United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001

Laurence H. Silberman
United States Senior Circuit Judge

February 17, 2022

**Judicial Misconduct Complaint**

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of the General Counsel
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Members of the Judicial Conference Committee on Judicial Conduct and Disability:

I hereby appeal the Judicial Council of the District of Columbia Circuit's February 14, 2022 affirmance of Chief Judge Srinivasan's dismissal of my misconduct complaint—that disposition was based on a Committee on Codes of Conduct opinion that found it ethical for a sitting Article III judge to serve on the D.C. Judicial Nomination Commission. (No. DC-21-90051).

That opinion is incorrect and inconsistent with the Committee on Codes of Conduct's own prior opinions. My contention that judicial ethics cannot be overridden by Congress through statute without running afoul of the separation of powers is particularly timely, given the Chief Justice's recent comments ("The Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."). (John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary* 1 (Dec. 31, 2021)).

I incorporate by reference my appeal to the Judicial Council, and previous letters to the Committee on Codes of Conduct and the Judicial Conference attached to this appeal.

The root of the matter is the unique statutory scheme that shapes how judges are appointed to the D.C. Superior Court and the D.C. Court of Appeals. *See* District of Columbia Home Rule Act §§ 433–434, Pub. L. No. 93-198, 87 Stat. 774, 795–98 (1973) (codified as amended at D.C. Code §§ 1-204.33–.34).

Similar to federal judgeships, vacancies for judgeships on the D.C. courts are filled by Presidential nomination and Senate confirmation. But under the existing statutory scheme,

unlike with ordinary Article III judges, the President does not have carte blanche to nominate who he or she wishes. Rather, the President must select from a list of three candidates, generated by the Judicial Nomination Commission. D.C. Code §§ 1-204.34(d)(1); 1-204.33(a). What's more, if the President fails to select an individual off of this short list, the Commission may itself nominate and, with advice and consent of the Senate, appoint a candidate. § 1-204.34(d)(1).

It is the composition of the Judicial Nomination Commission that in my view creates a serious judicial ethics issue. By statute, the Chief Judge of the United States District Court for the District of Columbia shall appoint "an active *or retired* Federal judge serving in the District" to the Commission. § 1-204.34(b)(4)(E) (emphasis added).

The participation of a sitting federal judge, whether active or senior, in such a body violates that judge's ethical duty to avoid political activity. That the selection of judges is committed to the executive branch is because judicial nominations are inherently political.

The judge currently caught in this ethical bind is Judge Emmet Sullivan, who sits as the Chairman of the Commission. I have made clear that the ethical concerns raised by this statutory scheme do not apply uniquely to Judge Sullivan and I do not fault him for initially accepting the position on the Commission—it is a systemic issue.

It is for that reason that I initially sought the Committee on Codes of Conduct's opinion directly. After more than a dozen letters exchanged, it became apparent that the Committee would not address this important issue unless Judge Sullivan requested its opinion himself. It was only then that I filed this formal misconduct charge to compel Judge Sullivan to seek an opinion.

After I filed this charge, Judge Sullivan sought and received the opinion, from the Committee on Codes of Conduct stating, over a dissent, that his service on the Commission was ethical. Based on that opinion, Chief Judge Srinivasan dismissed my misconduct complaint.[1] I appealed to the D.C. Circuit Judicial Council, and the Council affirmed the dismissal over the dissent of Judge Katsas and Judge Rao.[2] Although the dissent perceptively summarized the weaknesses of the Committee's opinion, and I largely stand by it, I write additionally to describe the grounds on which I seek review and to emphasize certain themes.

The Committee rested most of its reasoning on the existence of a statute and implicitly argued that the statute overrides previously expressed ethical concerns. Canon 4F itself shows that this is not so, since it explicitly states that a judge should not accept a statutory appointment if it would "undermine the public confidence in the integrity, impartiality, or independence of the judiciary." A moment's reflection will reveal why this proposition must be true. If Congress could induce judges to act in a manner that the judiciary considers unethical, it would be an encroachment of Article I into Article III in violation of principles of separation of powers.

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[1] A careful reading of Chief Judge Srinivasan's dismissal suggests that he agrees with me that this issue ought to be resolved by the Judicial Conference.

[2] Judge Walker joined the dissent in substance but thought that the Committee on Codes of Conduct's opinion, even if wrong, should justify Judge Srinivasan's dismissal.

But the statute need not even force resolution of those questions, because it does not compel any judge to serve on the Judicial Nomination Commission. And given that the statute expressly allows a retired judge to serve on the Commission,[3] it does not force the hand of an appointing Chief Judge of the District Court either.

The existence of the statute, therefore, does not permit a judge who wishes to act ethically to serve on the Judicial Nomination Commission while simultaneously hearing cases in his or her capacity as a federal judge.

1. The analysis can start and stop with the Committee on Codes of Conduct's Advisory Opinion No. 93. That opinion, in fleshing out prohibited "political activity" that violates Canon 5, stated that "a judge should not serve on an official state committee formed to select state trial and appellate court judges." And the Committee in the present opinion recognized that D.C. trial and appellate judges "technically are federal officials but treated as state judges." (Committee on Codes of Conduct Docket No. 2706 at 1). But as Judge Katsas's dissent noted, it shouldn't matter whether the D.C. judges are regarded as state or federal—the ethical problems are the same.

Indeed, Advisory Opinion No. 93 also prohibits judges from sitting on committees involved in selecting federal judges. In one opinion, the Committee previously advised "a judge not to participate in a committee that screened applicants for appointment by the President to the federal courts because it 'necessarily involve[d] political participation even when the committee recommendation [was] not binding.'" (Committee on Codes of Conduct Docket No. 2706 at 5). If judges may not sit on recommendation committees for federal courts, ineluctably judges may not sit on committees that limit a President's choices for potential nominations to the federal courts and that may, under certain circumstances, even appoint the judges themselves.

Judge Katsas's dissent rightly points out that the composition of the Judicial Nomination Commission emphasizes its political nature. Four of the seven members of the Commission are clearly representatives of politicians (the President, Mayor of D.C., and D.C. Council respectively—the Mayor gets two representatives). The last three members are two representatives of the D.C. Bar and the federal judge at issue here. Even if a federal judge was authorized to perform this function by himself or herself, it would be unethical. But it is particularly troubling that he or she does so in conjunction with avowed political appointees.

2. The participation of a sitting federal judge on the Commission is also ethically problematic because he or she connects the judiciary with the executive. In interpreting Advisory Opinion No. 93, the Committee's view is that judges are not allowed to enmesh the judiciary "with other branches of the Federal Government." Compendium of Selected Opinions § 4.6-5(a). But appointment of judges is part and parcel of the executive power. *See* Federalist No. 48; 1 Blackstone, *Commentaries* *259–60 ("In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the

[3] I expand on this below.

legislative and also from the executive power."). For judges to partake in the executive's appointment power would be enmeshing the judiciary with another branch of the federal government.

3. Several states and scholars have agreed with Advisory Opinion No. 93's prohibition. *See e.g.*, N.Y. Op. 94-37, Az. Op. 87-01, Md. Op. 89-06; Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?*, 114 Penn St. L. Rev. 49, 75–105 (2009).

To be sure, there are certain states—Alaska comes to mind—where, according to their constitutions, state judges are placed directly on state judicial nomination commissions. *See e.g.*, Ak. Const. art. IV, sec. 8. States may set their own standards and to do so constitutionally certainly overrides ethical concerns. Moreover, many states provide for judges to be elected and are therefore less concerned with mixing judicial power with politics. But that some states tolerate politics in their judiciary does not mean that the federal judiciary, with its lifetime appointments and protected salaries, should do the same.

4. Advisory Opinion No. 59 does not suggest otherwise. That opinion states that it would be appropriate for federal judges to respond to inquiries from appointing authorities about the qualifications of judicial nominees. Yet in implementing this opinion, the Committee previously advised a judge not to serve on a federal screening committee for the President "explicitly stat[ing] that Advisory Opinion No. 59 does not 'sanction membership on a selection committee.'" (Committee on Codes of Conduct Docket No. 2706 at 5). In another opinion, the Committee "advised a judge against accepting an invitation to serve on a committee designed to make recommendations to the Governor of a state for state judicial positions." *Id.* In other words, it would be unethical for judges to serve on formally constituted bodies that give recommendations to the executive.

It should be apparent that if it would be unethical for a sitting federal judge to serve on a committee that simply *recommends* to the executive, it follows *a fortiori* that serving on a committee that *limits* the executive's choices and can occasionally *act* as the executive in its nominating and appointing capacity must be unethical.

5. Towards the end of the Committee's opinion, almost as a throwaway line, never before relied upon and inconsistent with its prior cases, the Committee looks to the appointment of magistrate and bankruptcy judges for support. The analogy—not spelled out by the Committee—is quite fallacious.

Those judges, like all subordinate judicial officials, such as Circuit Executives and judicial staff, are aids to Article III judges. Moreover, magistrate judges are appointed by the majority of the district court judges and bankruptcy judges are appointed by the whole circuit court. Most important, as Judge Katsas's dissent emphasized, the selection of magistrate and bankruptcy judges is done by Article III judges alone, without the involvement of political figures.

6. I also reiterate my concern that a sitting federal judge who serves on the Judicial Nomination Commission creates an anomalous situation when a lawyer who appears before him or her has ambitions for an appointment on a D.C. court (which are quite desirable; paid as much as federal judges). Any of us who have tried cases is aware that sometimes it is appropriate in the interest of a client to press a judge beyond the point he or she is comfortable. Yet, a lawyer who wants a D.C. judicial appointment must tread softly. Given that judge's ability to blackball a lawyer, both the judge and trial lawyer are put in an awkward ethical position.

The Committee's response, that lawyers can be trusted to put their clients' interests first, belies the purpose of most structural checks against abuse. It should not be necessary to recall the famous line from Federalist No. 51, "If men were angels, no government would be necessary."

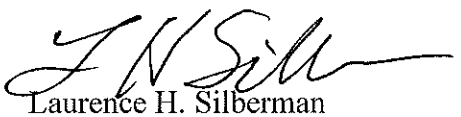
7. The Committee worried that the application of its prior opinions would make the statute ineffective. Yet the statute does not require a judge to serve on the Commission. So, without regard to ethical questions, if no judge was willing to serve, the statutory scheme would still go forward without a judge. If the Committee on Judicial Conduct and Disability (or as I have argued more appropriately the Judicial Conference) determines that the Committee on Codes of Conduct was wrong, presumably no sitting judge would be willing to serve.

In any event, as I have argued and Judge Katsas agreed in his dissent, there is another option contemplated by the statute, the appointment of a retired (non-sitting) judge. Fully retired judges or senior judges who stopped hearing cases (and do not draw upon judicial resources) could accept the position without the same ethical concerns. *See* Compliance with the Code of Conduct-C. Retired Judge (exempting fully retired judges and senior judges from compliance with Canon 4F and noting that "but [a senior] judge should refrain from judicial service during the period of extrajudicial appointment not sanctioned by Canon 4F").

I regretfully submit the Committee's opinion (surely not drafted by a judge) was quite convoluted and unpersuasive. Its bottom line is obvious: whatever we've said before, we don't want to annoy Congress or touch on sensitive political issues.

Pursuant to Rule 6(d) of the Rules governing Judicial-Conduct Proceedings, I affirm the truth of the facts stated here under penalty of perjury.

Sincerely,



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CC:

Members of the Judicial Conference
Judge Emmet Sullivan
District of Columbia Judicial Nomination Commission