creates the appearance of impropriety.

Section 455(a) requires that a judge whose “impartiality

61 “Financial interest’ means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.” 28 USC § 455(d)(4). See In re New Mexico Natural Gas Antitrust Litigation, 620 F2d 794, 796 (10th Cir 1980) (requiring recusal “if the judge owned even one share of stock in a party to the litigation”).


Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood.

63 See generally Flamm, Judicial Disqualification § 7.4.2 at 212–13 & n 38 (cited in note 29).

64 As the dissent in Sellers explained, “any person who has substantial holdings in a bank that is the victim of a robbery has an interest that is different from the general public in seeing the criminal convicted.” 566 F2d 884, 888 (4th Cir 1977) (Butzner dissenting).

65 As early as 1909, American courts recognized that “there should not be the basis of a suspicion that [the judge] is biased against the defendant in a criminal case.” Anderson v Commonwealth, 117 SW 364, 369 (Ky 1909) (holding that judge who owned stock in a bank that was a creditor of another failed bank could not try the criminal case of the person charged with bringing about the debtor-bank’s failure).
might reasonably be questioned" disqualify himself from the case.\textsuperscript{65} The legislative history reveals that the disqualification statute merely requires that the defendant provide an objectively "reasonable factual basis for doubting the judge's impartiality."\textsuperscript{66} A defendant need only show the appearance of partiality to fulfill the objectively reasonable factual basis requirement of § 455(a) — actual bias is not required.\textsuperscript{67} For example, in \textit{United States v Lovaglia},\textsuperscript{68} the court held that the proper disqualification inquiry is whether a reasonable person, knowing all the facts, would "conclude that the trial judge's impartiality could reasonably be questioned."

Because a stock-owning judge possesses a special interest in the outcome of a case, that "judge's impartiality might reasonably be questioned."\textsuperscript{70} The Fourth Circuit has recognized that "[a] monetary or financial interest is by its very nature such an interest that may generate doubt as to a judge's impartiality.\textsuperscript{2} At the very least, the stock-ownership situation presents a borderline case, and in such a questionable case, "a judge should exercise his discretion in favor of disqualification."\textsuperscript{72}

\textsuperscript{65} 28 USC § 455(a) (1994). The ABA Code of Judicial Conduct has embraced a similar inquiry. See \textit{Model Code Commentary to Canon 3(E)(1)} (cited in note 1) ("A judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules . . . apply.").

\textsuperscript{66} HR Rep No 93-1453 at 6, reprinted in 1974 USCCAN 6351, 6354–55.

\textsuperscript{67} \textit{Hal v Small Business Administration}, 695 F2d 175, 178–79 (5th Cir 1983) (holding that the test for disqualification under § 455(a) is whether the appearance of partiality, not actual bias, exists). See also \textit{United States v Nobel}, 696 F2d 231, 235 (3d Cir 1982) (bias-in-fact not required); \textit{United States v Balistrieri}, 779 F2d 1191, 1204 (7th Cir 1985) (same); \textit{Maldonado Santiago v Velazquez Garcia}, 821 F2d 822, 832–33 (1st Cir 1987) (case reassigned on remand to "preserve appearance of fairness"); \textit{Phillips v Joint Legislative Committee}, 637 F2d 1014, 1032 (5th Cir Unit A 1981) (holding that further proceedings should be heard by a different judge to maintain "the complete appearance of impartiality"); \textit{Duke v Pfizer, Inc}, 688 F Supp 1031, 1035–36 (E D Mich 1987) (explaining that public's confidence in the justice system "rests on a judge's scrupulous dedication to maintaining the appearance, as well as the fact, of impartiality."). The Ninth Circuit has disagreed, however, and required a showing of bias-in-fact. See, for example, \textit{United States v Sibla}, 624 F2d 864, 867–69 (9th Cir 1980). Additionally, the Seventh and Eleventh Circuits distinguish between recusal motions based on the appearance of impropriety and those based on actual bias. See \textit{United States v Murphy}, 768 F2d 1518, 1535–41 (7th Cir 1985); \textit{United States v Slay}, 714 F2d 1093, 1094–95 (11th Cir 1983) (per curiam).

\textsuperscript{68} Id at 815.

\textsuperscript{69} 954 F2d 811 (2d Cir 1992).


\textsuperscript{71} \textit{In re Virginia Electric & Power Co}, 539 F2d 357, 368 (4th Cir 1976).

\textsuperscript{72} \textit{Matter of Searches Conducted on March 5, 1980}, 497 F Supp 1283, 1290 (E D Wis 1980), citing \textit{Potashnick v Port City Construction Co}, 609 F2d 1101, 1112 (5th Cir 1980) (holding that § 455(a) "clearly mandates that it would be preferable for a judge to err on
When Congress redrafted § 455 in 1974, one of its primary goals was to improve public opinion about the impartiality of judges. The statute was intended "to promote confidence in the judiciary by avoiding even the appearance of impropriety" that small financial interests might create. The importance of public confidence in judicial propriety commands that judges who own stock in a crime victim recuse themselves.

The viability of the judicial system depends on the public’s perception of the impartiality of judges. Judges themselves acknowledge that public perception is as important to the maintenance of the justice system as how judges actually act. Skepticism regarding judicial impartiality undermines public confidence in — and ultimately reliance upon — the justice system. It is, therefore, important to ensure that judges appear to be, and are in fact, impartial.

The proper inquiry in determining whether a judge should recuse himself, therefore, is whether “it reasonably appears to the public that the judge can preside impartially.” A bright-line rule requiring disqualification would bolster public confidence in the judiciary by eliminating the appearance of partiality. Allowing the side of caution and disqualify himself in a questionable case.”}

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75 Liljeberg v Health Services Acquisition Corp, 486 US 847, 865 (1988). See also HR Rep No 93-1453 at 6, reprinted in 1974 USCCAN 6351, 6355.

76 See In re Yengo, 371 A2d 41, 46 (NJ 1977) (observing the importance of a judge’s “reputation” for impartiality within his “community” as a precondition for public confidence in the judiciary).

77 On “the need for a judicial system that not only is impartial in fact, but also appears to render disinterested justice,” see Comment, 46 U Chi L Rev at 267 (cited in note 5).

78 See In re Del Rio, 256 NW 2d 727, 748 (Mich 1977) (“Impartiality, although a difficult goal to achieve with perfection, must be relentlessly pursued in order to insure the rendering of fair, just determinations and to enhance public confidence in the judiciary.”). See also Comment, 24 Seton Hall L Rev at 2057 (“It has long been recognized that the success of the judiciary depends, fundamentally, on public confidence in the judicial system.”).


80 On the importance of impartial judges to the integrity of the justice system, see Liljeberg, 486 US at 862–64, 874 (discussing how failure to disqualify a judge when appropriate risks undermining the public’s confidence in the judicial process).
even the appearance of impropriety to remain "casts disrepute upon the judiciary".\(^{85}\)

When interpreting the judicial disqualification statute, courts should acknowledge the conflict of interest and the appearance of impropriety which stock ownership presents.\(^{86}\) In the words of Justice Frankfurter, "the administration of justice should reasonably appear to be disinterested as well as be so in fact."\(^{87}\) Achieving the goal of removing all actual and apparent conflicts due to stock ownership requires automatic disqualification of judges who own stock in the victim of a crime.

C. Defendant's Rights

The Due Process Clause of the Fifth Amendment prohibits deprivation of "life, liberty or property without due process of law."\(^{88}\) The Supreme Court has held that this constitutional guarantee requires that judges not harbor bias toward a criminal defendant.\(^{89}\) A judge's ownership of even a small financial interest may give rise to such bias, compromising the defendant's right to a fair trial.\(^{90}\)

By allowing a judge to preside over the trial of a defendant accused of victimizing a corporation in which the judge owns stock, the current disqualification law abridges the defendant's right to a trial before an impartial judge. When redrafting § 455, Congress itself expressed concern over the possibility that a judge's financial interest might infringe a defendant's due process rights.\(^{91}\)

81 Shaman, et al, Judicial Conduct and Ethics § 4.01 at 96 (cited in note 42).
83 Public Utilities Commission of the District of Columbia v Pollak, 343 US 451, 467 (1952). Justice Frankfurter disqualified himself from a case involving a streetcar company's broadcast of radio programs in its streetcars because his emotions were "so strongly engaged as a victim of the practice in controversy." Id.
84 US Const Amend V.
85 Wong Yang Sung v McGrath, 339 US 33, 50 (1950) (holding that the Fifth Amendment requires that hearings must be fair and held "before a tribunal which meets at least currently prevailing standards of impartiality"). On the appearance of impropriety as inconsistent with a defendant's due process rights, see Aetna Life Insurance Co v Lassie, 475 US 813, 825 (1986), quoting In re Murchison, 349 US 133, 136 (1955) ("[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice'.")
86 Tumey v Ohio, 273 US 510, 522-24 (1927) (holding that defendant was denied due process where a town mayor tried a case under a statute which provided that the mayor's salary was determined by the fines he assessed).
INVESTED IN THE OUTCOME

rights. The House Report observed that "a judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process."87

To make matters worse, certain practical problems make it difficult for a defendant to challenge the presiding judge. First, a defendant who asserts a Fifth Amendment claim in light of a judge’s stock ownership, ironically, may only further prejudice his own case. By questioning the judge’s ability to render an impartial verdict, the defendant might bias an initially impartial judge against him.88 Second, a defendant may lack the information necessary to assert a proper claim for disqualification. For example, a defendant reasonably might want to know how long a judge who refuses to recuse himself has owned the stock in question, what percentage of the judge’s entire investment portfolio the stock constituted, or why the judge invested in that company in the first place. Yet a defendant is not entitled to this information.89 The judge is neither subject to any voir dire procedure nor permitted to testify in court.90 A rule of automatic disqualification for stock-owning judges would solve this evidentiary problem and eliminate any possibility that a defendant’s due process right could be violated by a judge’s stockownership.

D. Benefits of a Bright Line Rule

Only a handful of federal cases address the problem of the stock-owning judge.91 One might argue that the dearth of caselaw

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87 Id.
88 Most judges, thinking themselves capable of objectively evaluating a case, react poorly when someone questions their impartiality. Bernard L. Shientag, The Personality of the Judge, in Donald K. Carroll, ed, Handbook for Judges 67 (American Judicature Society 1961). Moreover, a lawyer may hesitate to challenge a lifetime-tenured federal judge before whom he is likely to appear again because he may fear the judge will dislike him. See also David C. Hjelmfelt, Statutory Disqualification of Federal Judges, 30 U Kan L Rev 255, 256 (1982) (“[B]oth lawyers and clients recognize the potentially disastrous effects on their case of unsuccessfully seeking to disqualify a judge.”).
89 This situation “calls on the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias.” John Leubsdorf, Theories of Judging and Judge Disqualification, 62 NYU L Rev 237, 242 (1987). Annual financial disclosure statements which federal judges must file may, however, provide defendants with a relatively up-to-date picture of the judge’s finances. See ABA Code of Judicial Conduct Canon 4H(2) (requiring a judge to report his annual compensation).
90 See Leubsdorf, 62 NYU L Rev at 242 & n 23, citing FRE 605 (judge may not testify at trial).
91 See Part I. There is significantly more caselaw concerning the requirement that a judge in a civil trial who owns stock in a party disqualify himself under § 455(b)(4). “A judge who owns a single share of stock in a large corporation may not hear a suit for a few hundred dollars against it. . . .” Leubsdorf, 62 NYU L Rev at 238. In civil cases, the judge usually owns stock in one of the corporate parties, and thus is disqualified under §
indicates that most judges diligently recuse themselves from criminal trials when they own stock in crime victims, rendering any additional rule unnecessary. A recent survey of judges, however, suggests the opposite: "judges need more guidance as to when they should recuse themselves from proceedings in which their impartiality might reasonably be questioned." Forty-eight percent of the judges surveyed favored disqualification when a judge has a direct or indirect financial interest in the outcome of a case, while only sixteen percent of judges opposed disqualification.

The current ambiguity in the disqualification statute has created difficult line-drawing problems. How much stock in the victim is too much? What level of financial interest in the victim, to quote the language of 28 USC § 455(a), "might reasonably" lead one to question the judge's "impartiality?" The Fifth Circuit's interpretation of § 455 indicates that a judge's ownership of $100,000 in stock requires disqualification. Ravich offers a reading of the statute that suggests a judge's financial stake in the victim of a crime must exceed $15,000 to merit his disqualification. Nobel deemed $10,000 sufficient to justify recusal. Even a very small interest arguably could raise the specter of partiality.

A per se rule requiring disqualification in such a case would be preferable to the current procedure which relies on the discretion of the potentially biased judge. A rule requiring disqualification would remove the question from the judge. It would relieve the judge from having to make a potentially difficult decision about a situation in which he is personally involved. While a judge understandably may feel a duty to hear the cases to which he is assigned, Congress expressly rejected the "duty to sit" ra-


93 Id at 70. The remaining 36 percent were labeled "ambivalent." Id.
94 First National Bank of Louisville v Lustig, 36 F3d 1554, 1561, nn 5, 6 (5th Cir 1996).

97 See In re Virginia Electric & Power Co., 539 F2d 357, 368 (4th Cir 1976) ("What is a small sum to one person may not be to another.").
tionale for a judge's refusal to disqualify himself from a case in which he has a conflict of interest. A bright line rule requiring disqualification in these circumstances would comport with the statute and would rid the justice system of the burden of making these nettlesome judgment-calls.

The administrative costs to the judicial system of an automatic disqualification rule would be minimal. Because the particular type of stock ownership that is the subject of this Comment occurs rarely, a bright line rule would require few disqualifications. This rule would thus pose a minimal reassignment burden and would not significantly slow the efficient administration of justice. The strengthening of the justice system that would result more than justifies this small reassignment burden — a "burden" that might be less significant than the cost of appellate litigation resulting from the current ambiguous regime.

One criticism of requiring disqualification is that criminal trials are typically fact-intensive, presenting clear-cut legal issues. According to this argument, the threat of favoritism is minimal because of the transparency of any bias. Obvious bias would impugn both the judge's credibility and make the errone-

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60 Under the automatic disqualification rule proposed here, if a judge does not discover that he owns stock in the victim of the crime until he has already presided over a significant portion of a criminal trial, he should immediately divest himself of the stock, but need not withdraw from the case. Although the rule would still eliminate any potential conflict of interest, this modification would reduce the burden of retrials on a justice system already overburdened by crowded docket. This is similar to the approach that judges who learn of disqualifying interests in civil cases take. See Kidder, Peabody & Co, Inc v Maxus Energy Corp, 925 F2d 556, 561 (2d Cir 1991) (holding that the judge did not have to disqualify himself even though he and his wife owned stock in a party because the judge sold the stock as soon as he learned of the corporation's interest in the case). See also NEC Corp v Intel Corp, 654 F Supp 1256, 1257–58 (N D Cal 1987) (holding that disqualification of the judge on the grounds that he owned a financial interest in a party applied only to the rulings made after he learned of the disqualifying interest).

61 This Comment does not call for a more liberal use of disqualification in general but rather discusses a narrowly-defined, discrete situation in which disqualification is appropriate. On the forum-shopping problems created by over-use of disqualification see Justice Rehnquist's explanatory memorandum concerning his decision not to disqualify himself in Laird v Tatum, 408 US 1 (1971), reprinted at 409 US 824 (1972).

62 On this concern, see Virginia Electric & Power Co, 539 F2d at 363.

63 See generally Hoekema, 60 Temp L Q at 726–35 (cited in note 74) (observing the strengthening of the justice system which results from an impartial judiciary).
ous rulings ripe for reversal on appeal. However, this criticism does not consider that some criminal trials are factually and legally complex, especially when the alleged crime is a sophisticated financial offense. Moreover, it seems wiser to prevent a conflict that could produce bias than to wait for the favoritism to manifest itself and rely on the appellate courts to undo any injustice after the fact.

CONCLUSION

The conflict presented when a judge owns stock in the victim of a crime is an unusual but important one. Current disqualification law does not specifically require recusal in this situation. This is not entirely surprising. Judges live in the real world and engage in all kinds of activities, including certain financial investments, which the drafters of the disqualification regulations may not have contemplated. The absence of a specific provision addressing the problem of judicial stockownership in the victim of the crime does not, however, indicate that the threat to the judiciary posed by this problem is minimal. Rather, the absence of a specific ban is likely attributable to the rarity rather than the severity of the problem.

Allowing a judge who owns stock in the victim of a crime to preside over the criminal trial poses several threats to the justice system. The judge may in fact harbor bias for or against the criminal defendant as a result of the judge’s financial position. Even if the judge does not harbor bias, the appearance of impropriety created by the conflict undermines public confidence in the judiciary. Either of these results abridges the rights of a criminal defendant. Moreover, judges themselves acknowledge that they are unsure if disqualification is appropriate in this situation. Finally, determining what amount of stock is sufficient to require disqualification entails arbitrary boundaries.

By contrast, the sole drawback of a bright line rule requiring automatic disqualification when a judge owns stock in the victim of a crime is the potential small increase in the number of cases reassigned. Because the stock ownership problem discussed in this Comment occurs infrequently, the cost of establishing a bright line rule would be minimal. A minor administrative inconvenience is a small price for a rule which would rid the justice

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system of conflicts of interest which currently undermine both the legitimacy and fairness of the criminal justice system.