

24-90169-jm
October 6, 2025
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 24-90169-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In February 2025, the Chief Justice transferred to the Second Circuit Judicial Council a complaint filed pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), charging a district judge (the “Judge”) of another circuit with misconduct.

BACKGROUND

On October 23, 2023, the Judge notified President Joseph R. Biden, by letter, that the Judge intended to retire from regular active service as a United States district judge and to assume senior status upon the confirmation of a successor by the United States Senate. No one was nominated to replace the Judge before the presidential election. After the election, on November 8, 2024, the Judge again

wrote to President Biden, this time stating that he was withdrawing his October 23, 2023 letter and intended to continue in regular active service. As of this writing, the Judge remains on active status.

The misconduct complaint alleges that the Judge may have violated the Code of Conduct for United States Judges by deciding, after a presidential election, to remain on active status after having previously notified the President of an intention to assume senior status. The complaint cites no provision of the Code of Conduct or other authority specifically addressing the timing of a judge's decision to retire, to assume senior status, or to reconsider such a decision. It further acknowledges that "there is nothing unethical with a judge announcing an intent to assume senior status upon confirmation of a successor" and that it is not "necessarily" inappropriate for a judge to change his or her mind and to rescind the earlier announcement of such an intention. Finally, citing a statement attributed to former Chief Justice Rehnquist, which noted, *inter alia*, that the decision to step down is not a judicial act, the complaint asserts that "it is not inappropriate for a judge to consider timing as a factor when deciding whether to retire."¹

¹ The statement was attributed to the former Chief Justice by Walter Dellinger, former Solicitor General. See Walter Dellinger, *Is Justice Kennedy about to Retire? Or is it Justice Thomas?*, SLATE (June 25, 2017),

The complaint nevertheless alleges that the Judge potentially violated Canon 5, which provides that a judge should refrain from political activity; Canon 2A, which provides that a judge “should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”; and Canon 2B, which states that a judge “should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.” The complaint does not allege that the Judge made any public statements that criticized or supported a political party or candidate, or that were otherwise partisan in nature, or that the Judge made any public comment on the withdrawal of his letter whatsoever. Rather, the basis of the alleged misconduct is the timing of the Judge’s decision to withdraw his October 2023 letter. Specifically, the complaint invites an inference from the timing of events that the Judge “had a change of heart solely because of the outcome of the 2024 presidential election.” Although the complaint concedes that it is generally permissible for a judge to change his or her mind as to whether to step down from regular active service, it argues that withdrawing “an existing retirement or senior-status letter because of the outcome of a presidential election” constitutes an inappropriate “public statement of rebuke

<https://slate.com/news-and-politics/2017/06/is-justice-kennedy-about-to-retire-or-is-it-justice-thomas.html>.

about the winner of a partisan election.” The complaint argues that such a “public rebuke of the winner of the presidential election” raises concerns similar to those addressed in Advisory Opinion 112 of the Committee on Codes of Conduct, which concludes, *inter alia*, that a judge should refrain from “liking” a political social media post so as to avoid running afoul of Canon 5’s prohibition on engaging in political activity.

The Judge was given an opportunity to respond, and did so. The response confirms the chronology described above, *i.e.*, that the Judge notified President Biden of his intent to assume senior status in October 2023 and then, in November 2024, notified the President of his intent to remain in active service.

The remainder of the Judge’s response can be summarized as follows. The Judge’s letter to President Biden informing him of the Judge’s reconsideration of the decision to assume senior status states no political motivations, nor has the Judge engaged in political activity, endorsed or campaigned for or against any candidate, or made any statements that could be construed as political. In addition, the decision whether to retire or to take senior status lies within the discretion of the individual federal judge and “there is nothing in any Code of Judicial Ethics, or any federal law, that makes it impermissible for a judge who

announced taking senior status to withdraw this decision.” The Judge points out that “[n]o judge ever has been found to violate any law or an ethical rule based on the timing of a retirement decision or the choice to take senior status.” The Complainant would “create and impose a burden upon federal judges exercising their prerogative to take senior status to prove that they were taking senior status for ‘permissible reasons,’” when, in fact, “[n]o court ever has found it proper to inquire into an Article III judge’s reason for taking, or not taking, senior status.” In the Judge’s words, “[c]hoices about retirement and the taking of senior status often are influenced by deeply personal considerations, and likely by multiple factors.”

DISCUSSION

The complaint is dismissed.

The chief judge must review a complaint of judicial misconduct and “determine whether it should be: (1) dismissed; (2) concluded on the ground that voluntary corrective action has taken place; (3) concluded because intervening events have made action on the complaint no longer necessary; or (4) referred to a special committee.” Rule 11(a).

“In determining what action to take . . . the chief judge may conduct a limited inquiry.” Rule 11(b). But in conducting the inquiry, the chief judge “must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee’s report.” *Id.* The Commentary on Rule 11(b) states that “the standard articulated in subsection (b) is that used to decide motions for summary judgment.” Thus, “the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).” Commentary on Rule 11. Where a genuine issue is present at the conclusion of a limited inquiry, the chief judge must appoint a special committee “to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council.” Rule 11(f).

Here, the appointment of a special committee is not necessary, and the complaint is dismissed, because there is no genuine issue of fact or circumstance that need be resolved.

As an initial matter, as the Judge correctly points out, nothing in the Code of Conduct or any advisory opinion of the Committee on Codes of Conduct, or

any other relevant authority, dictates when a federal judge should or must retire, or whether a judge should or must retire at all. The Constitution provides that judges “shall hold their Offices during good Behaviour.” U.S. CONST. art. III, § 1. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (observing that art. III § 1 “protect[s] ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’” and “safeguard[s] litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government’”) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); then quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).² Thus, the decision whether—and when—to retire or to assume senior status is discretionary and personal to the judge, allowing for the consideration of many factors, none of which requires disclosure, and often including: ongoing duties related to the judge’s caseload and court-related work; the impact of a vacancy and new appointment on the court; personal considerations such as health, finances, job satisfaction, family needs; and other

² See also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (noting that provision securing “the practical equivalent of life tenure” for federal judges “helps to guarantee what Alexander Hamilton called the ‘complete independence of the courts of justice.’”) (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (terming art. III § 1’s provision on good behavior “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws”).

variables too numerous to list here. These factors (which may change precipitously even as the judge ponders stepping down) are equally present when the judge makes a decision to retire or assume senior status and, in the much rarer case, when the judge has a change of mind and elects to remain in regular active service.

The complaint nonetheless suggests that the Judge engaged in political activity, thus violating Canon 5 of the Code of Conduct, on the theory that withdrawing his October 2023 letter constituted a “public rebuke of the winner of the presidential election.” But this claim is without substance. Canon 5’s general prohibitions on political activity provide that a judge should not:

- (1) act as a leader or hold any office in a political organization;
- (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
- (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

The advisory opinions of the Committee on Codes of Conduct, construing Canon 5, opine that a judge should not, among other things, be a member of a political club (Advisory Opinion No. 19); accompany a spouse to a political function

(Advisory Opinion No. 53); recommend persons seeking election to political offices (Advisory Opinion No. 73); or “lik[e]” or “becom[e] a fan of” a political candidate or organization on social media (Advisory Opinion No. 112). Here, neither of the Judge’s letters, first expressing an intent to assume senior status and thereafter to remain in regular active service, involved a public statement or appearance. Neither letter expressed any political view whatsoever, much less the public rebuke of an incoming administration. The timing of a judge’s decision to assume senior status—or to reconsider that decision—is no analogue to the types of activities determined by the Committee to trigger Canon 5’s prohibition on political activity.

The same holds true for Canon 2’s admonitions that a judge “should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” *see* Canon 2A, and “should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment,” *see* Canon 2B. An advisory opinion construing Canon 2 opines that a judge should not accept an award from an organization “whose public image embodies a clearly defined point of view on controversial legal, social or political issues,” notwithstanding “the spirit in which [the award] is proffered.” Advisory

Opinion No. 46. But the decision whether to accept an award in circumstances that might suggest association with a hotly contested point of view is not fairly analogous to the decisions whether and when to retire or assume senior status. And no published opinion addresses *these* decisions—decisions which, like the process of being nominated and confirmed in the first place, may inevitably be seen by some members of the public at least partly in political terms, as the determination to step down from regular active service inevitably creates a vacancy to be filled by the judiciary’s coordinate political branches.

To be sure, the withdrawal of an earlier letter to the President that had expressed an intent to retire or to assume senior status is unusual and unfortunate. Personnel in both the executive and legislative branches devote time and energy to the nomination and appointment of judges, and the withdrawal of such a letter, even when no nominee is in place, may render this effort a waste. At the same time, and notwithstanding Canon 2B’s admonition against “allow[ing] family . . . relationships to influence judicial conduct,” few would contend that a judge who had determined to retire in order to care for an ailing spouse would act improperly should the judge reconsider this decision after the unexpected death or recovery of the spouse. The Complainant himself argues no such thing, contending only

that “[r]escinding a public retirement or senior-status letter because of the outcome of a presidential election” (regardless whether the judge issued a public statement or otherwise took any action to make such motivation clear) would violate the Code.

The Complainant argues, in effect, that the timing of the Judge’s decision to withdraw his letter should be sufficient to trigger an inquiry into the Judge’s motivations. But if the timing of a decision to withdraw is sufficient to spark a misconduct inquiry into the potential political or partisan motivations of a judge, it is difficult to see how related decisions—to step down in the first place, or even not to step down—could not also trigger inquiry into the subjective motives of the judges making such decisions. Such inquiries, in turn, could potentially inhibit the independent judgment that judges with the practical equivalent of life tenure have historically exercised as to the determination, which is the judge’s to make, whether to retire or to assume senior status.

Finally, and conclusively, “[j]udges subjected to judicial-misconduct proceedings are entitled to fair notice of what constitutes judicial misconduct.” *In re Complaint of John Doe*, JCP No. 08-24-90036 (8th Cir. Jud. Council Apr. 8, 2025).³

³ Available at <https://www.ca8.uscourts.gov/judicial-complaint-orders>.

Even assuming *arguendo* that the Judge considered the outcome of the election as one factor influencing his decision to withdraw the October 2023 letter—a factual issue I need not resolve—the complaint cites no authority, and I am aware of none, that would have apprised the Judge that his private consideration of such a factor could constitute judicial misconduct. For this reason, too, the complaint is properly dismissed. The timing of a judge’s decision either to assume senior status or to reconsider that decision, does not, without more, raise an inference of misconduct.

For the foregoing reasons, the complaint is dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” Rule 11(c)(1)(D).

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.