

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

November 18, 2021

Judicial Misconduct Complaint

Circuit Executive's Office
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Members of the Judicial Council:

I hereby petition the judicial council for review of the Chief Judge's dismissal of my Judicial Misconduct Complaint and the underlying Committee on Codes of Conduct opinion on which it relies. I incorporate by reference my previous letters to the Committee on Codes of Conduct and Judicial Conference attached to this appeal.

I wish to make clear that although my misconduct charge is nominally directed at Judge Emmet Sullivan, I am quite aware that for some time district judges have been appointed to the position he presently occupies. The ethical problem which I believe the practice creates has not been raised previously—at least formally. Therefore, I do not criticize Judge Sullivan for having accepted the position on the Judicial Nomination Commission. In other words to quote the famous line from the Godfather, my complaint is “not personal”; “it’s strictly business”—Article III business. I was prompted to consider the question after reading a memo from Judge Sullivan to all the federal judges in the D.C. Circuit which noted his role.

Although I have raised this complaint, my concern about congressional encroachment into Article III should be of equal concern to all Article III judges (it might be noted that I have a very long-term interest in separation of powers. *See In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988)).

This case has its genesis in the unique statutory scheme that governs the appointment of judges 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).

The Home Rule Act constrains the President’s selection of nominees for vacancies on the D.C. courts. While the position is filled by Presidential nomination and Senate advice and consent, according to the statute, the President may choose only from a list of three candidates generated by the D.C. Judicial Nomination Commission. D.C. Code §§ 1-204.34(d)(1); 1-204.33(a). If the President fails to choose one of the candidates from the list, the Judicial Nomination Commission may itself nominate and then, with advice and consent of the Senate, appoint one of the candidates. § 1-204.34(d)(1). In other words, the statutory scheme creates a formal gatekeeper for presidential appointments to the D.C. courts; it is worlds apart from random recommendations for judicial appointments.

At issue is the membership of the Judicial Nomination Commission. The statutory regime requires the Chief Judge of the United States District Court for the District of Columbia to appoint to the Commission, “an active *or retired* Federal judge serving in the District.” § 1-204.34(b)(4)(E) (emphasis added). This seat is currently held by Judge Sullivan. I regard it as unethical for an active federal judge to sit on that Commission. I filed the misconduct charge to compel Judge Sullivan to seek an opinion from the Committee on Codes of Conduct. As discussed below, under the Committee’s prior opinions, virtually identical behavior has been held unethical.

The essence of my position is that a federal statute that purports to authorize federal judges to act in a fashion contrary to federal judicial ethics cannot override judicial ethical restraints. Indeed as the Committee acknowledges, Canon 4F states that the mere existence of an authorizing statute does not make it ethical for a judge to accept an appointment where such an acceptance would “tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary.”

It should be obvious that the statute implicates separation of powers. If Congress can authorize judges to behave in a fashion that the judiciary regards as unethical, that constitutes an encroachment of Article I authority into Article III.¹ As Justice Scalia noted, this “wolf [albeit a small wolf] comes as a wolf.” *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting). As with *Morrison* and other cases involving the separation of powers, this case is fraught with political implications, but judges have a duty to confront it without regard to such concerns or for that matter congressional reaction.

The Committee’s opinion interpreted my contention as a challenge to the constitutionality of the statute—which supposedly exceeded their “jurisdiction.” I don’t know why its jurisdiction would be so limited, but at any rate its concern is a red herring. After all, the statute does not compel any judge to serve on the Commission; in my view *active* judges should be precluded from such service under Canon 4F, at least so far as a judge wishes to conform to judicial ethics.²

¹ Some have questioned whether the statute is unconstitutional because it limits the President’s Appointment power. That is a separate question that I do not raise.

² Similarly, an appointing Chief Judge of the District Court could, as I will explain, appoint a fully retired or senior judge to the Commission.

The Committee’s statement is nonetheless revealing because it indicates it did not grapple with the central question presented by the complaint. It simply assumed that the statute overrode its own prior opinions. By its reasoning, Congress could authorize an active judge to take a position in the executive branch while maintaining his or her judicial station. Indeed under the Committee’s own logic, it’s hard to see any limitation on what Congress could authorize federal judges to do.

I admire the Committee’s candor in reviewing its prior opinions—even though they point against its conclusion. The result is to make the Committee’s opinion virtually incoherent. I understand that it is the practice of the Committee not to have dissents in its opinions, so this is an unusual circumstance because dissents are noted. And I wonder whether the description of the prior opinions—which are so inconsistent with the Committee’s conclusion—was required by the dissenters.

1. Advisory Opinion No. 93 is almost directly on point. In its discussion of prohibited “political activity” in violation of Canon 5, the Committee explained that it has advised that “a judge should not serve on an official state committee formed to select state trial and appellate court judges.” And of course, as the Committee itself recognized, 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). *See also* 28 U.S.C. § 1257(b) (“[T]he term ‘highest court of a State’ includes the District of Columbia Court of Appeals”).

But the logic of Advisory Opinion No. 93 applies *a fortiori* to a committee selecting federal judges. If it is inappropriate political activity for judges to serve on bodies selecting state judges, it is obviously inappropriate for judges to serve on comparable bodies selecting federal judges. Indeed, 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) (emphasis added). If sitting on a committee that merely makes non-binding recommendations is unethical, it follows ineluctably that sitting on the Judicial Nomination Commission must be triply unethical. The Commission does not merely make recommendations to an appointing authority; it chooses who the appointing authority can nominate, and under certain circumstances can act as the appointing authority itself. That is, the Commission is an authoritative gatekeeper—the President must choose from one of three candidates the Commission selects. If the President does not select one of them, the Commission has statutory authority to nominate one of the candidates on its own.

2. The Committee’s opinion acknowledges that it issued an additional interpretation of Advisory Opinion No. 93 to the effect that a judge is forbidden from enmeshing the judiciary “with other branches of the *Federal Government*.” Compendium of Selected Opinions § 4.6-5(a) (emphasis added). That is inconsistent with the Committee’s distinction between serving on a state or federal judicial selection committee. If judges are precluded from federal legislative activity, it follows that judges are precluded from exercising federal executive functions. And the appointment of judges is a core executive function. *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 legislative and also from the executive power.”).

3. Advisory Opinion No. 93 conforms to a series of state cases in which ethics committees have opined that judges who sit on public bodies to select judges engage in inappropriate political activity. For example, as I have noted in a previous letter to the Committee on Codes of Conduct, at least three other states, New York, Arizona, and Maryland have issued similar opinions. N.Y. Op. 94-37, Az. Op. 87-01, Md. Op. 89-06. And Professor Mary Clark raised the same shared concerns in a thoughtful article. 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).

4. Of course as Advisory Opinion No. 59 acknowledges, it is perfectly appropriate for federal judges to respond to requests from appointing authorities about the qualifications of a nominee for judicial office. Yet in one of the implementing opinions regarding a federal screening committee for the President, the Committee “explicitly stated 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 formal 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.* Concern for the separation of powers underlies the logic of these opinions.

It should be clear from the foregoing that the inappropriateness of serving on the Judicial Nomination Commission, as I have said, is *a fortiori* to all of the Committee’s prior relevant opinions. The Judicial Nomination Commission does not merely make recommendations, but acts as an authoritative gatekeeper that limits the appointing authority, and can sometimes act as the appointing authority itself.

5. The Committee asserts that to accept my position would be to jeopardize the legitimacy of the appointment of magistrate and bankruptcy judges. That assertion is absurd. After all, like all subordinate judicial officials, those judges are aids to federal judges under Article III judges’ supervision. Moreover if this proposition were correct, none of its prior opinions—which support my position—would have been appropriate. Those prior opinions have severely limited judges’ participation in committees that appoint judges without regard to consideration of the appointment of bankruptcy and magistrate judges.

6. I explained to the Committee that there was an entirely different consideration—not previously contemplated by the Committee—created by this unique statute insofar as it authorizes an active federal district judge to serve on the Judicial Nomination Commission. It creates an unusual conflict of interest for lawyers who litigate before such a judge. D.C. judgeships are quite prestigious positions. They are paid, by statute, the same as federal judges. A lawyer who wishes for such an appointment, must tread softly when appearing before a

gatekeeper judge, even in cases where a client's interest might otherwise require a somewhat aggressive position *vis a vis* the judge. The Committee merely stated in, response to my concern, that lawyers can be always trusted to pursue their clients' interest. That simplistic reasoning reminds me of the old refrain that "If men were angels, no government would be necessary." Federalist No. 51.

7. Finally, the Committee stated that accepting my position would result in the statute becoming ineffective. Although that should not be determinative, it is not correct. Active judges would be discouraged from serving if the governing view of the judiciary regarded such service as unethical, but, as I noted previously, fully retired or senior judges could accept the position. If a senior judge did so, he or she would have to stop hearing cases thus avoiding all the above concerns. *See* Compliance with the Code of Conduct-C. Retired Judge (exempting fully retired judges and senior judges from compliance with Canon 4F noting "but [a senior] judge should refrain from judicial service during the period of extrajudicial appointment not sanctioned by Canon 4F").

It should be obvious that the Committee's opinion which I am challenging is a classic example of a result-driven legal opinion. The reasoning is so tortured and inexplicable it is hard to imagine that any Article III judge could have written it. I believe a fair reading, indeed even a cursory reading, of the previous opinions of the Committee reveals that this opinion stands out like a very sore thumb. It must be overridden if the independence of the judiciary is to be protected.

Pursuant to the 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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