



COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
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November 5, 2021

The Honorable Emmet G. Sullivan
United States District Court
District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4935
Washington, D.C. 20001

Re: Docket No. 2706

Dear Judge Sullivan:

Thank you for your inquiry. The Committee on Codes of Conduct is pleased to respond. This response is advisory only and is based solely on the judgment of the Committee members. Many of the proscriptions of the Code of Conduct for United States Judges are cast in general terms, and “[t]he Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.” Commentary to Canon 1.

You request advice on whether your service on the District of Columbia Judicial Nomination Commission pursuant to the District of Columbia Home Rule Act (Publ. L. No. 93-178, 87 Stat. 774, 795-98 (1973)) contradicts Canons 4F and 5 of the Code.

The Home Rule Act sets forth the procedures for the selection of D.C. trial and appellate judges. These judges are nominated by the President and confirmed by the Senate and technically are federal officials but are treated as state judges. The Home Rule Act provides that the President may choose a nominee only from a list of three candidates

submitted by the Judicial Nomination Commission and, if the President does not timely select a nominee, the Commission itself nominates a candidate. The Commission has seven members, one of whom is statutorily required to be a current or retired district judge from your court, appointed by the Chief Judge of your court. You have served on the Commission since your nomination on May 9, 2001.

In August 2020, another judge contacted the Committee, requesting a formal opinion on whether a federal judge's service on the Commission contradicts judicial ethics and requesting confirmation of his view. Ultimately, because the other judge had submitted a third-party inquiry, the Committee declined to address it on the merits.

On August 19, 2021, the other judge filed a complaint against you under the Judicial Conduct and Disability Act, charging you with unethical conduct in violation of 28 U.S.C. § 351(a) and Rule 4(a) of the Rules Governing Judicial-Conduct Proceedings because of your service on the Commission ("JC&D Complaint"). Following the receipt of the JC&D Complaint, the Chief Judge of your court requested an ethics opinion from an ethics professor. In addition, the Attorney General for the District of Columbia has submitted a letter. Both the attorney general and the ethics professor opine that your service does not contradict judicial ethics.

Your request for guidance based on the JC&D Complaint raises three possible reasons for why your service might contradict the Code: (1) the statute should not be read to condone otherwise impermissible behavior; (2) serving on the Commission involves the exercise of political power and results in separation-of-powers problems; and (3) having a judge on the Commission may result in attorneys appearing before the judge experiencing a conflict of interest. The Committee will address each of those arguments in turn. Ultimately, a large majority of the Committee does not conclude that your service on the Commission is contrary to the Code or is otherwise impermissible.¹

Before turning to your inquiry, we should clarify the scope of this Committee's authority to advise you. The Committee is authorized to provide a confidential advisory opinion on the application of the Code in response to your specific request for ethics advice concerning your service on the Commission. In contrast, the Committee does not have any role in the investigation or adjudication of the JC&D Complaint and does not have the authority to advise you regarding that process. As noted below, although the Committee's ethics advice to you is confidential and the Committee treats all inquiries and responses as confidential, you are free to use this letter, or otherwise disclose our advice to you, as you please.

¹ A minority of Committee members disagreed with this advice on the basis that service on the Commission can both be political and may compromise the independence of the judiciary by enmeshing it with other branches of the federal government (including the federally created District of Columbia government).

A question has been raised whether your service on the Commission contradicts Canons 4 and 5 because the Commission “exercises enormous political power” by selecting the slate of candidates for judicial office in the District of Columbia (and potentially nominating a candidate). Two preliminary questions must be addressed before analyzing the merits of your inquiry: (1) whether it is impermissible for a federal judge to “enmesh” the judiciary with other branches of the federal government, compromising the federal judiciary’s independence, and (2) whether your appointment is *per se* ethical because Congress created the position by statute.

First, the Committee has held that it is not permissible for a judge to entangle the operations of the judiciary with either state and local governments or other branches of the federal government. Advisory Opinion 93 states that “a judge should not serve on an official state committee formed to select state trial and appellate court judges.” However, Opinion 93, discussing Canon 1, notes the potential impermissibility of a federal judge’s extrajudicial activity “to the extent it enmeshes the judge in, or subordinates the judge to, the operation of a state or local government.” The Commission, of course, is established—and your service provided—by federal statute. It is not a state committee and would not enmesh you in or subordinate you to the operation of a state or local government. Thus, Advisory Opinion 93 does not prohibit your service on the Commission.

Although Advisory Opinion No. 93 forbids a judge from “enmeshing” the judiciary with only state and local government, additional guidance from the Committee indicates that a judge is also forbidden from enmeshing the judiciary with other branches of the federal government. As Compendium § 4.6-5(a) states, “[g]enerally speaking, a judge is not permitted to be employed by, receive compensation from, or participate in policy-making or the execution of policy on behalf of, any state or local government or *other branch of the Federal Government*.” Compendium of Selected Opinions § 4.6-5(a) (Sept. 2021) (emphasis added).

The Committee has also advised judges in formal opinions against entangling the federal judiciary with other branches of the federal government. In one opinion, for example, the Committee advised a judge against serving on the Committee of the National Research Council of the National Academy of Sciences. As chair, the judge was tasked with undertaking a study to develop a research agenda to increase understanding of violence against women, which would ultimately be reported to Congress. In that opinion, the Committee advised that judges are precluded from participating in “certain functions which might be considered legislative,” because that would bring the judiciary’s independence into question. In its analysis, the Committee noted that there must be a line between a judge using his “unique perspective and special expertise” to improve the law and making public policy (the latter of which is prohibited). Because it was likely that the judge could become involved in making public policy recommendations, the Committee advised against the judge’s participation. Thus, as part of the merits analysis, we must

consider whether participation on this Commission enmeshes a federal judge with other parts of the federal government.

One question is whether Article III of the Constitution “implicitly precludes Congress from empowering judges to behave in an unethical manner.” Of course, this argument first requires accepting the contention that serving on the Commission runs afoul of the canons. As discussed below, it does not.

In addition, the canons are advisory and cannot usually override the federal statute (particularly because statutes are to be construed to avoid substantial constitutional questions when it is fairly possible to do so). Indeed, recommending against your service would in practical terms render the statute ineffective. Canon 2A states that a “judge should respect and comply with the law.” Further, the commentary to Canon 1 explains that the “Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances.” Applying the Canons consistently with the statute further supports the permissibility of your service on the Commission. The Committee has no jurisdiction or authority to opine on whether the statute is constitutional.

Importantly, however, just because an extrajudicial position was created by statute does not automatically make it compliant with the Code. Indeed, Canon 4F stresses that a judge may accept an extrajudicial position created by statute, but a judge should not accept that position if it would undermine public confidence in the judiciary. The ultimate question is whether the extrajudicial position compromises the judiciary’s independence, not whether the position was created by statute.

Turning now to the merits, as you state in your inquiry, whether serving on the Commission involves the prohibited exercise of political power implicates Canon 4F and 5 of the Code. Canon 4F provides:

A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge’s governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge’s country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Canon 5 addresses political activity. Your service on the Commission does not implicate any of the prohibitions set forth in Canon 5A. Rather, the question involves

Canon 5C, which states, “A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.”

From the text of these Canons, your service on the Commission does not appear to constitute prohibited political activity. Canon 4F provides that appointment to a commission is acceptable only if: (1) it concerns the law, legal system, or administration of justice or (2) a judge is required to be appointed by federal statute. (As discussed below, Canon 4 also prohibits a judge from compromising the independence of the judiciary, even if the appointment is law-related or a product of statute.) In your case, both conditions are satisfied.² And Canon 5’s prohibition on “other political activity” specifically excepts activities described in Canon 4.

Another question is whether this situation—in which the Commission serves as “an authoritative gatekeeper”—is different from the permissible situation identified in Advisory Opinion 59 in which a judge responds in a passive and private role to requests from political authorities about a nominee’s qualifications. The fact that the Opinion permitted a different type of involvement with judicial nominations can in no way be construed to prohibit your service on the Commission.

There are, however, other formal opinions from the Committee that explain when a judge may not be permitted to participate in judicial nominations. In one of those opinions, the Committee advised a judge not to participate in a committee that screened applicants for appointment by the President to the federal courts because it “necessarily involve[d] political participation even when the committee recommendation [was] not binding.” That opinion also explicitly stated that Advisory Opinion No. 59 does not “sanction membership on a selection committee.” In another opinion, the Committee advised a judge against accepting an invitation to serve on a committee designed to make recommendations to the Governor of a state for state judicial positions. The Committee also cautioned in Advisory Opinion No. 93 against judges serving on judicial selection committees: a judge should not serve on “an official state committee formed to select state trial and appellate court judges.” Even though that activity is considered law-related, and therefore typically permissible, it may not be permissible if “it might compromise the judge’s independence.”

Advisory Opinion No. 59 does, however, permit a judge to “recommend and evaluate judicial nominees based on the judge’s insight and experience, with the objective of maintaining a qualified and honorable judiciary.” On the other hand, it is impermissible for a judge to initiate contact with the appointing authority or publicly advocate for a candidate. Here, you are using your expertise to evaluate and recommend candidates for

² The JC&D Complaint argues that no judge is required to serve on the Commission. However, as the Commission responds, the Home Rule Act provides that “[o]ne member shall be appointed by the chief judge of the United States District Court for the District of Columbia, and such member shall be an active or retired Federal judge serving in the District.” To the extent an argument were to be made for limiting this position to retired judges, that would require erasing the term “active” from the statute, which the Committee cannot do.

judicial office; you are not lobbying the appointing authority or publicly opining on the qualities of any candidate. Plus, Article III judges routinely select Article I judges (magistrate judges and bankruptcy judges) in other contexts. Accepting the argument that your service on the Commission inevitably leads to conflicts of interest would call into question this practice. Therefore, your service on the Commission likely does not contradict Advisory Opinion No. 59 or the Committee's past decisions.

On top of serving on a judicial selection committee, there are additional concerns about permissible extrajudicial activities more broadly. Canon 4F states that a judge "should not . . . accept [a government] appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary."

The Committee has addressed this requirement in formal opinions many times. In one opinion, the Committee advised a judge against serving in a nonvoting capacity on the North Carolina Commission of Law and Justice because although the commission's aim was to reform the state court system, there was a risk that its recommendations could lead to legislative reform, compromising judicial independence. In another opinion, the Committee advised a judge that it was permissible to serve on a Committee that recommends to a Board of Trustees candidates for university president position, because it did not involve the governance of a university. The Committee has issued many formal opinions on both sides of this divide, but the analysis boils down to whether an extrajudicial activity is related to improvements in the law. A committee "improves" the law if its "essential purpose" is to do so. But even if an activity "improves" the law, it must not bring into question the judiciary's independence. The Committee has stressed that "the key issue is whether the committee [on which the judge serves] is engaged in matters of broad public policy."

Here, you are not engaged in recommending broad public policy prescriptions. Rather, you are engaged in recommending judicial nominees to the President and, in rare cases, the Senate. It is the President and the Senate that make the ultimate decisions. By using your expertise as a member of the federal judiciary in the District of Columbia, you are serving in an advisory capacity regarding appointments to an Article I court. Considering this distinctive context, the Committee cannot conclude that your service is contrary to the Code.

Finally, we address whether sitting on the Commission gives a judge improper influence over lawyers appearing before the judge. Canon 3(C)(1) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Because a judge who serves on the Commission likely would be able to block a lawyer's nomination, the JC&D Complaint argues that a lawyer "would be inclined to tread softly," putting "a lawyer's ambition in tension with his or her client's interest." Even if the Committee were to assume that a high percentage of attorneys in the

District seek judgeships, this argument does not have merit. As the Commission has noted, any lawyer with ambitions may be generally concerned with a judge's view of her advocacy, but "we rightly assume that lawyers put their clients' interests ahead of their personal ambitions, consistent with their professional obligations, just as we assume that judges draw distinctions between advocacy on behalf of a client and the lawyer's own personal views and decision-making." It is more likely that a lawyer seeking a judgeship will strive to be even more competent, diligent, and meticulous. D.C. Rule of Professional Conduct 1.7(b)(4) requires a lawyer to monitor her own conduct to look for potential personal conflicts of interest. This is the proper solution if an attorney senses a conflict.

Nonetheless, if there is a particular case in which you deem that your impartiality could reasonably be questioned, you can seek remittal of disqualification from the parties under Canon 3D. In that situation, you must disclose the basis for your disqualification. You may then participate in the proceeding if "the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate." The agreement must be incorporated into the record of the proceeding.

In conclusion, having considered the concerns raised about your participation on the Commission, and evaluated these concerns and your ethics inquiry under the relevant Code provisions, we cannot conclude that your service on the Commission is contrary to the Code.

The Committee treats all inquiries and responses as confidential and will disclose information about them only in the narrow circumstances described in the Committee's confidentiality policy. *See* Guide to Judiciary Policy, Vol. 2B, Ch. 1 § 130. As the recipient of this letter, you may use it as you please.

We hope this response has been helpful. If you have any further questions, please do not hesitate to contact the Committee.

For the Committee,

A handwritten signature in cursive script that reads "Jennifer W. Elrod".

Jennifer Walker Elrod
Chair