

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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C.C.D. No. 16-01

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

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PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM  
OF THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT  
J.C. Nos. 05-14-90120, 05-14-90121

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MEMORANDUM OF DECISION

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(Filed January 26, 2017)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, Kathryn H. Vratil, and James E. Gritzner.<sup>1</sup>

MEMORANDUM OF DECISION

This matter is before the Judicial Conduct and Disability Committee on attorney Ty Clevenger's October 26, 2016, petition for review of his complaint against Judge Walter S. Smith, Jr. and Judge Harry Lee Hudspeth filed under the Judicial Conduct and Disability Act of 1980 ("Act"), 28 U.S.C. §§ 351-64, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Rules") (U.S. Jud. Conf. Sept. 17, 2015). The Fifth Circuit Judicial Council concluded Mr. Clevenger's complaint against Judge Smith and Judge Hudspeth by orders dated September 28, 2016, and October 21, 2016, respectively. The Circuit Judicial Council determined Judge Smith and Judge Hudspeth were "no longer subject to the disciplinary

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<sup>1</sup> This panel was comprised of six members of the seven-member Judicial Conduct and Disability Committee. One member was disqualified, and the Chief Justice selected an additional judge to join the qualified members to consider the matter. R. 21(c) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

procedures of [the Act] and the remedies they prescribe” because both judges had retired under 28 U.S.C. § 371(a) and are no longer judicial officers.

Mr. Clevenger now argues in his petition for review that “nothing in the rules prevents a judicial council from investigating, censuring and/or reprimanding a judge following his or her retirement.”<sup>2</sup> The Judicial Conduct and Disability Committee reviews Mr. Clevenger’s petition under 28 U.S.C. § 357 and Rule 21(a) and 21(b)(1)(A).

The Act provides that any person may file a complaint “alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts,” 28 U.S.C. § 351(a), and provides actions if a complaint is not dismissed, *id.* § 354(a)(2). A circuit judicial council may conclude a conduct and disability proceeding after it has been initiated if “intervening events have made the proceeding unnecessary.” R. 20(b)(1)(B). Resignation from judicial office constitutes an intervening event rendering a conduct and disability proceeding unnecessary because the judicial officer ceases to exercise judicial functions. *See In re Complaint of Judicial Misconduct*, 10 F.3d 99, 99–100 (3d Cir. 1993) (“Inasmuch as a judge who retired under 28 U.S.C. § 371(a) by giving up his or her judicial office is no longer exercising judicial duties, he or she can no longer prejudice the ‘effective and expeditious administration of the business of the courts.’”); *In re Charge of Judicial Misconduct*,

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<sup>2</sup> Mr. Clevenger supports this argument with reference to footnote 2 in this Committee’s Memorandum of Decision filed July 8, 2016, which references Judicial Conference of the United States, Certificate of Consideration of Impeachment of Former U.S. District Judge Mark E. Fuller (Sept. 9, 2015). That case is inapplicable because it involved a determination by the circuit judicial council that a “district judge may have engaged in conduct that might constitute ground for impeachment.” R. 20(b)(2)(A). *See* 28 U.S.C. § 355(b)(1). Though considered, no such determination was ever made by the Judicial Council of the Fifth Circuit in the matter now under consideration, which would have required rather than permitted further action.

782 F.2d 181, 181 (9th Cir. 1986) (“When the subject of the complaint is no longer a judicial officer, he is beyond the reach of these procedures and the remedies they prescribe.”).

The Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith and Judge Hudspeth retired under 28 U.S.C. § 371(a). For that reason, we deny Mr. Clevenger’s petition for review and affirm the Circuit Judicial Council’s orders concluding the complaint against Judge Smith and Judge Hudspeth.

## THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Before: STEWART, Chief Judge, OWEN, DAVIS, JONES, SMITH, DENNIS,  
ELROD, HAYNES, COSTA, LEMELLE, DICK, HICKS, DAVIDSON,  
JORDAN, LYNN, HINOJOSA, CLARK, and MARTINEZ

DOCKET NO. 05-14-90120

IN RE: Complaint of Judicial Misconduct Against United States District Judge  
Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002

### ORDER AND MEMORANDUM OF REASONS

This matter is before the Judicial Council of the Fifth Circuit (“Judicial Council”) on remand from the Committee on Judicial Conduct and Disability of the Judicial Council of the United States (“JCUS Committee”).

A complaint of judicial misconduct was lodged in September 2014 against United States District Judge Walter S. Smith, Jr. of the Western District of Texas, in effect alleging that in 1998 he made inappropriate and unwanted sexual advances toward a court employee. A Special Committee (“Committee”) appointed pursuant to 28 U.S.C. § 353 retained counsel to interview witnesses, and otherwise to carry out the investigation under its direction.

The investigators began their investigation in January 2015, and interviewed witnesses and took depositions throughout the first part of that year. The investigation was completed by mid-May, and Judge Smith’s attorney was given the transcripts and other materials obtained by the investigators.<sup>1</sup>

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<sup>1</sup> As noted in the comments to Rule 15 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the subject judge does not have the right to participate in the investigative phase of a special investigative committee’s work, and neither Judge Smith nor his attorney was present at these depositions. The depositions taken by the investigators both in this first investigation and in its more recent continuation might be described more precisely as oral examinations under oath; they were both transcribed and video-recorded.

Judge Smith met with the Committee and testified under oath on August 18, 2015. He chose not to request a hearing, or exercise his right to cross-examine witnesses provided by Rule 15(c) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. In October 2015, the Committee provided its report to the Judicial Council as well as to Judge Smith's attorney.

On December 3, 2015, the Judicial Council issued an order of reprimand finding that Judge Smith had engaged in misconduct, suspending for one year the assignment of new cases to him, directing him to complete a sensitivity training course, and further directing him to recuse himself in defined classes of current and future cases and to follow formal recusal procedures.

The complainant petitioned for review of the Judicial Council's order to the JCUS Committee. On July 8, 2016, the JCUS Committee entered a Memorandum of Decision remanding the matter to the Judicial Council, with instructions that the Judicial Council "undertake additional investigation and make additional findings where appropriate and reconsider the appropriate sanction if there are additional findings." The JCUS Committee specifically requested additional findings (1) with respect to the complainant's allegations that Judge Smith had sexually harassed other women in the courthouse, and "whether there was a pattern and practice of such behavior," and (2) as to the manner in which Judge Smith's conduct in allowing false factual assertions to be made to the Council "adversely impacted or interfered with the inquiry, if at all."

The Committee immediately re-engaged its prior investigators, who built upon their earlier work.<sup>2</sup> In the second investigation, over the course of approximately two months, the investigators ensured that all witnesses identified by the complainant, as well as all witnesses potentially having information relevant to the issues raised in the order of remand, were interviewed. The investigators obtained statements or affidavits from, and/or conducted depositions of, all people having relevant information. Overall, the investigators communicated with, received statements or affidavits from or deposed over 50 people. Although the investigation is complete, due to the circumstances described below, the Committee had not yet conducted any hearings, and Judge Smith had not reviewed any statements or depositions given in the second

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<sup>2</sup> In the first investigation, which spanned five months, the investigators interviewed 31 people who potentially had information relevant to the subject of the complaint, and affidavits or statements were obtained from, and/or depositions were taken of, those persons with relevant information. In both investigations, the investigators exercised the subpoena power provided under 28 U.S.C. § 356(a).

investigation or been afforded the opportunity to cross-examine witnesses or present argument to the Committee. See Rules for Judicial-Conduct and Judicial-Disability Proceedings Rules 14 and 15.

After the close of the investigators' work, but prior to resolution of proceedings on remand and any fact-finding by the Committee, Judge Smith announced that he had "retire[d] from office" under 28 U.S.C. § 371(a), effective immediately, by letter dated September 14, 2016 addressed to President Obama.

A judge who retires from office under § 371(a) is "no longer a judicial officer", and is "no longer subject to the disciplinary procedures of Section 372(c) [now 28 U.S.C. § 351 et seq.] and the remedies they prescribe." In re Charge of Judicial Misconduct, 91 F.3d 90, 91 (9th Cir. Judicial Council 1996), citing In re Complaint of Judicial Misconduct, 10 F.3d 99, 100 (3d Cir. Judicial Council 1994); see also In re Complaint of Judicial Misconduct, No. 13-02 (Judicial Conference of the United States 2014) (noting that after Judge Boyce Martin's retirement from office, the Second Circuit Judicial Council found that "the retirement was an intervening event that had made further proceedings unnecessary" per Rules for Judicial-Conduct and Judicial-Disability Proceedings Rule 20(b)(1)(B)).

In the light of Judge Smith's retirement from office, the Judicial Council is no longer able to impose any sanction under 28 U.S.C. § 354(a)(2)(A) or (B). The Council is satisfied that the investigation was comprehensive, and has identified and defined the full scope of the potential adverse findings that could be made about Judge Smith's conduct. After considering the information obtained in the second investigation, the Council again concludes that the actions of Judge Smith, though serious, do not warrant a recommendation for impeachment.

As noted in the first Judicial Council order, there is evidence that there were other incidents involving Judge Smith similar to the incident that was the focus of the complaint. After further investigation on remand, the investigators found no evidence that any such incidents have occurred in many years, despite their having interviewed all witnesses likely to have knowledge of any such conduct. The first order also indicated that there were misrepresentations by Judge Smith that extended the proceeding, but that did not affect its outcome. Thus, the Council concludes that Judge

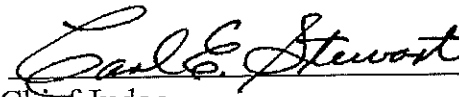
Smith's actions in neither respect warrant recommending the extraordinary step of attempting the impeachment of a judge who is no longer on the bench.<sup>3</sup>

Pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings Rule 20(b)(1)(B), the Judicial Council concludes this proceeding because the intervening event of Judge Smith's retirement from office has made further action unnecessary.

This order, the December 3, 2015 order, and any order entered in connection with Complaint Number 05-16-90014 will be available immediately in the public record, consistent with the requirements of 28 U.S.C. § 360(b), and will be placed on the website of the Fifth Circuit Court of Appeals. Pursuant to Rules for Judicial-Conduct and Judicial-Disability Proceedings Rule 24(a)(2) and (a)(5), it is ordered that the names of the subject judge and the complainant shall be disclosed.

For the Council:

Date: September 28, 2016

  
Chief Judge

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<sup>3</sup> The Committee considered whether impeachment and conviction after retirement would affect a judge's annuity under 28 U.S.C. § 371(a). The text of the Constitution (Article I, section 3, clause 7 states that "Judgment in Cases of Impeachment" extends only to removal from office and disqualification from further office) and the statute (a judge who has retired under § 371(a) "shall" receive the annuity, with no stated exceptions) indicate that impeachment after retirement would not result in loss of the annuity. See also Johnson v. United States, 79 F.Supp. 208, 210-11 (Ct. Cl. 1948) (the statutory right to salary [now annuity] after retirement is a property right likely subject to the protection of the Fifth Amendment). The Council further finds that the likelihood that Judge Smith will attain public office in the future is minimal, certainly not such as would warrant the significant additional expenditure and drain on judicial and Congressional resources that completing this proceeding and attempting impeachment would entail.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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C.C.D. No. 16-01

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

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PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM  
OF THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT  
J.C. No. 05-14-90120

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MEMORANDUM OF DECISION

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(Filed July 8, 2016)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, Kathryn H. Vratil, and James E. Gritzner.<sup>1</sup>

**MEMORANDUM OF DECISION**

This matter is before the Judicial Conduct and Disability Committee on attorney Ty Clevenger's petition for review of his complaint against Judge Walter S. Smith, Jr. filed under the Judicial Conduct and Disability Act of 1980 ("Act"), 28 U.S.C. §§ 351–64, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Rules") (U.S. Jud. Conf. Sept. 17, 2015). Mr. Clevenger alleges Judge Smith made inappropriate, unwanted physical and non-physical sexual advances toward a court employee in 1998. The Fifth Circuit Judicial Council issued an order dated December 3, 2015, confirming the misconduct alleged by Mr. Clevenger and reprimanding Judge Smith, suspending the assignment of new cases to Judge Smith for one year,

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<sup>1</sup> This panel was comprised of six members of the seven-member Judicial Conduct and Disability Committee. One member was disqualified, and the Chief Justice selected an additional judge to join the qualified members to consider the petition for review. R. 21(c) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.



and requiring Judge Smith to undergo sensitivity training. In his petition for review, Mr. Clevenger characterizes the Circuit Judicial Council's punishment as "far too lenient," urging the Judicial Conduct and Disability Committee to recommend impeachment. We are unable to complete our review of the record before us because findings were not made by the Circuit Judicial Council on all matters raised in its investigation.

Mr. Clevenger filed his complaint against Judge Smith on September 8, 2014, alleging Judge Smith committed misconduct when he made inappropriate, unwanted physical and non-physical sexual advances toward a court employee in 1998. The Chief Judge of the U.S. Court of Appeals for the Fifth Circuit appointed a Special Committee on October 28, 2014, to conduct an investigation into the allegations raised in Mr. Clevenger's complaint. The Special Committee retained counsel to conduct an investigation, including interviews with and statements from witnesses. It also received testimony under oath from Judge Smith. Following its investigation, the Special Committee submitted its findings and recommendations to the Judicial Council of the Fifth Circuit.

Based on the Special Committee's report, to which Judge Smith filed a response on November 4, 2015, the Circuit Judicial Council issued an order dated December 3, 2015, finding the following:

- "[I]n 1998 Judge Smith made inappropriate and unwanted physical and non-physical sexual advances toward a court employee."
- "Judge Smith does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts."

- “Judge Smith allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation.”

The Circuit Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training. *See* 28 U.S.C. §§ 354(a)(1)(c), (a)(2)(A)(i), (a)(2)(A)(iii).

Mr. Clevenger filed his petition for review to the Committee on Judicial Conduct and Disability on January 18, 2016, in which he requests the Committee “suspend Judge Smith from the bench immediately and recommend impeachment.” Mr. Clevenger also notes he submitted “the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse” and thus he believes “the assault of [the court employee] was [not] an isolated incident.” The Circuit Judicial Council neither addressed nor made findings with respect to these additional allegations.

The Judicial Conduct and Disability Committee has reviewed the record and considers this petition for review under Section 357 of the Act and Rule 21. We review circuit judicial council orders for errors of law, clear errors of fact, or abuse of discretion. R. 21(a). Rule 21(d) allows the Judicial Conduct and Disability Committee to return a matter to a circuit judicial council with directions to undertake additional investigation.

Because Mr. Clevenger’s petition for review includes the names of individuals who allegedly witnessed other instances of Judge Smith’s sexual harassment of women in the

courthouse, it raises the question whether there was a pattern and practice of such behavior.<sup>2</sup> The Circuit Judicial Council's order neither addressed nor made findings on these additional allegations of misconduct or on other matters raised by its investigation. Because we believe that additional findings are essential to the consideration of the petition for review, we are unable to complete our review of the Circuit Judicial Council's order.

Accordingly, we return this matter to the Circuit Judicial Council with directions to undertake additional investigation and make additional findings where appropriate and reconsider the appropriate sanction if there are additional findings. Regarding Judge Smith allowing false factual assertions in response to the complaint, the Committee requests additional findings and recommendations as to the manner in which Judge Smith's conduct adversely impacted or interfered with the inquiry, if at all.

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<sup>2</sup> *See, e.g.*, Judicial Conference of the United States, Certificate of Consideration of Impeachment of Former U.S. District Judge Mark E. Fuller (Sept. 9, 2015); Judicial Conference of the United States, Certificate of Consideration of Impeachment of U.S. District Judge Samuel B. Kent (June 9, 2009).

## THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Before: STEWART, Chief Judge, OWEN, JOLLY, JONES, SMITH, PRADO, ELROD, SOUTHWICK, HAYNES, COSTA, LEMELLE, DICK, HICKS, AYCOCK, JORDAN, LYNN, HINOJOSA, CLARK, AND MARTINEZ

DOCKET NO. 05-14-90120

IN RE: Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002

### ORDER OF REPRIMAND AND MEMORANDUM OF REASONS

A complaint of judicial misconduct was lodged in September 2014 against the Honorable Walter S. Smith, Jr. of the Western District of Texas, in effect alleging that in 1998 Judge Smith committed misconduct when he made inappropriate, unwanted physical and non-physical sexual advances to an employee of the federal judicial system. A Special Committee was appointed pursuant to 28 U.S.C. § 353 to conduct an investigation of the complaint. The Special Committee retained counsel to conduct interviews with and take statements from witnesses, and otherwise to carry out the investigation under its direction. The Special Committee also met with Judge Smith who was represented by counsel and who testified under oath.

The Special Committee has concluded its investigation, and submitted its Report to the Judicial Council. In the Report, the Special Committee recommended that Judge Smith receive a public reprimand from the Judicial Council, and that certain other remedial measures be taken.

Based on the Special Committee's Report, the findings and conclusions therein, and the admissions made by Judge Smith to the Special Committee and in his response to the Report, the Judicial Council finds that in 1998 Judge Smith made

inappropriate and unwanted physical and non-physical sexual advances toward a court employee, and that such behavior was in contravention of existing standards of behavior for federal judges. The Judicial Council further finds that Judge Smith does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts. The Judicial Council also finds that Judge Smith allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation.

Pursuant to 28 U.S.C. § 354(a)(2)(A)(iii), the Judicial Council reprimands Judge Smith for this conduct. The Judicial Council further admonishes Judge Smith that his actions are inconsistent with Canons 1 and 2 of the Code of Conduct for United States Judges and are prejudicial to the effective and expeditious administration of the business of the courts. It is imperative that Judge Smith not allow such events to recur and he is so directed.

Pursuant to 28 U.S.C. § 354(a)(2)(A)(i), the Judicial Council instructs the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year after the date of this order.

Further, in the exercise of its power under 28 U.S.C. § 354(a)(1)(C) to take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, the Judicial Council directs Judge Smith to complete at his expense a course of sensitivity training about appropriate professional interaction that is satisfactory to the Judicial Council. In this connection, Judge Ed Kinkeade of the Northern District of Texas is appointed to act as liaison between Judge Smith and the Judicial Council, and to make such recommendations as Judge Kinkeade deems appropriate.

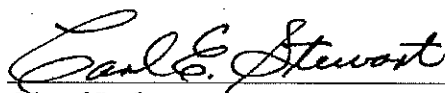
The Judicial Council has concluded that the actions of Judge Smith in 1998 and in connection with the investigation of this complaint do not warrant a recommendation for impeachment. However, it has imposed severe sanctions otherwise available to it under 28 U.S.C. § 354 and Rule 20(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The Special Committee having learned in the course of its investigation that Judge Smith did not follow appropriate procedures regarding recusal from cases in which his counsel in this matter was representing parties in his court, the Judicial Council further directs Judge Smith: (1) to recuse *sua sponte* (subject to remittal) in any future cases involving an attorney who is representing him at the time; (2) to recuse *sua sponte* in any cases in which his counsel in this matter has entered an appearance, filed during a three-year period following the conclusion of the representation; and (3) to follow the formal procedures mandated by 28 U.S.C. § 455(e) rather than attempting by informal means to obtain waivers of other potential conflicts of interest.<sup>1</sup>

This Order will be available in the public record on request, consistent with the requirements of 28 U.S.C. § 360(b), and will be placed on the website of the Fifth Circuit Court of Appeals, together with an appropriately redacted version of the complaint.

For the Council:

Date: December 3, 2015

  
Chief Judge

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<sup>1</sup>Recusal is not ordinarily required after the representation of a judge by an attorney has been terminated. However, it appears that the informal procedure used by Judge Smith resulted in at least one party in a case before him not being informed that opposing counsel was also representing Judge Smith. Accordingly, the Judicial Council imposes this further restriction in order to preserve public confidence in the judiciary.

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: EDWARD W.  
NOTTINGHAM

Judicial Misconduct Complaints  
No. 2007-10-372-36  
No. 2007-10-372-45  
No. 10-08-90089  
No. 10-08-90090

**ORDER**

In August 2007, following Denver media reports regarding activities by and allegations against Chief District Judge Edward W. Nottingham of the District of Colorado,<sup>1</sup> then Chief Circuit Judge Deanell Reece Tacha initiated misconduct complaint No. 2007-10-372-36 against Judge Nottingham. This complaint alleged that he spent more than \$3,000 at a topless nightclub in one evening, that he could not remember how he had spent that much money because he had a lot to drink,

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<sup>1</sup> The Judicial Council has determined that Judge Nottingham's name should be disclosed in this order. See *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (Misconduct Rules) 24(a)(2). The Council has also determined that this order should be issued without waiting for the expiration of any appeal rights under Misconduct Rules 21(b)(1)(A) and 22(c), but without prejudice to those rights. See Misconduct Rule 2(b).

The first two complaints addressed in this order were filed when the Tenth Circuit's former *Rules Governing Complaints of Judicial Misconduct and Disability*, approved by the Judicial Council in June 2003, were still in effect. On March 11, 2008, the nationally mandated *Rules for Judicial-Conduct and Judicial-Disability Proceedings* cited above superceded the previous rules.

and that this conduct may have brought disrepute to the Judiciary and constituted misconduct. Based on other allegations in the news media, the complaint also alleged that Judge Nottingham may have violated court policy by viewing sexually explicit images on his court computer. After receiving a response from Judge Nottingham, Chief Judge Tacha referred the matter to a Special Committee pursuant to 28 U.S.C. § 353(a).

On September 19, 2007, a complainant filed a misconduct complaint against Judge Nottingham alleging that he had parked illegally in a handicapped parking space and, in an ensuing conversation with her, had misused his authority by identifying himself as a federal judge and threatening to call the U.S. Marshals. Chief Judge Tacha also referred this complaint, No. 2007-10-372-45, to the Special Committee.

During the Special Committee's investigation of these matters, which included numerous interviews, review of credit card, telephone, and computer usage records, and inspection of computer hard drives, the Special Committee determined that Judge Nottingham may have made false statements in his initial response to the allegations regarding computer use and in a transcribed interview. The Special Committee expanded the scope of Complaint No. 2007-10-372-36 to include these alleged false statements.

In March 2008, Chief Circuit Judge Robert H. Henry, who succeeded Judge Tacha as chief circuit judge on January 1, 2008, and the Special Committee



learned from news reports of allegations that Judge Nottingham had solicited prostitutes. Following investigation into these allegations, informal proceedings pursuant to Misconduct Rule 5, and two hearings, Chief Judge Henry initiated misconduct complaint No. 10-08-90089 against Judge Nottingham on October 1, 2008, alleging that he had been a client of prostitution businesses in violation of Colorado law, had misused his court-owned cell phone in making calls to prostitutes, and had made false statements during the investigation. This matter was also referred to a new Special Committee.<sup>2</sup> On October 8, 2008, the two Special Committees submitted a joint report to the Judicial Council pursuant to 28 U.S.C. § 353(c).

On October 10, 2008, another misconduct complaint was filed against Judge Nottingham. The complainant alleged that she had been a prostitute and that Judge Nottingham had been one of her clients. She further alleged that on February 29, 2008, Judge Nottingham asked her to lie to federal investigators about the nature of their relationship and not to disclose that she was a prostitute whom he paid in exchange for sex.

Under 28 U.S.C. § 354, the Judicial Council has a variety of actions

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<sup>2</sup> Because of the change in misconduct rules and chief judges, Chief Judge Henry replaced former Chief Judge Tacha on the second Special Committee, though Judge Tacha remained a member of the first Special Committee. The other members of the two committees remained the same. *See* Misconduct Rule 12(a).

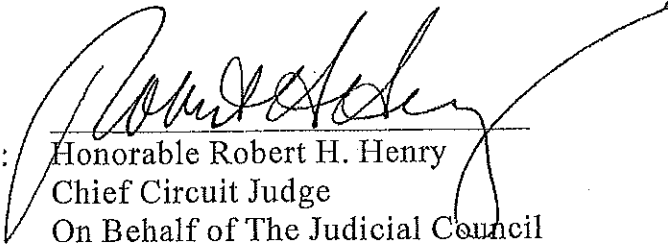
available to it on receipt of a special committee's report identifying judicial misconduct. These actions include dismissing the complaint on several bases; concluding the proceeding because of corrective action or intervening events; issuing public or private reprimands of the subject judge; ordering that no cases be assigned to the subject judge on a temporary basis; requesting the judge to voluntarily retire; and referring the matter to the Judicial Conference of the United States for determination of whether the matter warrants referral to the U.S. House of Representatives for impeachment. *See id.*; Misconduct Rule 20(b); *see also* 28 U.S.C. § 355. The Judicial Council cannot order the removal of an Article III judge. § 354(a)(3)(A).

Judge Nottingham resigned his commission from office as a United States district judge effective October 29, 2008. The Judicial Council finds that the resignation is in the interest of justice and the Judiciary.

The misconduct procedures apply only to federal judges. *See id.* § 351(d)(1); Misconduct Rule 4. Under the applicable federal law and misconduct rules, the Judicial Council has determined that these complaints should be concluded because intervening events, i.e., Judge Nottingham's resignation, have made further proceedings unnecessary. *See* Misconduct Rule 20(b)(1)(B).

The complaints are dismissed as moot. *See* 28 U.S.C. § 354(a)(1)(B). The  
Judicial Council will not exercise its discretion under Misconduct Rule 16(a).

So ordered this 30th day of October, 2008.

  
By: \_\_\_\_\_  
Honorable Robert H. Henry  
Chief Circuit Judge  
On Behalf of The Judicial Council  
Of the Tenth Circuit

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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C.C.D. No. 13-01

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

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PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM  
OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT  
J.C. Nos. 09-12-90026, 09-12-90032

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MEMORANDUM OF DECISION

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(Filed January 17, 2014)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Edith Brown Clement,  
David M. Ebel, James E. Gritzner<sup>1</sup>

This matter is before the Committee on petitions for review filed by complainant Third Circuit Chief Judge Theodore McKee on May 16, 2013 (“first petition”) and July 23, 2013 (“second petition”) regarding his March 6, 2012 complaint against Judge Richard Cebull under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (“Act”) and Rules for Judicial-Conduct and Judicial-Disability Proceedings, 248 F.R.D. 674 (U.S. Jud. Conf. 2008) (“JCD Rules”). The petitions address three unpublished Ninth Circuit Judicial Council orders on both Judge McKee’s complaint and another related complaint against Judge Cebull: an order of March 15, 2013; an order of May 13, 2013 purporting to vacate the March 15 order; and an order of July 2, 2013 issued in lieu of the March 15 order. The petitions argue that the March 15 order should be published as the resolution of these complaints. They also argue, in essence, that the

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<sup>1</sup>This panel comprised five members of the seven-member Committee, the other two members having been excluded from participation in this matter under Rule 21(c) of the Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings (2008).

subsequent orders are invalid as wrongly relying on a theory that Judge Cebull's retirement mooted the complaints and as inappropriately withholding factual findings that the March 15 order included. The Committee reviews these petitions under 28 U.S.C. § 357(a) and JCD Rules 21(a) and 21(b)(1)(A). For reasons we explain, the petitions are granted.

### **I. Factual Background**

The complaints arose from a February 2012 incident in which Judge Cebull, using his court email account, forwarded to six acquaintances an email message under the subject line, "A MOM'S MEMORY." The message was as follows:

Normally I don't send or forward a lot of these, but even by my standards, it was a bit touching. Hope it touches your heart like it did mine. A little boy said to his mother, Mommy, how come I'm black and you're white? His mother replied, "Don't even go there Barack! From what I can remember about that party, you're lucky you don't bark!"

Judge Cebull's forwarding of the email in question was widely reported in the local and national press. The ensuing notoriety was extensive, with calls for action—including demands that Judge Cebull resign—from members of Congress, governmental and non-governmental organizations, and members of the public. In particular, the incident received attention from members of the House Judiciary Committee. On March 6, 2012, Representatives John Conyers and Steve Cohen sent a letter to House Judiciary Committee Chair Lamar Smith requesting that the Judiciary Committee "investigate the potential consequences of Judge Cebull's conduct independent of whatever it is that the Ninth Circuit concludes." Another member of the House Judiciary Committee, Representative Hank Johnson, wrote directly to Judge Cebull asking him to resign.

There was also a substantial response from the public, and the story was widely reported in the local and national press. The Montana Human Rights Network collected more than 2,800

signatures on a petition calling for Judge Cebull to resign. The Crow Tribal Legislature passed a resolution asking Montana's federal legislators to take steps to impeach and remove Judge Cebull. Six professors at the University of Montana Law School published an editorial on March 14, 2012, writing that litigants before Judge Cebull "now have clear reason to question his ability to be fair and impartial when they appear in his court."

## II. Procedural History

When this incident became public through media reports, Judge Cebull wrote a letter of apology to the President.<sup>2</sup> He also asked Ninth Circuit Chief Judge Alex Kozinski to initiate a misconduct inquiry into the incident and waived "any confidentiality as to making this request or to the existence of any proceedings that may ensue from it." Judge Cebull's request was docketed as a complaint filed under the Act by Judge Cebull against himself. Chief Judge McKee filed his complaint against Judge Cebull based on the same incident, waiving "any right [of his own] to confidentiality in the proceedings." Ten additional complaints were filed regarding the incident, which the Ninth Circuit Judicial Council held in abeyance pending an investigation into Judge Cebull's and Judge McKee's complaints.<sup>3</sup> In accordance with JCD Rule 11(f), Chief Judge Kozinski referred Judge Cebull's self-initiated complaint and Judge McKee's complaint to a five-judge special investigating committee, which took testimony and reviewed relevant email, documents, and statistics.

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<sup>2</sup>The letter stated, in relevant part, as follows: "I sincerely and profusely apologize to you and your family for the email I forwarded. I accept full responsibility; I have no one to blame but myself. I can assure you that such action on my part will never happen again."

<sup>3</sup>Citing no authority for holding the additional complaints in abeyance, the Ninth Circuit Judicial Council's March 15 order described them as "based solely on public reports" and not offering "any firsthand information." The Council has apparently not taken any action on the additional complaints. As the filer of a complaint addressed by the orders here in question, Chief Judge McKee was entitled to receive those orders, but because the other ten complaints were held in abeyance, those individuals were not sent copies of the orders.

On March 15, 2013, the Ninth Circuit Judicial Council disposed of the two complaints in an order detailing the special committee's findings of judicial misconduct and issuing sanctions against Judge Cebull. A copy of this order was sent to Judge Cebull and to Chief Judge McKee under JCD Rule 20(f). The order found that Judge Cebull's conduct was "prejudicial to the effective administration of the business of the courts' under 28 U.S.C. § 351." It further found that Judge Cebull had violated Canon 2 of the Code of Conduct, which provides that a "judge should avoid impropriety and the appearance of impropriety," and Canon 5 of the Code of Conduct, which prohibits political activity. The order stated that Judge Cebull's conduct was "contrary to the Code of Conduct for United States Judges." It also noted that "[t]he strength and breadth of the public reaction to the publication of the February 2012 email illustrates the severity of the violation."

In the March 15 order, the Judicial Council issued a public reprimand, ordered that no new cases be assigned to Judge Cebull for 180 days, and ordered Judge Cebull to complete training on judicial ethics, racial awareness and elimination of bias "[t]o restore the public's confidence that any possible conscious or unconscious prejudice will not affect future decisions." The order described Judge Cebull's past email practices as discovered by the special committee, and "strongly condemn[ed]" them. It also condemned Judge Cebull's initial public apology as "insufficient to acknowledge fully or redress his past actions and the totality of his discriminatory emails" and required that he "issue a second public apology, approved by the Judicial Council," that would "acknowledge the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email." Two members of the Judicial Council, Chief District Judge Wilken and District Judge Ishii, wrote a concurring statement that "the Judicial Council should request that Judge Cebull voluntarily retire from the judiciary under

28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction.”

The March 15 order noted that the special committee investigated Judge Cebull’s cases—in particular, his dispositions of labor, employment, civil rights and prisoner rights matters—and his criminal sentencing, as well as his cases that were appealed. The investigation found no evidence of bias in his rulings or in his sentencing practices, and no cases that were “troubling.” The order noted the special committee interviewed “key individuals in Montana’s legal community, court staff and Judge Cebull’s professional and social contacts,” and found that “[w]itnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge.”

Under JCD Rule 20(f), the March 15 order was set to be published on May 17, absent any petition for review.<sup>4</sup> But there were further developments in the interim. On April 2, the Ninth Circuit Judicial Council announced through its public website that Judge Cebull had decided to retire effective May 3. On April 23, Chief Judge McKee wrote to the Judicial Conduct and Disability Committee, asking (1) whether the March 15 order must be published as it then stood, and (2) whether any modification of the order would begin a new appeal period. The Committee responded to Judge McKee, with a copy to the Ninth Circuit Judicial Council, that the March 15 order must, under JCD Rule 24(a), be published, and that any modification of the order would begin a new appeal period. Then, on May 3, the Ninth Circuit Chief Judge posted on the court’s public website the following announcement: “The Judicial Council now finds it necessary to review the procedural status and will consider the matter at its next regular meeting, scheduled for June 28, 2013.” Ten days later, on May 13, the Ninth Circuit Judicial Council issued an

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<sup>4</sup>Under JCD Rule 22(c), any such petition must be filed “within 63 days of the date of the order for which review is sought.”



order vacating its March 15 order as moot in light of Judge Cebull's retirement and stating that the Judicial Council would "consider appropriate revisions" at a forthcoming meeting, scheduled for June 28.

On May 16, Chief Judge McKee filed a petition for review ("first petition") asking the Judicial Conduct and Disability Committee to review the May 13 vacatur. The Ninth Circuit Judicial Council responded that the Committee had no jurisdiction to conduct review at that time because (1) the Judicial Council's vacatur order "is not a final order," and (2) the March 15 order "is not reviewable because it was vacated."<sup>5</sup> It characterized the "case" as "still pending before our Judicial Council." These arguments notwithstanding, the petition's pendency with this Committee required that both the March 15 order and the May 13 vacatur remain, at least for the time being, unpublished.

Against this backdrop, the Ninth Circuit Judicial Council took further action. On July 2, it issued an order that "dismissed the complaints as moot," declaring that the "intervening event" of Judge Cebull's retirement "concludes these proceedings," and that the vacatur of the March 15 order had been predicated on "changed circumstances" resulting from Judge Cebull's retirement. While still describing Judge Cebull's actions in this matter as "misconduct," the July 2 order presented a truncated version of the March 15 order's findings.

The March 15 Judicial Council order had described hundreds of inappropriate email messages that were received and forwarded from Judge Cebull's court email account. The emails were identified by category, noting emails that were "political in nature" and emails that

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<sup>5</sup>Although we doubt that a Judicial Council action under the Act could thus evade review, we need not reach that issue. One of petitioner's arguments focuses on the prospect that the March 15 order would be withheld from the public record in this matter—a prospect that, in our view, ripened only upon issuance of the July 2 order, which the Council evidently does deem "final." Petitioner's other argument implicates the May 13 vacatur but is more directly a challenge to the July 2 order's characterization of this matter as moot and as concluded for intervening events.

“showed disdain and disrespect for liberal political leaders”; race-related emails that “showed disdain and disrespect for African Americans and Hispanics, especially those who are not in the United States legally”; “emails related to religion [that] showed disdain for certain faiths”; “emails concern[ing] women and/or sexual topics and were disparaging of women”; “emails contain[ing] inappropriate jokes relating to sexual orientation”; and “emails related to pending legislation or an issue that could come before the court, such as immigration, gun control, civil rights, health care or environmental matters.”

None of the foregoing descriptions appears in the order of July 2, 2013. That order recharacterized its predecessor’s findings and omitted many salient details. For example, in lieu of the March 15 order’s nearly two-page description of the number and nature of inappropriate emails, the order of July 2 noted only that “Judge Cebull sent a substantial number of similarly inappropriate emails from his court email account.” The July 2 order included only a truncated version of the March 15 order’s discussion of witness interviews and the public response to the February 2012 email. And it omitted the March 15 order’s discussion of the specific conduct violations and the particularities of the public reprimand and the sanctions ordered, replacing it with the remark that “[t]he Judicial Council found misconduct with regard to the emails Judge Cebull sent from his court account, and issued an Order and Memorandum ... imposing a number of remedial and disciplinary measures.”

In summary, the July 2 order diverges from its predecessor in its (1) lack of specificity as to the number, nature, and targets of inappropriate emails found to have been sent by Judge Cebull; (2) recharacterization of the misconduct in a way that eliminates all references to “disdain and disrespect” for various groups; (3) lack of specificity as to why the emails constituted misconduct; (4) de-emphasis of derogatory findings by reduction of their extent and

prominence relative to extenuating material; and (5) omission of any reference to the concurrence in which two Council members indicated that they would have sought Judge Cebull's resignation.

Chief Judge McKee filed a new petition for review ("second petition") on July 23, incorporating the first petition by reference and requesting review of the July 2 order. (Under JCD Rule 20(f), Chief Judge McKee was entitled to receive and did receive the July 2 order.) This petition expressed "concern about the propriety of a Judicial Council issuing a final order making detailed findings of extensive judicial misconduct and then, after the subject judge retires, sua sponte vacating its own final order and issuing a new order that effectively conceals the judicial misconduct that previously had been identified and detailed." The Ninth Circuit Judicial Council, in an August 9, 2013 letter of response to the Committee, explained that the July 2 order sought only to "disclose[] enough about the investigation to ensure the public knows that the matter was taken seriously. . ." because, in the Council's view, "[saying anything further would be punitive, which is no longer appropriate. . . ." Thus, the Judicial Council did not intend to publish its March 15 order, which it declared "vacated."

### **III. Discussion**

#### **A. Publication of the March 15 Order**

The Judicial Conduct and Disability Act of 1980 mandates that "[e]ach written order to implement any action under section 354(a)(1)(C) . . . shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit." 28 U.S.C. § 360(b) (emphasis added). (Section 354(a)(1)(C) governs action taken "if the complaint is not dismissed.") JCD Rule 24(a) requires that "all orders entered by the chief judge and judicial council" be made public "[w]hen final action has been taken on a complaint and it is no longer

subject to review” of right. An order by a Judicial Council is no longer subject to review of right after “63 days of the date of the order” or, if a timely petition for review is filed, after the Committee adjudicates the petition. Neither 28 U.S.C. § 360(b) nor JCD Rule 24(a), by its terms, limits this publication requirement to “final” orders. The JCD Rules provide no exception to the requirement other than granting the Judicial Council discretion, in specified circumstances, to decide whether to identify the subject judge. JCD Rule 24 (a)(2). As noted, the Act refers to publication of orders implementing any action under Section 354 (a)(1)(C). In addition, this Committee may make available “other orders related to the complaint proceedings” by posting them on [www.uscourts.gov](http://www.uscourts.gov), the website on which we must post our own orders “constituting final action on a complaint proceeding.” JCD Rule 24(c).

The publication requirement in the Act and in the JCD Rules balances the need to preserve the confidentiality of the identity of a judge who is subject to a complaint of misconduct or disability to which no merit has yet been ascribed, with the need for transparency and public confidence once the Circuit Judicial Council has adjudicated the matter on the merits. The statutory provision requiring public disclosure of orders was one of several that were added to an earlier draft of the Act, to “requir[e] the procedures and institutions involved [in the process] to be more open to public scrutiny” and to serve the “goal of insuring public access to the [complaint] process.” 126 Cong. Rec. S. 13854, 3860-13861 (daily ed. Sep. 30, 1980); 126 Cong. Rec. H. 10188, 10190-10191 (daily ed. Oct. 1, 1980).

In this matter, the proceedings concluded when the Ninth Circuit Judicial Council issued its March 15 order, which rendered a final decision on the merits. Even though the period for review had not yet elapsed, the order was a final decision because the Council had adjudicated the matter on the merits after having received a report from a special investigating committee.

Moreover, the March 15 order was subject to the § 360(b) publication requirement, because it ordered action “to assure the effective and expeditious administration of the business of the courts” within the meaning of 28 U.S.C. § 354(a)(1)(C). Accordingly, and irrespective of the vacatur, the March 15 order must be published, under both the Act and the JCD Rules. 28 U.S.C. § 360(b); JCD Rule 24(a).

### **B. The “Intervening Event”**

The Ninth Circuit Judicial Council in this instance misapplied the Act and the JCD Rules by invoking Judge Cebull’s retirement as an “intervening event” warranting vacatur of the March 15 order and dismissal of the complaints as “moot.” Although a Circuit Judicial Council may conclude a proceeding “because . . . intervening events have made the proceeding unnecessary,” JCD Rule 20(b)(1)(B), such a disposition “after appointment of a special committee” is available only if “no final decision has been rendered on the merits.” JCD Rule 24(a) cmt. In other words, the JCD Rules contemplate that an “intervening event” is one that occurs before the Circuit Judicial Council has rendered factual and legal findings.<sup>6</sup>

The Ninth Circuit Judicial Council adjudicated the complaints on March 15, 2013. For purposes of JCD Rule 20(b)(1)(B), the complaint proceeding concluded when the Council issued its March 15 order, a decision on the merits. At that time, there was no intervening event to moot the Circuit Judicial Council’s disposition.<sup>7</sup> Because Judge Cebull’s retirement came after

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<sup>6</sup>The structure of Rule 20, captioned “Judicial Council Consideration of Reports and Recommendations of Special Committees,” makes clear that the rule’s options, including termination of a proceeding based on intervening events, come into play during the pendency of a special committee report before the Judicial Council, not post adjudication. In particular, Rule 20(b) authorizes a complaint proceeding to be concluded because the intervening event has made it unnecessary to adjudicate the complaint.

<sup>7</sup>Past orders, including those cited by the Ninth Circuit council, *see, e.g.*, *In re Charge of Judicial Misconduct*, 782 F.2d 181 (9<sup>th</sup> Cir. C.J. 1986), are not to the contrary, as they addressed situations in

the adjudication of the merits, it was not literally “intervening” and thus did not qualify as an intervening event under the Act and the JCD Rules.

Judge Cebull’s retirement only affected the prospective sanctions imposed by the March 15 order, rendering them inoperative. This applies to the order’s provisions that commanded Judge Cebull to undertake, or cooperate in, specified remedial actions. The Ninth Circuit Judicial Council could have issued a supplemental order, for publication alongside its March 15 order, declaring that the retirement had divested the Council of its jurisdiction to enforce these remedies. But the Circuit Judicial Council’s factual findings and legal conclusions on misconduct must be published.

As with the requirement that all orders implementing the Act be published, the preclusion of mootness termination under these circumstances is important to maintain public confidence in judicial conduct and disability complaint proceedings.<sup>8</sup> The imperative of transparency of the complaint process compels publication of orders finding judicial misconduct. Accordingly, even if the corrective action ordered in this matter is no longer applicable, this subject judge’s retirement after a finding that he had committed judicial misconduct was not an intervening event under JCD Rule 20(b)(1)(B).

#### **IV. Conclusion**

The Ninth Circuit Judicial Council’s March 15 order, attached herewith, is adopted and published as the final order disposing of Judge Cebull’s and Judge McKee’s complaints on the merits, although its provisions commanding Judge Cebull to take remedial action are declared

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which a subject judge’s resignation or retirement occurred either before the complaint was filed or at a point in complaint proceedings when no order on the merits had been issued.

<sup>8</sup>Sound administration of the act excludes “institutional favoritism,” *see* Implementation of the Judicial Conduct and Disability Act of 1980 — A Report to the Chief Justice, 239 F.R.D. 116, 119 (2006) (“Breyer Report”).

inoperative. The Council's vacatur order of May 13 and its order of July 2 are also attached and published herewith. The publication requirements of 28 U.S.C. § 360(b) and JCD Rule 24(a) are thereby satisfied. Resolution of the ten remaining complaints in this matter is left to the Ninth Circuit chief judge and Judicial Council.

**FILED**

MAR 15 2013

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL  
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF  
JUDICIAL MISCONDUCT**

Nos. 12-90026 and 12-90032  
**ORDER AND  
MEMORANDUM**

Before: **KOZINSKI**, Chief Judge, **WALLACE**, **FISHER** and **CLIFTON**,  
Circuit Judges, **BEISTLINE**, **KING** and **WILKEN**, Chief District  
Judges, and **ISHII** and **McNAMEE**, District Judges<sup>1</sup>

On March 1, 2012, Richard Cebull, Chief District Judge for the District of Montana, wrote to Chief Judge Kozinski and asked that an inquiry be conducted as to whether his transmittal of an email about President Obama's mother constituted misconduct under the Judicial Conduct and Disability Act. In the letter, he apologized for his "serious mistake and lack of judgment." He also attached a letter of apology sent to President Obama. This matter was docketed as Complaint of Judicial Misconduct No. 12-90026.

Judge Cebull waived the confidentiality of his request, and his letter to Chief Judge Kozinski and his apology to the President were posted on the Ninth Circuit website. We name Judge Cebull in this order based on his waiver of

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<sup>1</sup> Hon. Sidney R. Thomas and Richard C. Tallman did not participate in the consideration of this matter.



confidentiality and our finding that the publicity and outcry surrounding this incident constitute extraordinary circumstances requiring public assurance that the federal judiciary is redressing the judicial misconduct. Judicial-Conduct Rule 23(a).

On February 20, 2012, Judge Cebull forwarded the email referenced above from his official court email account to six friends, at least one of whom forwarded it to others. The email reached a reporter for the *Great Falls Tribune*, who published an article quoting the email on February 29, 2012. According to the article, Judge Cebull maintained to the reporter that he sent the email not because it was racist but instead because it was “anti-Obama.” Judge Cebull is quoted as saying: “The only reason I can explain it to you is I am not a fan of our president, but this goes beyond not being a fan.” The article also states that Judge Cebull agreed the email was racist, but denied any personal racial bias. Judge Cebull made similar comments to the *Billings Gazette*, which were published in a February 29, 2012 article: “There’s no doubt it’s racist. It wasn’t forwarded for that purpose. . . . If anything, it’s political.” Judge Cebull added that he intended the email to be private and said that he would “never forward or send another email from his office that isn’t business related.”

This event generated nationwide media coverage, and a number of groups

and individuals called on Judge Cebull to resign. On March 23, 2012, Chief Judge Kozinski referred Complaint No. 12-90026 to a Special Committee for investigation. Members of the Special Committee are Circuit Judge M. Margaret McKeown, presiding officer; Circuit Judge Richard A. Paez; Chief Judge Rosanna Peterson, Eastern District of Washington; District Judge Raner Collins, District of Arizona; and Chief Judge Kozinski, *ex officio*. Douglas R. Young of Farella Braun + Martel LLP, San Francisco, California, was appointed counsel to the Special Committee pursuant to Judicial-Conduct Rule 13(c).

Chief Judge Theodore A. McKee of the Third Circuit also filed a complaint, docketed at No. 12-90032, arising out of the same events, and requested that his identity as complainant be disclosed. Chief Judge Kozinski referred Chief Judge McKee's complaint to the Special Committee for inclusion in the investigation. Because other filed complaints were based solely on public reports and did not offer any firsthand information, they were held in abeyance pending resolution of Complaint Nos. 12-90026 and 12-90032.

Pursuant to Judicial-Conduct Rule 17, the Special Committee issued a Report ("the Report") to the Judicial Council on December 17, 2012. The Report described the Special Committee's thorough investigation, which focused on 1) retrieval, review and analysis of Judge Cebull's emails; 2) interviews with key

witnesses; 3) analysis of Judge Cebull's cases; and 4) the interview with Judge Cebull and materials submitted by his counsel.

#### Email Review

The Special Committee had initially assumed the investigation related to a single inappropriate email. The Special Committee still undertook an extremely detailed and time-consuming review to obtain additional information about the February 2012 email and to determine whether the email was an isolated incident or whether Judge Cebull had a pattern or practice of sending inappropriate emails. The investigation revealed that there were hundreds, and the volume and nature of similar inappropriate emails was unanticipated.

Judge Cebull has only one court email account, from which the February 2012 email was sent. During the period he served as a judicial officer, beginning as a magistrate judge in 1998, and as a district judge since July 2001, he did not possess a personal or any other email account. The Special Committee retrieved Judge Cebull's email archives from the backup tapes maintained by the Administrative Office of the United States Courts, which go back to 2008. Backup tapes were obtained for multiple dates, effectively providing "snapshots" showing all files present in the account at the time of each backup and allowing a more comprehensive review.

The Special Committee's review encompassed approximately four years of Judge Cebull's personal, noncourt related correspondence. The bulk of the noncourt emails included personal correspondence, forwarded cartoons, articles or video links and forwarded jokes. The recipients included Judge Cebull's personal and professional contacts, as well as court staff. Committee staff logged only emails that related to race, politics, religion, gender, sexual orientation, and politically sensitive issues, or that were inappropriate for Judge Cebull to have sent from his federal email account. Hundreds of emails fell within one or more of these categories.

The majority of the emails were political in nature. Whether they were cast as jokes or serious commentary, the emails showed disdain and disrespect for liberal political leaders. A significant number of emails were race related. Whether cast as jokes or serious commentary, the emails showed disdain and disrespect for African Americans, Native Americans and Hispanics, especially those who are not in the United States legally. A similarly significant number of emails related to religion and showed disdain for certain faiths. Approximately the same number of emails concerned women and/or sexual topics and were disparaging of women. A few emails contained inappropriate jokes relating to sexual orientation. Finally, a large number of emails related to pending legislation

or an issue that could come before the court, such as immigration, gun control, civil rights, health care or environmental matters.

### Witness Interviews

The Special Committee and its staff also traveled to Montana and interviewed over 25 witnesses, including key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts. In addition, the Special Committee interviewed a number of individuals who had exchanged inappropriate emails with Judge Cebull, including recipients of the February 2012 email. A few interviews were conducted by video conference and telephone. Judicial-Conduct Rule 23 prevents the identification of specific interviewees, so their comments are generally summarized here.

The interviews focused on Judge Cebull's professional conduct, his reputation, his attitudes towards women and minorities and the witnesses' personal experiences with Judge Cebull. The witnesses' statements were generally consistent and in the aggregate there was praise for Judge Cebull's conduct on the bench. A few witnesses commented that given the small number of judges in the District of Montana and the close-knit legal community, lawyers might be reluctant to make negative comments about Judge Cebull, even anonymously.

Witnesses generally regarded Judge Cebull as a good and honest trial

lawyer, and an esteemed trial judge. There were no specific reports of bias or prejudice in Judge Cebull's professional conduct, including from attorneys who had appeared before him on multiple occasions. Those with knowledge of his sentencing practices did not identify any troubling general practices or specific cases where his sentences may have been unfair. A number of witnesses who were friendly with Judge Cebull commented that they thought he made extra efforts to be fair to and accommodate Native Americans, including regularly approving their requests to conduct traditional rituals while incarcerated. The Special Committee did not learn of any concerns with respect to recusal of Judge Cebull.

Although there were some general detractors, the Special Committee uncovered no information that Judge Cebull had made comments or taken other actions in his personal or private life that demonstrated racial or other prejudice. Judge Cebull's friends and acquaintances were adamant that he was not biased in any way, and commented that they often saw him interact with minorities without prejudice. Many witnesses, however, also believed that the single disclosed email and associated publicity undermined not only Judge Cebull's personal reputation, but the reputation of the judiciary and the Montana legal community as a whole.

Many of the witnesses had talked to Judge Cebull about the email. Judge Cebull discussed it not only with his social and professional contacts but traveled

to every division of the District of Montana and met with court staff individually to apologize and allow them to raise any concerns. Recipients and nonrecipients alike viewed Judge Cebull's actions in forwarding the email to be "stupid" and in poor judgment. Those witnesses who had spoken to Judge Cebull said that he had also stated that what he did was inexcusable and stupid. In the main, the witnesses, except a few with whom he exchanged multiple emails, did not know about Judge Cebull's extensive email correspondence or his practice of forwarding large numbers of email jokes.

#### Review of Cases

The Special Committee further analyzed Judge Cebull's cases, with particular attention to sentencing practices, civil rights cases and appeals. The Special Committee did not see evidence of bias in any area. The Special Committee requested data from the U.S. Sentencing Commission ("USSC") on Judge Cebull's sentencing practices from 2005 to the present. The USSC provided the Special Committee with detailed data, broken down by race, showing the number of within-guidelines sentences as well as the number of upward and downward departures. The USSC provided additional detailed data with respect to certain individual departures. The Special Committee thoroughly examined Judge Cebull's sentencing practices with respect to particular crimes and ethnic groups,

and found no evidence of bias against nonwhite defendants.

The Special Committee also reviewed appeals of Judge Cebull's cases to the Ninth Circuit that resulted in published opinions or unpublished memorandum dispositions between July 2009 and July 2012. The Special Committee did not identify any specific reversals or vacated cases as troubling, nor did it identify any troubling patterns in the types of cases that were appealed.

The Special Committee also reviewed statistics on the disposition of the labor, civil rights and prisoner civil rights cases Judge Cebull heard over the last five years. The Special Committee did not see any anomalous patterns in the data, including the appeals of those cases. The Special Committee did not hear reports of bias in any such cases.

#### Interview of Judge Cebull

The Special Committee conducted an interview with Judge Cebull, who was represented by his counsel. The interview was conducted primarily by the Special Committee's counsel, and Committee members had the opportunity to ask additional questions of Judge Cebull. Judge Cebull acknowledged the seriousness of the issue and did not attempt to minimize or explain away the February 2012 email. Discussing the personal implications, he said that his "public shaming [in reaction to the email] has been a life-altering experience." He said he was "acutely



aware that each day in my court is the most important day in someone's life" and said that his behavior had undermined public confidence in the judiciary. Judge Cebull acknowledged that the February 2012 email was inappropriate, but repeatedly emphasized that he was not biased in court or in his personal attitudes or conduct. Judge Cebull acknowledged his history of inappropriate emails and emphasized that all of the messages were intended as private communications. He said that once the story came out, he stopped sending and receiving any personal email.

#### Public Response

The Special Committee also obtained the letters, faxes and phone calls received directly by Judge Cebull following the February 2012 news articles. The bulk of these communications were negative with respect to the initial email. The Montana State Bar also forwarded the correspondence it received to the Special Committee. Judge Cebull's counsel provided letters from attorneys and other supporters. The Special Committee reviewed and considered these communications in preparing the Report.

On September 24, 2012, Judge Cebull announced that he would take senior status effective March 18, 2013. As a senior judge, he would remain subject to the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Thus, his decision

does not affect the disposition of this matter.

The conduct at the core of these Complaints consists of Judge Cebull's sending, from his court email address, a racist and politically partisan email to a small group of friends. In response to publicity, he publicly explained the email was not intended as racist, but was instead anti-Obama. Publicity was widespread and there was an overwhelming negative reaction not only to the email but also to Judge Cebull's explanatory and/or exculpatory comments. The expressions of support vis-a-vis the email were in comparison minimal, and generally reflected a mistaken impression that this was an isolated incident. However, Judge Cebull sent hundreds of other inappropriate emails to court staff and individuals outside the court. The quantity and nature of these emails underscores the magnitude of Judge Cebull's breach of judicial ethics and the public trust.

Although the allegations in Complaint No. 12-90032 relate to Judge Cebull's performance of his official duties and the administration of justice, the Special Committee did not uncover misconduct in that area. Cognizable misconduct nevertheless can include conduct occurring outside the performance of official duties that is "prejudicial to the effective and expeditious administration of the business of the courts" under 28 U.S.C. § 351, which can include "a substantial and widespread lowering of public confidence in the courts among reasonable

people.” Judicial-Conduct Rule 3(h)(2).

Under 28 U.S.C. §§ 351-364, the Judicial Council has the power to decide whether Judge Cebull has “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” Remedial actions that may be taken by the Judicial Council are prescribed under 28 U.S.C. § 354(a), and include the following:

- (a) censuring or reprimanding the subject judge, either by private communication or by public announcement;
- (b) ordering that no new cases be assigned to the subject judge for a limited, fixed period;
- (c) requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived.

If a judge engaged in conduct that might constitute grounds for impeachment, the Judicial Council would refer that complaint to the Judicial Conference. Judicial-Conduct Rule 20(b)(2).

Disposition

After due consideration of the record, the Judicial Council adopts the Special Committee's Findings of Fact. See Judicial-Conduct Rule 20(d). Based thereon, the Judicial Council takes the following actions:

1. The Judicial Council hereby publicly reprimands Judge Cebull for conduct prejudicial to the effective administration of the business of the courts. 28 U.S.C. § 351. The racist and political February 2012 email, particularly when coupled with the hundreds of other emails regularly sent from Judge Cebull's court email account, reflects negatively on Judge Cebull and on the judiciary and undermines the public trust and confidence in the judiciary.

This conduct is contrary to the Code of Conduct for United States Judges which "may provide standards of conduct for application" in judicial conduct proceedings under 28 U.S.C. § 351. Commentary to Canon 1. In sending these emails, Judge Cebull violated his pledge "to uphold the integrity and independence of the judiciary" in Canon 1. As the Commentary to Canon 1 notes, "violation of this Code diminishes public confidence in the judiciary and injures our system of government under law." The strength and breadth of the public reaction to the publication of the February 2012 email illustrates the severity of the violation. We conclude that these acts constitute "conduct prejudicial to the effective

administration of the business of the courts” under 28 U.S.C. § 351.

Judge Cebull’s conduct also runs afoul of Canon 2 which provides that a “judge should avoid impropriety and the appearance of impropriety in all activities.” Canon 2(A). More specifically, the commentary counsels that “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges” and that the prohibition to “avoid all impropriety and appearance of impropriety . . . applies to both professional and personal conduct.” Even if Judge Cebull intended his emails to remain private, he was indifferent to their potential negative impact. See Commentary to Canon 2(A) (a “judge must expect to be the subject of constant public scrutiny”). In this case, we conclude that his conduct was “prejudicial to the effective administration of the business of the courts.” 28 U.S.C. § 351.

Canon 5 provides that “a judge should refrain from political activity.” This restriction includes making public speeches, commenting on a candidate for public office and “any other political activity.” Canon 5(A)(2). This Canon does not preclude a judge from having political opinions or even sharing those opinions in private among friends. However, disseminating political opinions via a court email account to court staff and to individuals outside the judiciary contravenes this Canon. Judge Cebull compounded his mistake in forwarding political emails by

making anti-Obama statements to reporters who called for comment on the February 2012 email. Judge Cebull repeatedly violated his duties under Canon 5. This conduct too, we conclude, was “prejudicial to the effective administration of the business of the courts” under 28 U.S.C. § 351.

2. We have concluded that Judge Cebull took no action in this matter that violated federal or Montana state law and thus impeachment is not warranted. Nonetheless, in recognition of the severity of his violation and the breadth of the public reaction, the Judicial Council orders that no new cases be assigned to Judge Cebull for a period of 180 days, such period to begin at the direction of the Judicial Council. See 28 U.S.C § 354(a) and Rule 20. During this period, Judge Cebull should undertake the training and other requirements set out in paragraphs 3 and 4 below.

3. Although we conclude based on our review of Judge Cebull’s cases that he has not demonstrated bias in his professional behavior, his email practices create a substantial possibility that his neutrality could be questioned. To restore the public’s confidence that any possible conscious or unconscious prejudice will not affect future decisions, Judge Cebull shall complete training on judicial ethics, racial awareness and elimination of bias, including unconscious or latent bias, before his suspension is terminated. Any training must be of sufficient breadth and

depth to raise Judge Cebull's awareness of how and why his emails were interpreted as political, racist, sexist or otherwise biased. Following the completion of such training, Judge Cebull shall engage in public outreach to help sensitize the legal community and the community at large in order to avoid repetition of such misconduct in the future. The Judicial Council appoints District Judge Raner Collins from the District of Arizona, who served as a member of the Special Committee, to monitor and advise Judge Cebull on appropriate activities to fulfill the requirements of this Order, and to keep the Judicial Council apprised accordingly.

4. The Judicial Council strongly condemns Judge Cebull's past email practices, and Judge Cebull's initial apology, which was insufficient to acknowledge fully or redress his past actions and the totality of his discriminatory emails. Further measures are therefore appropriate to instill public confidence in the judiciary. Judge Cebull must issue a second public apology, approved by the Judicial Council, that acknowledges the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email.

5. All parties and attorneys involved in cases assigned to Judge Cebull may move to recuse him based on conduct or concerns arising out of this Order or claims related to any of the categories of individuals or groups referenced in the

Order. Any motions to recuse based on this Order will be referred to an out-of-district judge for resolution.

Separate Statement by Chief District Judge Wilken and District Judge Ishii

We concur with the Judicial Council's order and agree that the discipline set out therein should be imposed. We would go further. In our view, the Judicial Council should request that Judge Cebull retire voluntarily from the judiciary under 28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction. See 28 U.S.C § 354(a)(2)(B)(ii) and Judicial-Conduct Rule 20.

*This order shall be made public 63 days after its filing, provided that no petition for review is filed before that date. Judicial-Conduct Rules 22(c) and 24(a).*



**FILED**

MAY 13 2013

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL  
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF  
JUDICIAL MISCONDUCT**

Nos. 12-90026 and 12-90032

**ORDER**

Before: **KOZINSKI**, Chief Judge, **WALLACE**, **FISHER** and **CLIFTON**,  
Circuit Judges, **BEISTLINE**, **KING** and **WILKEN**, Chief District  
Judges, and **ISHII** and **McNAMEE**, District Judges<sup>1</sup>

The Judicial Council's March 15, 2013 Order and Memorandum is vacated as moot pending further Order of the Council. In light of Judge Cebull's May 3, 2013 retirement, pursuant to 28 U.S.C. § 371(a), and the resulting change of circumstances, the Council will consider appropriate revisions to the Order and Memorandum at its next meeting, scheduled for June 28, 2013.

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<sup>1</sup> Hon. Sidney R. Thomas and Richard C. Tallman did not participate in the consideration of this matter.

FILED

JUL 02 2013

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JUDICIAL COUNCIL  
OF THE NINTH CIRCUIT

IN RE COMPLAINT OF  
JUDICIAL MISCONDUCT

Nos. 12-90026 and 12-90032  
ORDER

Before: **KOZINSKI**, Chief Judge, **WALLACE**, **FISHER** and **CLIFTON**,  
Circuit Judges, **BEISTLINE**, **KING** and **WILKEN**, Chief District  
Judges, and **ISHII** and **McNAMEE**, District Judges<sup>1</sup>

On March 1, 2012, Richard Cebull<sup>2</sup>, who was at that time the Chief District  
Judge for the District of Montana, wrote to Chief Judge Kozinski and asked that an  
inquiry be conducted as to whether his transmittal of an email about President  
Obama's mother constituted misconduct under the Judicial Conduct and Disability  
Act. In the letter, he apologized for his "serious mistake and lack of judgment,"  
and attached a letter of apology sent to President Obama. This matter was  
docketed as Complaint of Judicial Misconduct No. 12-90026.

On February 20, 2012, Judge Cebull forwarded the email referenced above  
from his official court email account to six friends, at least one of whom forwarded

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<sup>1</sup> Circuit Judges Sidney R. Thomas and Richard C. Tallman did not  
participate in the consideration of this matter.

<sup>2</sup> The Judicial Council has determined that Judge Cebull's name should be  
disclosed in this order. See Judicial-Conduct Rules 23(a) and 24(a)(2).

it. The email reached a reporter for the *Great Falls Tribune*, who published an article quoting the email on February 29, 2012. According to the article, Judge Cebull maintained to the reporter that he sent the email not because it was racist but instead because it was “anti-Obama.” Judge Cebull is quoted as saying: “The only reason I can explain it to you is I am not a fan of our president, but this goes beyond not being a fan.” The article also states that Judge Cebull agreed the email was racist, but denied any personal racial bias. Judge Cebull made similar comments to the *Billings Gazette*, which were published in a February 29, 2012 article: “There’s no doubt it’s racist. It wasn’t forwarded for that purpose. . . . If anything, it’s political.” Judge Cebull added that he intended the email to be private and said that he would “never forward or send another email from his office that isn’t business related.” This event generated nationwide media coverage, and a number of groups and individuals called on Judge Cebull to resign.

On March 23, 2012, Chief Judge Kozinski referred Complaint No. 12-90026 to a Special Committee for investigation. Members of the Special Committee are Circuit Judge M. Margaret McKeown, presiding officer; Circuit Judge Richard A. Paez; Chief Judge Rosanna Peterson, Eastern District of Washington; District Judge Raner Collins, District of Arizona; and Chief Judge Kozinski, *ex officio*. Douglas R. Young of Farella Braun + Martel LLP, San Francisco, California, was

appointed counsel to the Special Committee pursuant to Judicial-Conduct Rule 13(c).

Chief Judge Theodore A. McKee of the Third Circuit also filed a complaint, docketed at No. 12-90032, arising out of the same events, and requested that his identity as complainant be disclosed. Chief Judge Kozinski referred Chief Judge McKee's complaint to the Special Committee for inclusion in the investigation. Because other filed complaints were based solely on public reports and did not offer any firsthand information, they were held in abeyance pending resolution of Complaint Nos. 12-90026 and 12-90032.

Pursuant to Judicial-Conduct Rule 17, the Special Committee issued a Report ("the Report") to the Judicial Council on December 17, 2012. The Report described the Special Committee's thorough investigation, which focused on 1) retrieval, review and analysis of Judge Cebull's emails from 2008-2012; 2) interviews with over 25 key witnesses in Montana; 3) analysis of Judge Cebull's cases; and 4) an interview with Judge Cebull and materials submitted by his counsel.

The Special Committee's extensive and thorough investigation found no evidence of misconduct as to Judge Cebull's performance of his official duties. The Special Committee analyzed Judge Cebull's cases, with particular attention to

sentencing practices, civil rights cases and appeals. The Special Committee requested data from the U.S. Sentencing Commission (“USSC”) on Judge Cebull’s sentencing practices from 2005 to the present. The USSC provided the Special Committee with detailed data, broken down by race, showing the number of within-guidelines sentences as well as the number of upward and downward departures. The USSC provided additional detailed data with respect to certain individual departures. The Special Committee thoroughly examined Judge Cebull’s sentencing practices with respect to particular crimes and ethnic groups, and found no evidence of bias against nonwhite defendants.

The Special Committee also reviewed appeals of Judge Cebull’s cases to the Ninth Circuit that resulted in published opinions or unpublished memorandum dispositions between July 2009 and July 2012. The Special Committee did not identify any specific reversals or vacated cases as troubling, nor did it identify any troubling patterns in the types of cases that were appealed.

The Special Committee also reviewed statistics on the disposition of the labor, civil rights and prisoner civil rights cases Judge Cebull heard over the last five years. The Special Committee did not see any anomalous patterns in the data, including the appeals of those cases. The Special Committee did not hear reports of bias in any such cases.

The Special Committee undertook an extremely detailed and time-consuming review to obtain additional information about the February 2012 email, and to determine whether the email was an isolated incident or whether Judge Cebull had a pattern or practice of sending inappropriate emails. The investigation revealed that Judge Cebull sent a substantial number of similarly inappropriate emails from his court email account.

The Special Committee and its staff also traveled to Montana and interviewed over 25 witnesses, including key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts. The witnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge. There were no specific reports of bias or prejudice in Judge Cebull's professional conduct, including from attorneys who had appeared before him on multiple occasions. Those with knowledge of his sentencing practices did not identify any troubling general practices or specific cases where his sentences may have been unfair.

The Special Committee conducted an interview with Judge Cebull, who was represented by his counsel. Judge Cebull acknowledged the seriousness of the issue and expressed remorse for his conduct. Discussing the personal implications, he said that his "public shaming [in reaction to the email] has been a life-altering

experience.” He said he was “acutely aware that each day in my court is the most important day in someone’s life” and that his behavior had undermined public confidence in the judiciary. He said that once the story came out, he stopped sending and receiving any personal email.

The Judicial Council found misconduct with regard to the emails Judge Cebull sent from his court account, and issued an Order and Memorandum on March 15, 2013, imposing a number of remedial and disciplinary measures. 28 U.S.C. § 354. The Order was kept confidential during the appeal period pursuant to Judicial-Conduct Rules 22 and 24(a). On March 29, 2013, Judge Cebull submitted his retirement letter, pursuant to 28 U.S.C. § 371(a), effective May 3, 2013. Due to the resulting changed circumstances, the Judicial Council vacated its March 15, 2013 Order on May 13, 2013.

Because Judge Cebull has resigned and is no longer a federal judge, the misconduct procedures and remedies no longer apply to him. 28 U.S.C. § 351(d); Judicial-Conduct Rule 4; In re Charge of Judicial Misconduct, 782 F.2d 181 (9th Cir. Jud. Council 1986) (holding that when the subject of a complaint is no longer a judicial officer, he is beyond the reach of the misconduct procedures and the remedies that they prescribe). The Judicial Council holds that this intervening event concludes these proceedings, and dismisses the complaints as moot. 28

U.S.C. § 354(a)(1)(B); see also Judicial-Conduct Rule 20(b)(1)(B).

This is the final Order of the Judicial Council, and shall be made public 63 days after its filing if no petition for review is filed before that date. See Judicial-Conduct Rules 22(c) and 24(a).



THE JUDICIAL COUNCIL  
OF THE FIFTH CIRCUIT  
FILED

MAY 27 2009

Gregory A. Nussel  
Secretary to the Council

**THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT**

**Before: Edith H. Jones, Chief Judge, U. S. Court of Appeals for the Fifth Circuit; Jerry E. Smith, U. S. Circuit Judge; Carolyn Dineen King, U. S. Circuit Judge; E. Grady Jolly, U. S. Circuit Judge; W. Eugene Davis, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Edith Brown Clement, U. S. Circuit Judge; Jennifer Walker Elrod, U. S. Circuit Judge; Leslie H. Southwick, U. S. Circuit Judge; Eldon E. Fallon, U. S. District Judge; James J. Brady, U. S. District Judge; Robert G. James, U. S. District Judge; Neal B. Biggers, Jr., U. S. District Judge; Louis G. Guirola, Jr., U. S. District Judge; Sam R. Cummings, U. S. District Judge; Hayden Head, U. S. District Judge; David Folsom, U.S. District Judge; Orlando L. Garcia, U. S. District Judge**

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**DOCKET NO. 07-05-351-0086**

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**IN RE: Samuel B. Kent  
United States District Judge  
Southern District of Texas**

Pursuant to Title 28, Section 354 (b)(2)(A), the Judicial Council of the Fifth Circuit, based on the court record in Case No. 4:08-cr-00596, *United States of America v. Samuel B. Kent*, filed in the Southern District of Texas at Houston, and the subsequent lapse of fifteen days after sentencing without a notice of appeal or any post-judgment motion being filed, determines that Samuel B. Kent, a United States District Judge for the Southern District of Texas, has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) and has thus

by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States.

The Judicial Council urges the Judicial Conference of the United States to take expeditious action on this matter pursuant to 28 U.S.C. § 355(b).

The foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent.\*\*

FOR THE COUNCIL

  
Chief Judge

Dated: May 27, 2009

\*United States Circuit Judge Catharina Haynes stood recused and did not participate in this Judicial Council decision.

\*\*Copies of this Council certification and resolution are being contemporaneously delivered to the complainant and to Judge Kent pursuant to 28 U.S.C. § 354(b)(3).

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

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THE JUDICIAL COUNCIL  
OF THE FIFTH CIRCUIT  
FILED

1 JAN 9 2009

Gregory A. Nussel  
Secretary to the Council

DOCKET NO. 07-05-351-0086

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**IN RE: Complaint of Judicial Misconduct against United States  
District Judge Samuel B. Kent under the Judicial Conduct and  
Disability Act of 1980**

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**ORDER**

On December 20, 2007, this Council issued an order deferring consideration of the complainant's motion to reconsider the sanctions imposed against Judge Samuel B. Kent as the result of his misconduct. The consideration of this motion was deferred in deference to a criminal investigation being conducted by the United States Department of Justice.

On August 28, 2008, a United States Grand Jury handed down a three count indictment charging Judge Kent with felonies for conduct which had been the subject of the misconduct investigation of the Special Investigating Committee and the sanctions imposed by this Council as a result of that misconduct. (This indictment is attached as "Exhibit A".) The Council has continued to defer action on the motion for reconsideration pending the trial on those charges.

On January 6, 2009, that same United States Grand Jury issued a superseding indictment charging Judge Kent with committing additional misconduct described in Counts 4, 5 and 6 of the superseding indictment. The superseding indictment is attached as "Exhibit B". The conduct charged in Counts 4, 5 and 6 of the superseding indictment is conduct which is beyond the

misconduct the Special Investigating Committee and this Council discovered and considered, and upon which it based its earlier sanction.

In light of the new allegations of additional serious misconduct of which the Special Investigating Committee and the Council were unaware:

1. It is ordered that the complainant's motion seeking reconsideration of the sanctions imposed against Judge Kent is granted;

2. Following the trial of the criminal charges pending against Judge Kent, the Council will investigate the additional charges of misconduct alleged in Counts 4, 5 and 6 of the superseding indictment along with any supplemental investigation needed on the misconduct alleged in the original indictment. The Council will take such additional steps as are necessary to impose further sanctions in light of the result of the investigation.

DONE this <sup>9th</sup>   day of January, 2009.

FOR THE COUNCIL:

  
\_\_\_\_\_  
Chief Judge

United States Courts  
Southern District of Texas  
FILED

AUG 28 2008

Michael N. Milby, Clerk of Court

EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

**08-596**

UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	
v.	§	Count One: 18 U.S.C. § 2244(b)
	§	
SAMUEL B. KENT	§	Count Two: 18 U.S.C. §
	§	2241(a)(1)
	§	
Defendant.	§	Count Three: 18 U.S.C. § 2244(b)
	§	
	§	

INDICTMENT

The grand jury charges:

INTRODUCTION

At all times relevant to this indictment:

1. Defendant SAMUEL B. KENT was a United States District Judge in the Southern District of Texas. From 1990 to 2008, defendant KENT was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.
2. Person A was an employee of the Office of the Clerk of Court for the Southern District of Texas, and served as a Deputy Clerk in the Galveston Division assigned to defendant KENT's courtroom.

**COUNT ONE**  
**(18 U.S.C. § 2244(b))**  
**Abusive Sexual Contact**

3. On or about August 29, 2003, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly engage in sexual contact with another person without that other person's permission, to wit: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, did engage in the intentional touching, both directly and through the clothing, of the groin, breast, inner thigh, and buttocks of Person A with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of Person A.

All in violation of Title 18, United States Code, Section 2244(b).

**COUNT TWO**  
**(18 U.S.C. § 2241(a)(1))**  
**Attempted Aggravated Sexual Abuse**

4. On or about March 23, 2007, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly attempt to cause another person to engage in a sexual act by

using force against that other person, to wit: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, attempted to cause Person A to engage in contact between Person A's mouth and defendant KENT's penis by forcing Person A's head towards defendant KENT's groin area.

All in violation of Title 18, United States Code, Section 2241(a)(1).

**COUNT THREE**  
**(18 U.S.C. § 2244(b))**  
**Abusive Sexual Contact**

5. On or about March 23, 2007, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly engage in sexual contact with another person without that other person's permission, to wit: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, did engage in the intentional touching, both directly and through the clothing, of the groin, breast, inner thigh, and buttocks of Person A with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of Person A.

All in violation of Title 18, United States Code, Section 2244(b).

A true bill.

ORIGINAL SIGNATURE ON FILE

By: \_\_\_\_\_  
Grand Jury Foreperson

WILLIAM M. WELCH II  
Chief, Public Integrity Section

By:

A handwritten signature in cursive script, appearing to read "Ainsworth", written over a horizontal line.

Peter J. Ainsworth  
John P. Pearson  
AnnaLou T. Tirol  
Trial Attorneys



EXHIBIT B

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

JAN - 6 2009

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA	§	CRIMINAL NO. 08 - 596
	§	
v.	§	Count One: 18 U.S.C. § 2244(b)
	§	Count Two: 18 U.S.C. § 2241(a)(1)
SAMUEL B. KENT	§	Count Three: 18 U.S.C. § 2244(b)
	§	Count Four: 18 U.S.C. § 2241(a)(1)
Defendant.	§	Count Five: 18 U.S.C. § 2244(b)
	§	Count Six: 18 U.S.C. § 1512(c)(2)

**SUPERSEDING INDICTMENT**

The grand jury charges:

**INTRODUCTION**

At all times relevant to this indictment:

1. Defendant SAMUEL B. KENT was a United States District Judge in the Southern District of Texas. From 1990 to 2008, defendant KENT was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.
2. Person A was an employee of the Office of the Clerk of Court for the Southern District of Texas, and served as a Deputy Clerk in the Galveston Division assigned to defendant KENT's courtroom.

3. Person B was an employee of the United States District Court for the Southern District of Texas.

**COUNT ONE**  
**(18 U.S.C. § 2244(b))**  
**Abusive Sexual Contact**

4. On or about August 29, 2003, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly engage in sexual contact with another person without that other person's permission, that is: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, did engage in the intentional touching, both directly and through the clothing, of the groin, breast, inner thigh, and buttocks of Person A with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person.

All in violation of Title 18, United States Code, Section 2244(b).

**COUNT TWO**  
**(18 U.S.C. § 2241(a)(1))**  
**Attempted Aggravated Sexual Abuse**

5. On or about March 23, 2007, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly attempt to cause another person to engage in a sexual act by using force against that other person, that is: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, attempted to cause Person A to engage in contact between Person A's mouth and defendant KENT's penis by forcing Person A's head towards defendant KENT's groin area.

All in violation of Title 18, United States Code, Section 2241(a)(1).

**COUNT THREE**  
**(18 U.S.C. § 2244(b))**  
**Abusive Sexual Contact**

6. On or about March 23, 2007, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly engage in sexual contact with another person without that other person's permission, that is: defendant KENT, at the United States

Post Office and Courthouse in Galveston, Texas, did engage in the intentional touching, directly and through the clothing, of the groin, breast, inner thigh, and buttocks of Person A with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person. All in violation of Title 18, United States Code, Section 2244(b).

**COUNT FOUR**  
**(18 U.S.C. § 2241(a)(1))**  
**Aggravated Sexual Abuse**

7. On one or more occasions between January 7, 2004, and continuing until at least January 2005, any one and all of which constitute the offense of Aggravated Sexual Abuse, but which the Grand Jury cannot further differentiate by date, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly cause and attempt to cause another person to engage in a sexual act by using force against that other person, that is: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, did engage and attempt to engage in contact between his mouth and Person B's vulva by force and did penetrate and attempt to penetrate the genital opening of Person B by a hand and finger by force with an intent to abuse,

humiliate, harass, degrade, and arouse and gratify the sexual desire of any person.

All in violation of Title 18, United States Code, Section 2241(a)(1).

**COUNT FIVE**  
**(18 U.S.C. § 2244(b))**  
**Abusive Sexual Contact**

8. On one ore more occasions between January 7, 2004, and continuing until at least January 2005, any one and all of which constitute the offense of Abusive Sexual Contact, but which the Grand Jury cannot further differentiate by date, in the Southern District of Texas, in the special maritime and territorial jurisdiction of the United States, defendant

**SAMUEL B. KENT**

did knowingly engage in sexual contact with another person without that other person's permission, that is: defendant KENT, at the United States Post Office and Courthouse in Galveston, Texas, did engage in the intentional touching, directly and through the clothing, of the genitalia, groin, breast, inner thigh, and buttocks of Person B with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person.

All in violation of Title 18, United States Code, Section 2244(b).

**COUNT SIX**  
**(18 U.S.C. § 1512(c)(2))**  
**Obstruction of Justice**

9. On or about May 21, 2007, Person A filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit. In response, the Fifth Circuit appointed a Special Investigative Committee to investigate Person A's complaint.
10. On or about June 8, 2007, at defendant KENT's request and upon notice from the Special Investigative Committee, defendant KENT appeared before the Committee.
11. As part of its investigation, the Committee sought to learn from defendant KENT and others whether defendant KENT had engaged in unwanted sexual contact with Person A and individuals other than Person A.
12. On or about June 8, 2007, in the Southern District of Texas, defendant

**SAMUEL B. KENT**

did corruptly obstruct, influence, and impede an official proceeding, and attempt to do so; that is, defendant KENT falsely stated to the Special Investigative Committee of the United States Court of Appeals for the Fifth Circuit that the extent of his unwanted sexual contact with Person B was one kiss and that when told by Person B his advances were unwelcome no

further contact occurred, when in fact and as he well knew defendant KENT had engaged in repeated unwanted sexual assaults of Person B, in order to obstruct, influence, and impede the Fifth Circuit's investigation into the misconduct complaint filed by Person A.

All in violation of Title 18, United States Code, Section 1512(c)(2).

A true bill.

By: ORIGINAL SIGNATURE ON FILE

WILLIAM M. WELCH II  
Chief, Public Integrity Section

By:



Peter J. Ainsworth  
John P. Pearson  
AnnaLou T. Tirol  
Public Integrity Section

DEC. 20 2007

Gregory A. Nussel  
Secretary to the Council

**THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT**

**Before: Edith H. Jones, Chief Judge, U. S. Court of Appeals for the Fifth Circuit; Jerry E. Smith, U. S. Circuit Judge; W. Eugene Davis, U. S. Circuit Judge; Jacques L. Wiener, Jr., U. S. Circuit Judge; Rhesa H. Barksdale, U. S. Circuit Judge; Emilio M. Garza, U. S. Circuit Judge; Fortunato P. Benavides, U. S. Circuit Judge; Carl E. Stewart, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Priscilla R. Owen, U. S. Circuit Judge; Sarah S. Vance, U. S. District Judge; James J. Brady, U. S. District Judge; Tucker L. Melançon, U. S. District Judge; Michael P. Mills, U. S. District Judge; Louis Guirola, Jr., U. S. District Judge; Sam R. Cummings, U. S. District Judge; Hayden Head, U. S. District Judge; Thad Heartfield, U. S. District Judge; Fred Biery, U. S. District Judge**

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**DOCKET NO. 07-05-351-0086**

---

**IN RE: Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent under the Judicial Conduct and Disability Act of 1980**

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**ORDER**

A Special Investigatory Committee was appointed by the Chief Judge pursuant to 28 U.S.C. § 353(a) to investigate a complaint filed on May 21, 2007, by Cathy McBroom (“complainant”) alleging that United States District Judge Samuel B. Kent (“Judge Kent”) has engaged in judicial misconduct. The Special Investigatory Committee conducted an extensive investigation.



Thereafter, on September 11, 2007, the Special Investigatory Committee forwarded to the Judicial Council a comprehensive written Report presenting both the findings of the investigation and the Committee's recommendation for necessary and appropriate action by the Judicial Council. The Judicial Council entered its Order on September 28, 2007.

The complainant in these proceedings filed a motion for reconsideration, seeking a determination under 28 U.S.C. § 354(b) that Judge Kent may have engaged in conduct in violation of specific federal criminal statutes which might constitute one or more grounds for impeachment, and also asks the Council to certify such a determination, if made, to the Judicial Conference of the United States. The complainant also alleges that there is additional evidence of misconduct by Judge Kent. Judge Kent opposes the motion to reconsider.

The United States Department of Justice has subsequently initiated a criminal investigation, with which the Council is cooperating in keeping with Rule 9(B) of the Rules Governing Complaints of Judicial Misconduct of the United States Fifth Circuit ("Rules").

The propriety of further discipline in this case, or a certification to the Judicial Conference of the United States, cannot be fairly evaluated without adversarial proceedings in which the witnesses are subject to cross-examination. Further, Judge

Kent has demanded an adversarial hearing, as is his right, if the Council grants the motion to reconsider. See Rule 14(B)(3) and (4). Conducting adversarial proceedings at this time, however, while a criminal investigation is underway, could prejudice that investigation or be perceived as interfering with it. When courts confront parallel criminal and civil proceedings, it is customary to defer to the criminal investigation to the extent consistent with the rights of all concerned.

Accordingly, it is ORDERED, that the Council will defer action on the motion for reconsideration in light of the ongoing investigation. If the investigation is not concluded within 3 months, the Council will revisit the issue. In the meantime, the Council may investigate any newly discovered evidence.

The Council finds that its deferral of the motion for reconsideration does not prejudice any substantial rights of the complainant.

During the pendency of the criminal investigation, Judge Kent has agreed he will not handle any civil or criminal cases in which the United States is a party or in which sexual misconduct of any kind is alleged.

DONE this 20th day of December, 2007.

FOR THE COUNCIL:



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Chief Judge

SEP 28 2007

Gregory A. Nussel  
Secretary to the Council

**THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT**

**Before:** Edith H. Jones, Chief Judge, U. S. Court of Appeals for the Fifth Circuit; Jerry E. Smith, U. S. Circuit Judge; W. Eugene Davis, U. S. Circuit Judge; Jacques L. Wiener, Jr., U. S. Circuit Judge; Rhosa H. Barksdale, U. S. Circuit Judge; Emilio M. Garza, U. S. Circuit Judge; Carl E. Stewart, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Edith Brown Clement, U. S. Circuit Judge; Priscilla R. Owen, U. S. Circuit Judge; Sarah S. Vance, U. S. District Judge; James J. Brady, U. S. District Judge; Tucker L. Melancon, U. S. District Judge; Michael P. Mills, U. S. District Judge; David C. Bramlette, III, U. S. District Judge; Sidney A. Fitzwater, U. S. District Judge; Hayden W. Head, Jr., U. S. District Judge; T. John Ward, U. S. District Judge; Fred Biery, U. S. District Judge

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DOCKET NO. 07-05-351-0086

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IN RE: Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent under the Judicial Conduct and Disability Act of 1980

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**ORDER OF REPRIMAND AND REASONS**

A complaint of judicial misconduct was lodged on May 21, 2007 against the Hon. Samuel B. Kent of the Southern District of Texas, alleging sexual harassment toward an employee of the federal judicial system. A Special Investigatory Committee of the Council was appointed pursuant to 28 U.S.C. §353 to conduct an investigation of the original complaint. Following its initial investigation, the

Special Investigatory Committee notified the judge in question of an expansion of the original complaint under Rule 9(A) of the Rules Governing Complaints of Judicial Misconduct or Disability to investigate instances of alleged inappropriate behavior toward other employees of the federal judicial system, and ultimately recommended that a reprimand of the judge be issued along with the accomplishment of other remedial courses of action.

After due consideration of the report of the Special Investigatory Committee of the Council, and the response thereto by the Hon. Samuel B. Kent, the Council adopts the Special Investigatory Committee's Report, Findings of Fact, Conclusions of Law and Recommendations. Based thereon, by a majority vote, the Council accepted the recommendations of the Special Investigatory Committee and concluded these proceedings because appropriate remedial action had been and will be taken, including but not limited to the Judge's four-month leave of absence from the bench, reallocation of the Galveston/Houston docket and other measures.

Based on the Special Investigatory Committee's report, the Council reprimands Judge Kent for the conduct that the report describes. It further admonishes Judge Kent that his actions described in the report violated the mandates of the Canons of the Code of Conduct for United States Judges and are deemed prejudicial to the effective and expeditious administration of the business of the courts and the administration of justice.

This Order will be available in the public record upon request, consistent with the requirements of 28 U.S.C. §360(b), and will be placed on the website of the Fifth Circuit. The Special Investigatory Committee's Report, Findings of Fact, Conclusions of Law and Recommendations, and the Response to the Report are confidential under 28 U.S.C. §360(a) and shall not be disclosed.

For the Council:

*Edith H. Jones*  
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Chief Judge

*September 28, 2007*

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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C.C.D. No. 17-02

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

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PROCEEDING IN REVIEW OF THE ORDER AND MEMORANDUM  
OF THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT  
J.C. Nos. 10-16-90009 (DC-16-90009) & 10-16-90017

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(Filed November 30, 2017)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, Jon O. Newman, and Kathryn H. Vratil.

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**MEMORANDUM OF DECISION**

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In early 2016, the Utah Attorney General’s Office and Terry Mitchell filed complaints of judicial misconduct against Judge Richard W. Roberts (retired) of the U.S. District Court for the District of Columbia under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (amended Sept. 17, 2015).<sup>1</sup> Terry Mitchell alleged in part that Judge Roberts, prior to his judicial appointment, “used his authority and status as a federal prosecutor to manipulate and coerce [then-]sixteen-year-old Terry Mitchell”—a witness in a 1981 trial—“into numerous sex acts before and throughout the trial.” Mitchell Compl. at 1. The Utah Attorney General made similar

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<sup>1</sup>The Utah Attorney General’s Office and Terry Mitchell filed their complaints in the U.S. Court of Appeals for the District of Columbia Circuit. At the request of the Judicial Council of the District of Columbia Circuit, on May 10, 2016, the Chief Justice transferred the Utah Attorney General’s complaint and any related complaints to the Judicial Council of the U.S. Court of Appeals for the Tenth Circuit.

serious allegations. Terry Mitchell further alleged that Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of these allegations. *See id.* at 4. The Tenth Circuit Judicial Council dismissed the judicial misconduct complaints in an Order attached herewith, concluding that Judge Roberts's pre-appointment conduct is not justiciable under the Judicial Conduct and Disability Act, and further that Judge Roberts did not dishonestly assert a disability.

Neither Terry Mitchell nor the Utah Attorney General challenged the Judicial Council's determinations by filing a petition for review.<sup>2</sup> Because neither Complainant took such an appeal, the Judicial Council's determinations of the two principal issues described above are not before this Committee for review.

Judge Roberts, however, has filed a Petition for Partial Review in which he objects to the Judicial Council's inclusion of the medical diagnosis underlying his disability retirement.<sup>3</sup> He asks this Committee to strike that specific medical diagnosis from the record. For the following reasons, we deny Judge Roberts's Petition for Partial Review.

## I.

On March 14, 2016, and May 26, 2016, respectively, the Utah Attorney General's Office and Terry Mitchell filed judicial misconduct complaints against Judge Roberts. The allegations in the two complaints stem from Judge Roberts's actions as a federal prosecutor in Utah 17 years

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<sup>2</sup> *See* 28 U.S.C. § 357(a) ("A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof."); R. 21(b)(1)(A) ("A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with . . . Rule 20(b)(1)(A) . . . ."); R. 22(a) ("A petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability . . . .").

<sup>3</sup> Brian M. Heberlig and Linda C. Bailey, of Steptoe & Johnson LLP, represent Judge Roberts.

before his 1998 appointment as a federal judge. Specifically, the complaints allege that (1) Judge Roberts had a manipulative and coercive sexual relationship with a young witness (Terry Mitchell) during a trial in Utah; (2) prior to and after his appointment as a federal judge, Judge Roberts breached his duty to report his past unethical behavior; (3) Judge Roberts misused his chambers and office equipment in contacting Terry Mitchell while he was a judge; and (4) Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of the misconduct complaints and a related federal civil complaint.

Within a matter of days of the Utah Attorney General's judicial misconduct complaint, Judge Roberts retired based on a permanent disability. The Acting Chief Judge<sup>4</sup> of the U.S. Court of Appeals for the D.C. Circuit certified to the President that Judge Roberts was permanently disabled from performing the duties of a judge in regular active service on March 15, 2016. On March 16, 2016 (the same day Terry Mitchell filed a related federal civil complaint), Judge Roberts notified the President of his retirement. *See* 28 U.S.C. § 372(a) ("Any . . . judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service . . . . A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit."). On March 18, 2016, the Acting Chief Judge dismissed the Utah Attorney General's complaint on the ground that Judge Roberts's recent retirement "render[ed] . . . the allegations moot or [made] remedial action impossible." *In re Charge of Judicial Misconduct or Disability*, No. D.C.-16-90009, Order & Mem. at 2 (D.C. Cir. 2016) (quoting R. 11(e)).

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<sup>4</sup> The Chief Judge of the D.C. Circuit recused from both Judge Roberts's disability certification and the judicial misconduct complaint against Judge Roberts and played no role in the decisions.



The Utah Attorney General filed a Petition for Review of the Acting Chief Judge's dismissal of its complaint. Upon request from the D.C. Circuit Judicial Council, the Chief Justice transferred to the Tenth Circuit the Utah Attorney General's complaint and any related matters (including the subsequent complaint filed by Terry Mitchell). *See* R. 26. The Tenth Circuit Judicial Council granted in part the Utah Attorney General's Petition for Review. Specifically, it vacated the dismissal order after determining that Judge Roberts's retirement "does not preclude him from coverage under the Judicial Conduct and Disability Act," and returned the complaint to the Chief Judge of the Tenth Circuit for further action under Rule 19(b).<sup>5</sup> *In re: Complaint Under the Judicial Conduct & Disability Act*, No. 10-16-90009, Order at 4 (10th Cir. 2016); *see also* 28 U.S.C. § 294(b) (stating "[a]ny judge of the United States who has retired from regular service under section . . . 372(a) . . . shall be known and designated as a senior judge"). The Chief Judge of the Tenth Circuit consolidated the two complaints and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

Following the Special Committee's detailed investigation and submission of its Report, the Tenth Circuit Judicial Council dismissed the Utah Attorney General's and Terry Mitchell's judicial misconduct complaints. The Judicial Council dismissed the allegations related to Judge Roberts's actions as a prosecutor, concluding that a judge's pre-appointment conduct is not cognizable under the Judicial Conduct and Disability Act. 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)(iv); *see also* 28 U.S.C. § 351(a) (providing that the Act applies to complaints

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<sup>5</sup> We agree that Judge Roberts's retirement does not preclude him from coverage under the Act. Disability retirement under Section 372(a) is an essential and proper step for judges who can no longer discharge the duties of their office. It is not, however, a safe harbor from allegations of judicial misconduct.

alleging that “a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts”). The Judicial Council also dismissed the allegations that Judge Roberts had a continuing duty to report his pre-appointment conduct because it was “unaware of any authority supporting such a duty for a federal judge.” Judicial Council Order at 20; *see also* 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)(i). In addition, the Judicial Council concluded the evidence did not support the allegation that Judge Roberts misused his chambers telephone and email account. 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)(iii). Finally, the Judicial Council concluded that the evidence did not support the allegation that Judge Roberts dishonestly asserted a disability. *Id.* As noted, neither the Utah Attorney General nor Terry Mitchell filed a petition for review of those determinations.

## II.

In reaching the conclusion that the evidence did not support the allegation that Judge Roberts dishonestly asserted a disability, the Tenth Circuit Judicial Council relied on the Special Committee’s “thorough investigation, including reviewing medical records and interviewing 28 witnesses, including medical professionals.” Judicial Council Order at 20. This investigation included consideration of the diagnosis of Judge Roberts provided by his neurologist, who had been treating Judge Roberts for 22 months at the time he provided his opinion. Specifically, the Judicial Council noted, in a sentence that is the subject of the pending Petition for Partial Review, that “[Judge Roberts’s] neurologist diagnosed Judge Roberts with limbic encephalitis associated with voltage gated potassium channel antibody, a rare condition that in most cases has a spontaneous onset and caused Judge Roberts symptoms of near-term memory loss, several instances of disorientation, seizures, and changes in personality.” *Id.* at 18.

Judge Roberts asserts in his Petition for Partial Review that the Tenth Circuit Judicial Council's inclusion in its final Order of the sentence explaining his neurologist's diagnosis is neither warranted nor necessary in a public order ruling on the propriety of his requesting and being granted disability retirement. According to Judge Roberts, he has "a personal privacy interest in not having his specific medical diagnosis and symptoms shared publicly." Pet. for Review at 3. In addition, he believes that a public order citing "the thoroughness of the investigation" alone is all that is necessary here. *Id.* at 4. He requests that this Committee strike the sentence from the record and replace it with the following: "Judge Roberts has been diagnosed with a rare condition that causes serious symptoms." *Id.* The Tenth Circuit Judicial Council rejected these same arguments when Judge Roberts raised them before the Judicial Council, declining to remove the specific medical diagnosis from its final Order.

### III.

We recognize that there may be instances where a judge's personal medical information should not be made public. This is not the case here.

Judge Roberts's medical diagnosis is not a collateral issue that in a different case might be treated in the manner he suggests. Rather, Judge Roberts's medical diagnosis has been placed directly at issue due to the timing of his departure from judicial office, occurring within days of the filing of the Utah Attorney General's judicial misconduct complaint and Terry Mitchell's federal civil complaint. *See* Judicial Council Order at 17 ("The timing of Judge Roberts'[s] retirement . . . caused [the Tenth Circuit's] Chief Judge . . . to appoint the Special Committee, which investigated whether Judge Roberts'[s] disability was merely coincidental and legitimate or otherwise.").

The basis for Judge Roberts's disability retirement was a fact in controversy that required a determination as to its legitimacy under the circumstances. The specific nature of Judge Roberts's medical diagnosis is essential to a conclusion that his disability retirement was not a contrivance. In light of the nature of our review, *see* R. 21(a), the Tenth Circuit Judicial Council's consideration and rejection of Judge Roberts's arguments to strike the sentence from its final Order, and our independent conclusion that inclusion of Judge Roberts's medical diagnosis in the Judicial Council's Order is both warranted and necessary, we deny Judge Roberts's Petition for Partial Review.

#### IV.

In concluding that it lacked authority under the Act to review Judge Roberts's alleged misconduct, the Tenth Circuit Judicial Council acknowledged that "[t]he complainants are not without other avenues to address impropriety committed by a judge prior to appointment." Judicial Council Order at 14. Recognizing "the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint," the Judicial Council requested that this Committee forward a copy of its Order to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee. *Id.* at 15.

We agree. We will forward to those Committees copies of the Judicial Council's Order and this Decision denying Judge Roberts's Petition for Partial Review.

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

Nos. 10-16-90009 (DC-16-90009) &  
10-16-90017

Before **TYMKOVICH**, Chief Circuit Judge, **BACHARACH**, **PHILLIPS**, **McHUGH**,  
**MORITZ**, Circuit Judges, and **HERRERA**, **DEGIUSTI**, **NUFFER**, **MELGREN**,  
District Judges

**ORDER**

Two complaints of judicial misconduct were filed in the United States Court of Appeals for the District of Columbia Circuit against Judge Richard W. Roberts, then chief judge of the United States District Court for the District of Columbia.<sup>1</sup> The D.C. Circuit's acting chief judge dismissed the first complaint. Complainant filed a petition for review and the D.C. Circuit's Judicial Council requested that the matter be transferred to another circuit. Chief Justice John Roberts transferred the complaint and any related

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<sup>1</sup> The Rules for Judicial-Conduct and Judicial-Disability Proceedings (RJCD) provide "if the complaint is . . . dismissed at any time after a special committee is appointed, the Judicial Council must determine whether the name of the subject judge should be disclosed." RJCD 24(a)(2). Further, "the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure." RJCD 24(a)(5). Given that the misconduct matter has already received significant publicity, the names of the subject judge and first complainant have previously been disclosed by the media, and the second complainant's civil action against the subject judge has received considerable media attention, the Judicial Council has determined that it is in the public interest to disclose the name of the subject judge in this order. For the same reasons, the Chief Circuit Judge has ordered the disclosure of the names of the complainants.

matters to this circuit. Shortly thereafter, the second complaint was filed and was automatically transferred in accordance with Chief Justice Roberts' order.

The allegations in the two complaints stem from Judge Roberts' actions as a federal prosecutor in Utah 17 years before his appointment as a federal judge in 1998. Specifically, the complaints allege as misconduct: (1) that Judge Roberts had an improper sexual relationship with a young female witness during a trial in Utah; (2) that during and after his appointment, Judge Roberts breached his duty to report his past unethical behavior; (3) that Judge Roberts misused his chambers and office equipment in contacting the former witness while he was a judge; and (4) that Judge Roberts dishonestly asserted his disability in order to retire and avoid the consequences of the misconduct complaint and the civil complaint filed against him in federal court. Chief Circuit Judge Timothy M. Tymkovich appointed a Special Committee to investigate these matters. The Special Committee has submitted its report of findings and recommendations to the Judicial Council.

After considering the law and evidence, the Judicial Council agrees with the findings and recommendations of the Special Committee. It concludes that Judge Roberts' pre-appointment conduct does not fall within the scope of the Judicial Conduct and Disability Act and that he had no continuing duty after he became a judge to disclose pre-appointment conduct. The Judicial Council finds that there is insufficient evidence that Judge Roberts misused his chambers or office equipment in contacting the former witness. Finally, the Judicial Council finds that, while the timing of Judge Roberts'

disability retirement was accelerated by the anticipated publicity about the Utah complaints, medical and other evidence strongly support the existence of his disability and, thus, his disability was not dishonestly asserted.

## I. Background

The Judicial Conduct and Disability Act (the Act) provides procedures for handling misconduct complaints and defines misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 353(a). The Rules for Judicial-Conduct and Judicial-Disability Proceedings (RJCD), provide further guidance on what conduct may constitute misconduct and how the process proceeds once a chief circuit judge has referred a misconduct matter to a special committee.

This matter involves two misconduct complaints, which Chief Judge Tymkovich consolidated pursuant to RJCD 11(f). The first complainant, the State of Utah Attorney General’s Office (Utah AG’s Office), received a complaint from a witness, Terry Mitchell, who testified in the 1981 high-profile trial of Joseph Paul Franklin. Franklin was tried in federal court on civil rights charges and in state court on first-degree murder charges for killing two black men at a park in Salt Lake City. At the time, Judge Roberts was a trial attorney in the Department of Justice’s Civil Rights Division, and he helped prosecute Franklin’s federal charges. Mitchell, who was 16 years old during the trial, testified against Franklin. Mitchell alleged to the Utah AG’s Office that she engaged in a sexual relationship with Judge Roberts during the federal trial preparation and trial.

Franklin was convicted of both the federal and state charges and was executed by the State of Missouri in November of 2013 for a different murder conviction. Following the Franklin prosecution, Judge Roberts held various positions in private practice and the Department of Justice until 1998, when he was nominated and confirmed as a district judge in the United States District Court for the District of Columbia.

Upon receiving the witness's complaint against Judge Roberts, the Utah AG's Office initiated an investigation of the allegations. On March 14, 2016, the Utah AG's Office filed a judicial misconduct complaint with the D.C. Circuit based on its investigation of Mitchell's allegations.

The same week that the complaint was filed with the D.C. Circuit, Judge Roberts retired on disability pursuant to 28 U.S.C. § 372(a). For a district judge to retire on disability under this section, he or she must provide the President with a certification of disability signed by the chief circuit judge. The D.C. Circuit chief judge recused from both the disability certification and the judicial misconduct complaint. The most senior active D.C. Circuit judge became acting chief judge for both purposes. On March 15, 2016, the acting chief judge certified to the President that Judge Roberts was permanently disabled from performing the duties of a judge in regular active service. On March 16, 2016, Judge Roberts notified the President of his retirement. On March 18, 2016, the acting chief judge dismissed the Utah AG's Office's complaint after determining that Judge Roberts' recent retirement "render[ed] . . . the allegations moot or [made] remedial action impossible." *In re Charge of Judicial Misconduct or Disability*, No.



D.C.-16-90009, Order and Mem. at 2 (D.C. Cir. 2016) (quoting RJCD 11(e)). The Utah AG's Office filed a petition for review, and the Judicial Council for the D.C. Circuit requested that Chief Justice Roberts transfer the matter to another circuit. *See* RJCD 26. On May 10, 2016, Chief Justice Roberts transferred the complaint to the Tenth Circuit.

On May 26, 2016, Terry Mitchell filed her own complaint dated May 22, 2016, containing similar and additional allegations. Like the Utah AG's complaint, Mitchell's complaint focuses mostly on Judge Roberts' conduct as a federal prosecutor and other pre-appointment conduct. Additionally, Mitchell alleged that Judge Roberts may have dishonestly asserted his disability to avoid the consequences of the allegations being made public. Mitchell also asserted that Judge Roberts misused his chambers and office equipment to contact Mitchell. Finally, unrelated to Judge Roberts' conduct, Mitchell alleged that the acting chief circuit judge improperly certified Judge Roberts' disability because she was beyond the age permissible to act as chief judge under 28 U.S.C. § 45(a)(3)(C) and that information about the Utah AG's Office's investigation was leaked to Judge Roberts by staff at the Utah AG's Office. In accordance with the terms of Chief Justice Roberts' transfer order, Mitchell's complaint was also transferred to the Tenth Circuit.

On October 26, 2016, the Tenth Circuit Judicial Council granted in part the Utah AG's Office's petition for review from the acting chief circuit judge's dismissal of the first complaint, vacated that dismissal order, and returned the complaint to Chief Judge Tymkovich for further action pursuant to RJCD 19(b), after determining that "the statute

under which [Judge Roberts] retired does not preclude him from coverage under the Judicial Conduct and Disability Act.” *In re: Complaint Under the Judicial Conduct and Disability Act*, No. 10-16-90009 at 4 (10th Cir. 2016) (Tymkovich, C.J.); *see also* 28 U.S.C. § 294(b) (stating “[a]ny judge of the United States who has retired from regular service under . . . Section 372(a) . . . shall be known and designated as a senior judge”). Chief Judge Tymkovich consolidated the two matters and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

## II. Allegations Determined by Law

### A. The Judicial Conduct and Disability Act and Pre-appointment Conduct

Both complaints allege that Judge Roberts’ alleged sexual relationship with a witness during trial constitutes misconduct. As this conduct occurred in 1981, before Judge Roberts was appointed as a judge, the Special Committee requested the Utah AG’s Office, Mitchell, and Judge Roberts to brief whether the Judiciary has jurisdiction under the Act to consider misconduct complaints containing allegations that focus on actions or conduct of a judge committed prior to the judge’s appointment to the federal bench. The Judicial Council has considered those responses and concludes that pre-appointment conduct is outside of the scope of the Act.

The Act addresses “complaints” and defines the term “judge”:

Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by

reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

28 U.S.C. § 351(a). “[T]he term ‘judge’ means a circuit judge, district judge, bankruptcy judge, or magistrate judge.” *Id.* § 351(d)(1).

The Act gives the Judiciary authority to investigate and resolve complaints about the conduct of judges, i.e., “a circuit judge, district judge, bankruptcy judge, or magistrate judge.” *Id.* Thus, the Act applies to complaints only if they allege that “a *judge* has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” (or that a “*judge* is unable to discharge all the duties of office by reason of mental or physical disability”). 28 U.S.C. § 351(a) (emphasis added). Section 351(a) thereby effectively excludes any complaint aimed at a judge’s conduct before he or she became a federal judicial officer, i.e., before the nominee’s appointment. Section 352(b)(1)(A)(i) permits the chief circuit judge to dismiss an allegation that does not constitute misconduct under § 351(a). *See* Judicial Conduct & Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116, app. E at 240 (West 2006) (“Breyer Report”).

RJCD 3 correspondingly defines “[c]ognizable misconduct” as “conduct prejudicial to the effective and expeditious administration of the business of the courts,” and adds the following examples:

- (A) using the judge’s office to obtain special treatment for friends or relatives;
- (B) accepting bribes, gifts, or other personal favors related to the

judicial office; (C) having improper discussions with parties or counsel for one side in a case; (D) treating litigants, attorneys, or others in a demonstrably egregious and hostile manner; (E) engaging in partisan political activity or making inappropriately partisan statements; (F) soliciting funds for organizations; (G) retaliating against complainants, witnesses, or others for their participation in this complaint process; (H) refusing, without good cause shown, to cooperate in the investigation of a complaint under these Rules; or (I) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

RJCD 3(h)(1). “Cognizable misconduct” also includes “conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” *Id.* 3(h)(2).

Critically, all of the examples listed in RJCD 3(h) suggest that misconduct, to be actionable, must be committed while the subject “judge” is actually serving as a “judge,” even though inclusive of a judge’s actions performed outside of his or her official duties. Thus, none of these examples encompass conduct that occurred before a judge’s appointment.

The Breyer Report provides committee standards for assessing compliance with the Act, noting that “the standard does not appear susceptible to a precise definition” and surmising “[p]resumably that was the intent of the Act’s drafters.” Breyer Report, 239 F.R.D. app. E at 240. The Breyer Report advises that § 351(a) is given context in part by the “accumulated precedent of the circuits.” *Id.* Although the Breyer Report acknowledges a “contrary view . . . that pre-judicial conduct can be prejudicial to the

current administration of the business of the courts,” *id.* at 241, both the accumulation of circuit precedents and the Code of Conduct support the conclusion that pre-appointment conduct falls outside the scope of the Act.

The Ninth Circuit has provided the most thorough analysis of the scope of the Act. It held that the Act “is intended to deal with misconduct relating to the judicial office or judicial conduct.” *In re Complaint of Judicial Misconduct*, 366 F.3d 963, 964 (9th Cir. 2004). Moreover, the Ninth Circuit has explained that “the plain language of the Judicial Conduct and Disability Act limits its scope to conduct by federal judicial officers.” *In re Complaint of Judicial Misconduct*, 570 F.3d 1144, 1144 (9th Cir. 2009) (Kozinski, C.J.) (citing 28 U.S.C. §§ 351(a) and (d)(1) and dismissing complaint that alleged misconduct when subject judge sat on state court). The court has also emphasized that “Congress limited the scope of misconduct proceedings in order to preserve the constitutional scheme of presidential appointment and legislative confirmation.” *Id.* That same Ninth Circuit order appended and incorporated a 1986 order by former Ninth Circuit Chief Judge James R. Browning dismissing a misconduct complaint for lack of jurisdiction. That appended order expounded on the constitutional separation-of-powers concerns:

Article III, Section 2 of the United States Constitution vests the President with power to nominate officers of the United States, including federal judges, and to appoint such officers with the advice and consent of the Senate. The judicial branch has no constitutional role in considering the fitness of an individual to assume judicial office. Congress noted the differing roles of the coordinate branches in relation to judicial fitness, and recognized that, “[b]ecause of the separation of powers principle established by the Constitution, these roles must remain separate.” H.R. Rep. No. [96-]1313 at 5. It would be incompatible with this constitutional

principle for the judiciary to review the determination of the executive and legislative branches in the nomination and confirmation process by investigating and possibly disciplining a judge for conduct occurring before appointment to the bench.

*Id.* at 1154-55 (first alteration in original) (analyzing the legislative history of the Act, concluding that “[t]aken as a whole the legislative history of both chambers can be harmonized only by interpreting the phrase ‘prejudicial to the effective and expeditious administration of the business of the courts’ according to its plain meaning,” and holding that pre-appointment conduct does not fall within that plain meaning).

The 1986 order went on to dismiss the misconduct complaint for lack of jurisdiction because it alleged pre-appointment misconduct, which Judge Browning held was “unrelated to the effective functioning of the judge’s court.” *Id.* at 1154. Following this same analysis, the Ninth Circuit has routinely dismissed judicial misconduct complaints focusing on pre-appointment conduct. *See, e.g., In re Charge of Judicial Misconduct*, No. 89-80031, Order at 2 (9th Cir. 1989) (Goodwin, C.J.) (concluding judge’s pre-appointment conduct was “beyond the administrative jurisdiction of the chief judge and the circuit judicial council” because it had no bearing on effective and efficient administration of the federal courts); *In re Complaint of Judicial Misconduct*, Nos. 09-90269 & 10-90043, Order at 1 (9th Cir. 2010) (Kozinski, C.J.) (dismissing misconduct complaint because conduct occurred before appointment as federal judge and is, therefore, not cognizable under the Act).

Decisions from other circuits are consistent: the Act does not cover pre-appointment conduct. See *In re Complaint of Judicial Misconduct*, No. 34, Order at 2, 4 (Fed. Cir. 1990) (Markey, C.J.) (dismissing allegations of non-criminal pre-appointment misconduct, noting that the Act is concerned only with the conduct of judges); *In re Charge of Judicial Misconduct*, Nos. 10-90014 & 10-90015, Order at 3 (2d Cir. 2010) (Jacobs, C.J.) (dismissing complaint alleging pre-appointment conduct, noting that “any actions by the Judge in the Judge’s former capacity as a federal prosecutor would not constitute *judicial* misconduct under the Act”); *In re Complaints of Judicial Misconduct or Disability*, Nos. 04-35 & 05-16, Order at 8-9 (3d Cir. 2005) (Scirica, C.J.) (dismissing as not cognizable under the Act allegations that the judge made false statements during his Senate confirmation hearings, because the conduct occurred before the judge became a member of the Judiciary); *In re Complaint of Judicial Misconduct*, No. 06-6-351-02, Order at 1-2 (6th Cir. 2006) (Boggs, C.J.) (dismissing the misconduct complaint for lack of jurisdiction, because the complained-of conduct occurred before appointment to the federal bench); *In re Complaint Against a Judicial Officer*, No. 07-7-352-47, Mem. at 1 (7th Cir. 2007) (Easterbrook, C.J.) (dismissing as outside of the scope of the Act allegations based on a judge’s conduct when he was a teenager); *Memorandum of Reasons for Order of Dismissal of Complaint in Proceeding No. 92-10-372-10*, Order at 1 (10th Cir. 1992) (McKay, C.J.) (finding no jurisdiction under the Act or Tenth Circuit Judicial Council Rules to review a judge’s pre-appointment conduct and stating that “[t]hose matters are properly reviewed by the United States Senate in the course of confirmation proceedings”); but *c.f.* *In re Complaint Against a Judicial Officer*, No. 07-

11-90031, Mem. at 1 (7th Cir. 2011) (Easterbrook, C.J.) (dismissing a complaint premised on a judge's conduct as a state judge in a state court proceeding on ground conduct was directly related to the merits of state court case); *In re Complaint No. 262*, Order at 1 (1st Cir. 1999) (Torruella, C.J.) (dismissing allegations of pre-appointment conduct as frivolous without discussing jurisdiction under the Act).<sup>2</sup>

The Judicial Council notes that circuits have varied in their reasoning as to why they have declined to address pre-appointment conduct. Most circuits have relied on § 352(b)(1)(A)(i) (permitting the chief judge to dismiss the complaint upon finding the complaint not to be in conformity with § 351(a)<sup>3</sup>) when dismissing an allegation of pre-appointment conduct. Some circuits do this by implying that no pre-appointment conduct could constitute conduct prejudicial to the effective and expeditious administration of the business of the courts. *See, e.g., In re Charge of Judicial Misconduct*, Nos. 10-90014 & 10-90015 at 3 (2d Cir.). Other circuits have indicated that they lack jurisdiction to consider pre-appointment conduct at all. *See, e.g., In re Complaint of Judicial Misconduct*, No. 06-6-351-02 at 1 (6th Cir.); *Memorandum of Reasons for Order of Dismissal of Complaint in Proceeding*, No. 92-10-372-10, at 1 (10th Cir.).

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<sup>2</sup> These two latter decisions that reached the merits of the respective complaints are not authority for the presence of jurisdiction, however, because a court “is not bound by a prior exercise of jurisdiction in a case where it was not questioned and was passed *sub silentio*.” *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

<sup>3</sup> This was previously codified in 28 U.S.C. § 372(c).



The Judicial Council does not believe it is necessary to determine whether the Act affords jurisdiction in the strict legal sense over pre-appointment conduct or whether the conduct is simply not prejudicial to the current business of the courts.<sup>4</sup> What is critical is that in no situation of which the Judicial Council is aware has a circuit expressly found that pre-appointment misconduct constitutes cognizable misconduct under the Act.

The Breyer Report also advises that, like the “accumulated precedent of the circuits,” the Code of Conduct for United States Judges (“Code”) provides context for § 351(a). Breyer Report, 239 F.R.D. app. E at 240. The Code also supports the interpretation of the Act as excluding pre-appointment conduct. The Code makes clear that it applies only to those persons who are “officer[s] of the federal judicial system authorized to perform judicial functions.” *Code of Conduct for United States Judges, Compliance with the Code of Conduct* (Judicial Conference of the U.S. 1973). Further, each of the Code’s seven Canons begins with the phrase “A JUDGE” (e.g., “CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY”) and focuses on what “a judge” should or should not do. *See generally* Code of Conduct. Although the Code indicates that it is meant to “provide guidance . . . to nominees for judicial office,” Canon 1, cmt., it otherwise does not reference pre-

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<sup>4</sup> Of course, assuming jurisdiction to reach the merits in an adjudication of a case or controversy is prohibited. *See Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 101-102 (1998) (“For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is by very definition, for a court to act *ultra vires*.”). Hypothetical jurisdiction is not implicated here, however, because this is an administrative matter, rather than an Article III proceeding.

appointment conduct or advise that such conduct, even if disclosed after appointment, can be in violation of the Code.

In sum, the Judicial Council agrees with the Ninth Circuit and other circuits insofar as they have held that pre-appointment conduct is not cognizable misconduct within the scope of the Act. Here, Judge Roberts' sexual relationship with the witness, the focus of the misconduct allegations, occurred over 17 years prior to his appointment as a federal judge. The Judicial Council concludes that the Act does not give the Judiciary authority to review that conduct. Because the Judicial Council has concluded that the conduct alleged does not fall within the scope of the Act, it makes no determination as to whether Judge Roberts has engaged in conduct that might constitute a ground for impeachment under 28 U.S.C. § 354(b)(2)(A). *See In re Complaint of Judicial Misconduct*, 570 F.3d at 1155.

The complainants are not without other avenues to address impropriety committed by a judge prior to appointment:

Confirmation by the Senate does not, of course, shield a judge from responsibility for prior misconduct. If allegations of pre-confirmation conduct involve violation of the state's ethical standards for lawyers, the complainant may file charges with the state bar association's disciplinary body. If the allegations rise to the level of criminal conduct . . . complainant may lodge his complaint with the United States Department of Justice or the appropriate state law enforcement authorities. If the allegations involve conduct constituting "Treason, Bribery or other high Crimes and Misdemeanors," complainant may take the complaint directly to the House of Representatives.

*Id.*

The Judicial Council also acknowledges the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint. Nat'l Comm'n on Judicial Discipline and Removal, *Report of the Nat'l Comm'n on Judicial Discipline & Removal*, 152 F.R.D. 265, 342-43 (1994) (acknowledging "that some (non-frivolous) allegations of criminal conduct by a federal judge may be outside the Act's jurisdiction," but noting that "any such serious allegation should be brought to the attention of other institutions that have and exercise jurisdiction"). Here, the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee and the Senate Finance Committee have already received a copy of the Utah AG's complaint. The Judicial Council will request that the Committee on Conduct and Disability of the Judicial Conference of the United States forward a copy of this order to those committees.

B. Continuing Duty to Disclose

Both complaints contend that Judge Roberts had a continuing duty to report his relationship with Mitchell, under either *Brady v. Maryland*, 373 U.S. 83 (1963), or attorney professional conduct rules. According to the Utah AG's Office, these duties continued during Judge Roberts' tenure as an Article III judge, and his failure to report his pre-appointment conduct constitutes cognizable misconduct.

Neither of these points is persuasive. First, if *Brady* rights are at all relevant, which is dubious, they are personal to a defendant and Franklin's death renders the argument moot. Second, a lawyer's professional obligations are enforced by local bodies. The Judicial Council will leave to the appropriate governing bodies any

determination of whether Judge Roberts' conduct violated any professional standards, how long his obligations continued after conclusion of judicial proceedings against Franklin, and whether there should be consequences for any violation of those professional obligations.

C. Allegations Unrelated to Judge Roberts' Conduct

Mitchell's complaint contains two additional allegations that are unrelated to Judge Roberts' conduct and, thus, were not considered. First, Mitchell contends that the acting chief circuit judge improperly certified Judge Roberts' disability because she was beyond the age permissible to act as chief judge under 28 U.S.C. § 45(a)(3)(C). Second, Mitchell asserts that information about her complaint to the Utah AG's Office was leaked to Judge Roberts by staff at the Utah AG's Office.<sup>5</sup> Neither of these allegations pertains to the conduct of Judge Roberts and thus, will not be addressed further.

III. Allegations Determined by Fact

A. Allegation: Judge Roberts Misused his Chambers Telephone and Email with the Intent to Keep Mitchell from Disclosing their Relationship

In the years following his appointment as a judge, Judge Roberts and Mitchell had occasional email exchanges and telephone conversations. Mitchell alleges Judge Roberts engaged in misconduct when he used his chambers telephone and email with the

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<sup>5</sup> In an abundance of caution, however, the Judicial Council investigated whether the Utah AG's investigation was leaked to Judge Roberts and found no reliable evidence that it had been.

intention of preventing Mitchell from disclosing Roberts' alleged abuse. The Special Committee reviewed all of the written or transcribed communications between Judge Roberts and Mitchell that the two of them had identified (they were consistent) and reviewed Judge Roberts' court email account for all communications between them. Neither Mitchell nor Judge Roberts indicated that he contacted her using his personal email accounts. The Judicial Council agrees with the Special Committee that there is no evidence to support an assertion that Judge Roberts used his chambers equipment to keep Mitchell from disclosing Roberts' alleged abuse of Mitchell or otherwise engaged in misconduct while using his chambers equipment.

B. Allegation: Judge Roberts was Dishonest in Asserting his Disability

Judge Roberts retired on disability only a few days after the Utah AG's Office filed its misconduct complaint against him and on the same day Mitchell filed her civil action against Judge Roberts in the District of Utah. Mitchell contends that Judge Roberts' retirement occurring so soon after these events suggests that Judge Roberts may have dishonestly asserted his disability in an attempt to avoid the consequences of the allegations against him. The timing of Judge Roberts' retirement, in addition to the questions about his alleged misuse of chambers equipment, caused Chief Judge Tymkovich to appoint the Special Committee, which investigated whether Judge Roberts' disability was merely coincidental and legitimate or otherwise.

The Special Committee reviewed all of the materials submitted by the two complainants and Judge Roberts, including medical records from all doctors having

knowledge of Judge Roberts' medical condition leading to his disability retirement. The Special Committee interviewed the two physicians having the most relevant knowledge of Judge Roberts' condition. It also interviewed nearly all of the court staff identified by Judge Roberts as having information about his medical condition prior to his retirement, as well as those persons identified by others as possibly having knowledge of Judge Roberts' medical condition or any knowledge relevant to the allegations contained in either complaint. This included two circuit and two district judges in the D.C. Circuit, Judge Roberts, three current or former court unit executives, nine of Judge Roberts' former law clerks, and eight support staff.<sup>6</sup> The Special Committee also engaged a board-certified medical expert to review medical evidence and consult on medical norms.

The acting chief circuit judge's certification that Judge Roberts was disabled was based on an opinion from Judge Roberts' neurologist who had been treating Judge Roberts for 22 months at the time he gave his opinion that Judge Roberts was disabled. The neurologist diagnosed Judge Roberts with limbic encephalitis associated with voltage gated potassium channel antibody, a rare condition that in most cases has a spontaneous onset and caused Judge Roberts symptoms of near-term memory loss, several instances of disorientation, seizures, and changes in personality. While the condition has resolved in some patients, in the case of Judge Roberts, it had not done so by the time he took disability retirement. The Special Committee interviewed the neurologist who stood by his opinion that Judge Roberts was disabled at the time he retired. Judge Roberts' long-

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<sup>6</sup> Judge Roberts' interview differed from the other interviews in that he was represented by counsel and a court reporter transcribed the interview.

time internist agreed with that opinion. The Special Committee found both physicians to be credible.

Based on its review of the evidence developed by the Special Committee, the Judicial Council agrees with the Special Committee and concludes that Judge Roberts undoubtedly has a serious condition that significantly impacts his ability to perform as a trial judge. Accordingly, the Judicial Council concludes that neither the medical records, nor the interviews of district court staff or of doctors support a conclusion that Judge Roberts' dishonestly took a disability retirement.

#### IV. Conclusions

The Judicial Council dismisses the allegations related to Judge Roberts' actions as a prosecutor pursuant to 28 U.S.C. § 354(a)(1)(B) and RJCD 20(b)(1)(A)(iv) (requiring a complaint to be dismissed to the extent that the Judicial Council concludes that the complaint is "otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364"). The Judicial Council takes very seriously the important responsibility of disciplining its colleagues, but the Council also respects the authority of the President and the Senate to assess the fitness of a judicial nominee. Should evidence of pre-appointment misconduct surface after a judicial appointment, Congress, not the courts, has the power and responsibility to take appropriate measures.

Judge Roberts was not an officer of the federal judicial system nor was he performing judicial functions when he engaged in the alleged misconduct in Utah. The Act requires review of allegations that a *judge* has engaged in conduct prejudicial to the

effective and expeditious administration of the business of the courts. *See* 28 U.S.C. § 351(a). If a complaint is not within the scope of the Act, the judicial council may dismiss the complaint. *See* RJCD 20(b)(1)(A)(iv).

The Judicial Council dismisses the allegations that Judge Roberts had a continuing duty to report his pre-appointment conduct both before he became a judge and afterward pursuant to 28 U.S.C. § 354(a)(1)(B) and RJCD 20(b)(1)(A)(i) (permitting the judicial council to dismiss a complaint because “even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts”). The Judicial Council is unaware of any authority supporting such a duty for a federal judge. Should such a duty exist in another capacity, enforcing that duty is a matter best left to appropriate governing bodies.

The Judicial Council concludes that the evidence does not support the allegation that Judge Roberts misused his chambers telephone and email account. This allegation is dismissed pursuant to 28 U.S.C. § 354(a)(1)(B) and RJCD 20(b)(1)(A)(iii).

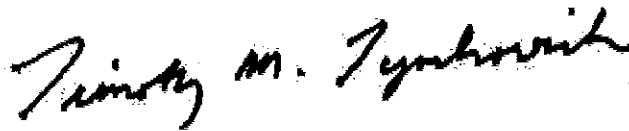
Finally, the Judicial Council concludes that the evidence does not support the allegation that Judge Roberts dishonestly asserted his disability and dismisses the allegation pursuant to 28 U.S.C. § 354(a)(1)(B) and RJCD 20(b)(1)(A)(iii). The Special Committee conducted a thorough investigation, including reviewing medical records and interviewing 28 witnesses, including medical professionals.



The Judicial Council concludes that despite any concerns about the timing of Judge Roberts' retirement, the evidence supports his claim of disability.

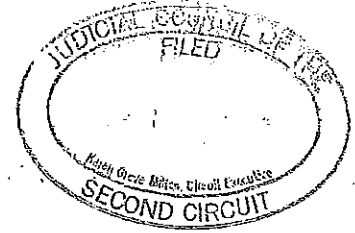
So **ORDERED**, July 28, 2017, and  
Entered on behalf of the Judicial Council  
Of the Tenth Circuit

By:

Handwritten signature of Timothy M. Tymkovich in black ink.

Honorable Timothy M. Tymkovich  
Chief Circuit Judge

17-90118-jm  
February 5, 2018  
Judicial Council



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In re  
COMPLAINT OF JUDICIAL MISCONDUCT

Docket No. 17-90118-jm

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**Before: The Judicial Council of the Second Circuit.**

On Thursday, December 14, 2017, the Chief Judge of the Ninth Circuit identified a complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351(b) (the "Act"), and Rule 5(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the "Rules"), against then-Circuit Judge Alex Kozinski of the Ninth Circuit "based on allegations contained in a December 8, 2017, Washington Post article entitled 'Prominent 9th Circuit Judge Accused of Sexual Misconduct' and any other related articles." Cplt. at 1. On Friday, December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council. *See* Rule 26.

Three days later, on Monday, December 18, 2017, then-Judge Kozinski permanently and irrevocably relinquished the office of United States circuit judge by retiring, effective immediately, pursuant to 28 U.S.C. § 371(a).

We recognize that the complaint references grave allegations of

inappropriate misconduct, which the federal judiciary cannot tolerate. Indeed, the federal judiciary has taken steps to ensure that the workplace is free of misconduct. We note that Chief Justice John G. Roberts, Jr., in his 2017 Year-End Report on the Federal Judiciary charged James C. Duff, Director of the Administrative Office of the U.S. Courts, with establishing a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the judiciary to protect employees from inappropriate conduct in the workplace. That working group has now been formed.

As to the instant matter involving former-Judge Alex Kozinski, the Second Circuit Judicial Council is obligated to adhere to the Act. The Act is concerned with individuals who *currently* exercise the powers of the office of federal judge. Its emphasis is on correction of conditions that interfere with the effective and expeditious administration of the business of the courts. The Act defines "judge" as "a circuit judge, district judge, bankruptcy judge, or magistrate judge." 28 U.S.C. § 351(d)(1). Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act.

Accordingly, the Judicial Council must "conclude the proceeding because

[of] . . . intervening events . . . .” Rule 20(b)(1)(B); *see also* Rule 11 cmt. (identifying “resignation from judicial office” as such an intervening event); *In re Charge of Judicial Misconduct*, No. 12-90069, at \*2 (2d Cir. Jud. Council June 20, 2013) (“Because Judge Martin has informed the president that he will retire from office, the Judicial Council has decided that it should ‘conclude the proceeding because . . . intervening events have made the proceeding unnecessary.’” (quoting Rule 20(b)(1)(B)));<sup>1</sup> *In re: Complaint of Judicial Misconduct*, No. 16-01, at \*2 (Comm. on Jud. Conduct & Disability of U.S. Jud. Conf. Jan. 26, 2017) (same); *In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Jud. Council 1996) (same); *In re Complaint of Judicial Misconduct*, 10 F.3d 99, 99–100 (3d Cir. Jud. Council 1993) (same).

In sum, within the space of three days, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council and then-Judge Kozinski resigned, completely relinquishing his office, placing himself outside the

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<sup>1</sup> The Second Circuit Judicial Council referred the order concluding the Martin proceeding to the Public Integrity Section of the Department of Justice, which was appropriate because then-Judge Martin retired from office only after (i) he had submitted a preliminary response to the complaint, *see* Rule 11(f), (ii) the Chief Judge of the Second Circuit had appointed a special committee, (iii) the special committee had hired outside counsel, (iv) the outside counsel, in conjunction with the special committee, had conducted an expansive nine-month investigation, and (v) the special committee had directed then-Judge Martin to testify under oath at a hearing—none of which has happened here. By way of comparison, the pending matter did not even reach step one; *i.e.*, then-Judge Alex Kozinski wholly relinquished his office before even submitting a preliminary response to the complaint, thereby precluding any further investigation under the Act.

parameters of the Act and precluding any inquiry by the Judicial Council.

Because the Judicial Council is without statutory authority to do anything more, we must close this matter.

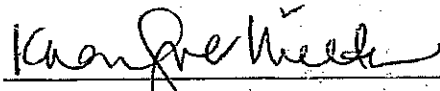
The complaint proceeding is therefore concluded. In so doing, the Judicial Council does not reach the merits of the complaint. Given the seriousness of the conduct alleged, however, the Judicial Council acknowledges the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint. Accordingly, the Judicial Council requests that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States forward a copy of this order to any relevant Congressional committees for their information, and that the Secretary of the Judicial Council forward a copy of this order to all other judicial councils.

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**  
**ADJUDGED AND DECREED** that the above-referenced complaint proceeding is **CONCLUDED**.

A TRUE COPY  
Karen Greve Milton, Circuit Executive



Signed: New York, New York  
February 5, 2018



Karen Greve Milton,  
Circuit Executive & Secretary  
of the Judicial Council



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

September 11, 2015

Honorable John Boehner  
Speaker  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Speaker:

At a special session held on September 9, 2015, the Judicial Conference of the United States by its members present determined, upon recommendation of its Committee on Judicial Conduct and Disability, to transmit the enclosed Certificate and record of proceedings in a judicial misconduct matter to the House of Representatives in accordance with 28 U.S.C. § 355(b)(1).

The Certificate is a "determination" within the meaning of the following provision in section 355(b)(1): "Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination." The Judicial Conference will make no public statement on this matter, but will transmit the Certificate to the individual who is the subject of the determination and to the chair of the Judicial Council of the Eleventh Circuit.

Sincerely,

A handwritten signature in cursive script that reads "James C. Duff".

James C. Duff  
Secretary

Enclosures

cc: Honorable Bob Goodlatte  
Honorable John Conyers, Jr.



## JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

### CERTIFICATE

TO THE SPEAKER, UNITED STATES HOUSE OF REPRESENTATIVES:

Pursuant to 28 U.S.C. § 355(b)(1), the Judicial Conference of the United States certifies to the House of Representatives its determination that consideration of impeachment of former United States District Judge Mark E. Fuller (M.D. Ala.) may be warranted. This determination is based on evidence provided in the Report of the Special Committee to the Judicial Council of the Eleventh Circuit and unanimously adopted by the Circuit Judicial Council.

The Constitution entrusts impeachment of public officials to Congress. But the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, creates a distinct role for the Judiciary in the impeachment process. The Act mandates a process through which the Judicial Conference and its members identify and investigate allegations of misconduct by judges. However, there may be considerations relevant to impeachment of other officers outside the Judicial Branch that are different from those faced by the Judiciary under the Act.

In a case with less egregious and protracted conduct, the Judicial Conference may decide that resignation obviates the need for certification. However, given the severity of the misconduct outlined below, together with a finding of perjury, the Judicial Conference believes that certification of this matter "to the House of Representatives for whatever action the House of Representatives considers to be necessary" is appropriate.  
28 U.S.C. § 355(b)(1).

The Judicial Conference also recognizes that, given Judge Fuller's resignation, Congress may decline to pursue impeachment. In the event that the House of Representatives determines in its sound discretion that impeachment is not warranted, this certification may also serve as a public censure of Judge Fuller's reprehensible conduct, which has no doubt brought disrepute to the Judiciary and cannot constitute the "good behavior" required of a federal judge.

The determination is based on substantial evidence provided in the Report of the Special Committee to the Judicial Council of the Eleventh Circuit, as adopted by the Circuit Judicial Council, that:

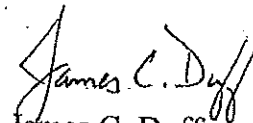
(a) Judge Fuller physically abused Kelli Fuller at least eight times, both before and after they married, which included and culminated in the assault that took place on August 9, 2014, in the Ritz-Carlton Hotel in downtown Atlanta, Georgia.

(b) Judge Fuller made repeated statements under oath before the Special Committee that he never, at any time, hit, kicked, or punched Kelli Fuller, which were false and material under 18 U.S.C. § 1621.

(c) Judge Fuller made false statements to the Chief Judge of the Eleventh Circuit in late September 2010 in a way that caused a massive disruption in the District Court's operation and loss of public confidence in the Court as an instrument of justice. These false statements, in combination with the actions outlined in (a) and (b), contributed to the overall determination that Judge Fuller's conduct may constitute grounds for impeachment.

(d) The conduct described in (a)–(c) has individually and collectively brought disrepute to the federal Judiciary.

Executed this 9th day of September, 2015.

  
James C. Duff  
Secretary