Judicial Council of the District of Columbia Circuit

In the Matter of

Judicial Council Complaint
No. DC-21-90051

A CHARGE OF JUDICIAL
MISCONDUCT OR DISABILITY

BEFORE: Srinivasan,[1] Chief Circuit Judge; Katsas,[2] Rao,[3] Walker,[4] and Jackson, Circuit Judges; Howell, Chief District Judge; Contreras, Cooper, and Chutkan, District Judges.

ORDER

By order dated November 16, 2021, Chief Circuit Judge Srinivasan dismissed a complaint filed against a Judge of the United States District Court for the District of Columbia. On November 18, 2021, the complainant filed with the Judicial Council a petition for review of the order of dismissal. Upon consideration thereof, it is

ORDERED, by the Judicial Council, that the Chief Circuit Judge's disposition is affirmed and the petition for review is denied pursuant to Rule 19(b)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

A petition for review by the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States may be filed under Rule 21(b)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Rule 22(c) requires that a petition for review be submitted within 42 days after the date of the Judicial Council Order.

FOR THE COUNCIL:

Elizabeth H. Paret
Circuit Executive

Filed: February 14, 2022

[1] Chief Circuit Judge Srinivasan did not participate in the instant order.
[2] A separate statement by Circuit Judge Katsas, dissenting from the denial of the petition for review, is attached.
[3] Circuit Judge Rao joins Judge Katsas' statement.
[4] A separate statement by Circuit Judge Walker, concurring in the denial of the petition for review and joining in part Circuit Judge Katsas' statement, is attached.

KATSAS, *Circuit Judge*, dissenting[1]: This misconduct proceeding arises from a dispute about whether a sitting federal judge may serve on a nominating commission for the District of Columbia courts. A divided committee of the Judicial Conference advised the judge in question that he may do so. Based on that advice, the Chief Judge of our circuit dismissed a misconduct complaint against the judge, and the Judicial Council now denies further review.

In my view, the committee's advice was mistaken. For the D.C. courts as elsewhere, judicial selection is inescapably political. And it is thus improper for sitting federal judges to serve on the D.C. nominating commission, just as it would be improper for them to serve on nominating commissions for state or federal courts. The committee itself has long recognized the latter point, and its efforts to distinguish the D.C. commission are unpersuasive.

Given the long history of sitting judges serving on the D.C. nominating commission and the advice of the committee, I would impose no sanction on the judge at issue for his past service on the commission. But I would conclude this proceeding only if the judge takes corrective action by resigning from the commission or ceasing to hear cases while serving on it. As my colleagues deny review unconditionally, I respectfully dissent.

I

A

The Judicial Conduct and Disability Act permits any person to file a complaint alleging that a federal judge has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). The Chief Judge of the relevant

[1] Judge Rao joins this dissent in its entirety. Judge Walker joins parts I and II.

circuit adjudicates such complaints. *Id.* § 352(a). In doing so, he may dismiss a complaint that fails to allege actionable misconduct. *Id.* § 352(b)(1). Alternatively, he may "conclude the proceeding" if the judge in question takes "appropriate corrective action." *Id.* § 352(b)(2). The Chief Judge's disposition of a misconduct complaint is reviewable by the circuit Judicial Council. *Id.* § 352(c).

The Judicial Conference has promulgated a Code of Conduct for United States Judges. Canon 1 of the Code requires judges to "maintain and enforce high standards of conduct" to preserve "the integrity and independence of the judiciary." Canon 2A likewise requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B prohibits judges from "lend[ing] the prestige of the judicial office to advance the private interests of the judge or others." Canon 4 permits judges to engage in various "extrajudicial activities," including "law-related" ones, but it prohibits any such activities that would "reflect adversely on the judge's impartiality." Canon 4F more specifically addresses appointment to a government commission. It permits a judge to accept such an appointment "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." But Canon 4F further provides that "[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." Canon 5C prohibits judges from engaging in any "political activity," but does not prohibit activities allowed by Canon 4.

The Code of Conduct provides "standards of conduct" to apply in misconduct proceedings. *See* Canon 1 commentary. But Code standards are often quite general, as is the underlying

statutory prohibition of conduct "prejudicial to the effective and expeditious administration of the business of the courts." *See* Jud. Conf. U.S., Rules for Judicial-Conduct and Judicial-Disability Proceedings (Judicial-Conduct Proceedings Rules), Rule 4 commentary. Where the governing standards are unclear, the "responsibility for determining what constitutes cognizable misconduct" falls to circuit judicial councils, subject to review by the Judicial Conference. *Id.*; *see* 28 U.S.C. § 355.

Two Judicial Conference committees interpret the Code of Conduct. The Committee on Codes of Conduct does so in providing confidential advisory opinions to individual judges. The Committee on Judicial Conduct and Disability does so in reviewing judicial-misconduct decisions of the circuit councils.

B

This dispute concerns the nominating commission for the District of Columbia Court of Appeals and the Superior Court of the District of Columbia. The District of Columbia Home Rule Act sets forth procedures for appointing judges to these courts. Pub. L. No. 93-198, §§ 433–34, 87 Stat. 774, 795–98 (1973) (codified as amended at D.C. Code §§ 1-204.33–.34). Like federal judges, D.C. judges are nominated by the President and subject to Senate confirmation. D.C. Code § 1-204.33(a). But the Home Rule Act requires the President to select each nominee from a list of three candidates recommended by the District of Columbia Judicial Nomination Commission. *Id.* If the President fails to nominate a candidate within 60 days of receiving the list, then the Commission itself nominates the judge, and appoints him or her with the Senate's advice and

consent. *Id.* § 1-204.34(d)(1). The Commission also designates, from among the respective D.C. judges, the chief judge of each D.C. court. *Id.* § 1-204.31(b).

The Commission consists of seven members, who serve staggered terms of five or six years. D.C. Code § 1-204.34(a). Its members include two appointees of the Mayor, two of the D.C. bar, one of the President, and one of the D.C. Council. *Id.* § 1-204.34(b)(4). The Council's appointee, and one of the Mayor's, must be non-lawyers. *Id.* § 1-204.34(b)(4)(C)–(D). The Chief Judge of our district court appoints the final member, who "shall be an active or retired Federal judge serving in the District." *Id.* § 1-204.34(b)(4)(E). Five sitting federal judges have served on the Commission, over a period spanning more than four decades.

C

The complainant here contends that the Code of Conduct prohibits sitting federal judges from serving on the Commission. The complainant sought an advisory opinion from the Codes of Conduct Committee, which declined to opine on the conduct of a third-party judge. The complainant then filed a misconduct complaint against the judge currently serving on the Commission, who has taken senior status but continues to hear cases. While the complaint was pending, the judge himself sought an advisory opinion. A divided Committee advised him that his service on the Commission does not violate the Code of Conduct. Advisory Op. (Nov. 5, 2021). The judge then waived confidentiality of the opinion. Based on the opinion, Chief Judge Srinivasan dismissed the complaint. The complainant now seeks review by the Judicial Council.

II

In my view, sitting federal judges cannot properly serve on the D.C. Judicial Nomination Commission for one basic reason: Judicial selection is an inescapably political enterprise.

A

Judges resolve cases or controversies according to law, but judicial selection is something entirely different. For one thing, the political branches typically do it; to take the most obvious example, the President nominates Article III judges, and the Senate confirms them. U.S. Const. art. II, § 2, cl. 2. Moreover, no statute purports to set forth standards for federal judicial selection. What professional experience best qualifies a candidate for judicial office? Service as a partner in an elite law firm, as an Assistant United States Attorney, or as a public-interest advocate? What personal qualities? What judicial philosophy? What demographic background? How should these considerations be weighed? For a nomination, how much deference should the President give to picks of the home-state Senators? For a confirmation, how much deference should the Senate give to picks of the President? How should the branches resolve any disagreement? And so on. These questions have no right or wrong legal answers, and reasonable people hotly contest them. They are quintessentially political questions as opposed to legal ones.

The process for selecting D.C. judges is no less political than that for selecting Article III judges. It too involves the President and the Senate. And it further involves the Commission, which is yet a third political entity. Consider the Commission's composition. Four of its seven members are appointed by political officials or entities—the President, the Mayor of the District, and the D.C. Council. These members may properly behave politically, both in representing the

interests of their appointer and in their dealings on the Commission. So too may the bar appointees. Judicial service on the Commission thus requires ongoing membership in a political body of the D.C. government.

Consider also the Commission's responsibilities. As is the case for federal judicial selection, the Commission must choose, without the benefit of law-like selection criteria, from among many interested and plausibly qualified candidates. To be sure, the D.C. scheme does impose a few objective eligibility requirements: A D.C. judge must be a United States citizen; must be a resident of the District; must have practiced law, been a law professor, or been a government lawyer in the District for at least five years; and must not have recently served on two specified commissions. D.C. Code § 1-204.33(b). But these modest requirements screen out only a few categories of obviously unqualified candidates and only a small number of otherwise qualified candidates. They do nothing to change the fundamentally political nature of making recommendations from among the plausible and eligible candidates. So imagine deliberations among the lawyers and non-lawyers on the Commission. They will sound very much like deliberations among White House staff about which candidates to recommend to the President for a federal judicial appointment. And they will sound nothing like deliberations among a panel of judges about how to resolve a case or controversy.

Several Code provisions make clear that sitting federal judges may not be actively involved in the political enterprise of D.C. judicial selection. Canons 1 and 2A prohibit judges from engaging in any activity that would tend to undermine public confidence in judicial impartiality and independence—as would continuing service on a political commission of the D.C. government. Canon 2B prohibits judges from lending the prestige of their office to advance the

interests of private parties—as a sitting judge would if actively involved in recommending some judicial candidates over others. Canon 4F prohibits judges from accepting government appointments that would tend to undermine public confidence in judicial impartiality and independence—an application of Canons 1 and 2A in the specific context at issue here. Finally, Canon 5C prohibits judges from engaging in political activity—which surely includes judicial selection for federal, state, and D.C. courts.

Although not every violation of the Code qualifies as "conduct prejudicial to the effective and expeditious administration of the business of the courts" under the statute, *see* Judicial-Conduct Proceedings Rule 4 commentary, service on the D.C. nominating commission surely does. Implementing regulations provide that conduct so qualifies if it is "reasonably likely" to cause a "substantial and widespread lowering of public confidence in the courts among reasonable people." *Id.* Rule 4(a)(7). An "inadvertent, minor violation" of the Code might not meet this standard if "promptly remedied," but serious violations likely will. *See id.* Rule 4 commentary. For example, even a single instance of partisan political activity is actionable. *Id.* Rule 4(a)(1)(D). After all, the Constitution itself separates the political branches from the judiciary, to make the political branches accountable and the judicial branch independent. *See*, *e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Keeping judges out of political activities is thus essential to maintaining public confidence in the judiciary, for "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). And few things are more likely to lower public confidence in judicial impartiality than the permanent involvement of a sitting Article III judge in the highly political process of judicial selection.

B

Past advisory opinions reinforce this analysis. Start with Advisory Opinion No. 93. It states categorically that "a judge should not serve on an official state committee formed to select state trial and appellate court judges." 2B *Guide to Judiciary Policy* § 220, at 158 (2019). And it explains that "engaging in law-related extrajudicial activities where the activity is political in nature is fraught with risks for judges"—in particular, risks of violating Canons 1, 2A, 2B, and 5C, all of which limit the range of permissible activities under Canon 4. *Id.*

Next consider Advisory Opinion No. 59, which addresses the extent to which judges may recommend prospective nominees for state or federal appointments. The commentary to Canon 2B permits judges to "participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship." Opinion No. 59 concludes that this commentary authorizes judges to play only a passive, responsive role in dealing with appointing authorities: "A judge, *if asked*, may recommend and evaluate judicial nominees based on the judge's insight and experience …. [J]udges may—*when requested to do so*—provide recommendations of persons to be considered for judicial office." 2B *Guide to Judiciary Policy* § 220, at 79 (emphases added). At the same time, the opinion stresses that judges cross the line when they play a more active role: "Judges should not initiate communications with federal or state appointing authorities, such as Congress or the White House, or screening committees for the purpose of supporting or opposing any candidate or nominee for judicial, executive or legislative branch appointment. Unsolicited contact with an appointing authority or

screening committee is contrary to Canon 2B's proscription against lending the prestige of the judicial office to advance the private interests of others." *Id.*

The Committee's *Compendium of Selected Opinions*, which summarizes certain unpublished opinions, reinforces this advice. Here is one relevant summary: "Although Canon 4F excepts matters related to improvement of the legal system, a judge should not serve on [a] judicial selection board established by [a] Governor because of political implications." *Compendium* § 4.6-5(*l*). Here is another: "Same for [a] U.S. Senator's judicial screening committee." *Id.* The opinion underlying this summary warns that service on a screening committee "necessarily involve[s] political participation even when the committee recommendation [is] not binding." Advisory Op. at 5 (quoting opinion). It further warns that Advisory Opinion No. 59 does not "sanction membership on a selection committee." *Id.* (same).

C

Despite acknowledging the opinions noted above, the Committee concluded that a federal judge may serve on the D.C. nominating commission. It gave four reasons for distinguishing its prior work, but none is persuasive.

First, the Committee reasoned that Advisory Opinion No. 93, which advises against service on *state* judicial nominating commissions, does not apply to D.C. judgeships created by *federal* law. Advisory Op. at 3. But the D.C. court system is akin to those of the states. *See*, *e.g.*, District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 172, 84 Stat. 473, 590–91 (codified at 28 U.S.C. §§ 1451, 2113); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 388 (2006). In any event, federal judicial

selection is no less political than state judicial selection, which is why Advisory Opinion No. 59 makes no distinction between "federal and state merit selection commissions." 2B *Guide to Judiciary Policy* § 220, at 78. It is also why the *Compendium* pairs up one opinion concluding that a judge should not serve on a Governor's judicial selection board "because of political implications" with another one concluding the "[s]ame" for a Senator's screening commission. *Compendium*, *supra*, § 4.6-5(*l*). The Committee itself acknowledged that although Opinion No. 93 "forbids a judge from 'enmeshing' the judiciary with only state and local government, additional guidance … indicates that a judge is also forbidden from enmeshing the judiciary with other branches of the federal government." Advisory Op. at 3. Likewise, the Committee acknowledged its past advice that a judge should not "participate in a committee that screened applicants for appointment … to the federal courts" because doing so "necessarily involved political participation." *Id.* at 5 (cleaned up). So the Committee itself recognized that a judge may not actively participate in state *or* federal judicial screening committees. Participation on the D.C. nominating commission is thus improper regardless of whether the D.C. courts are treated more like state or federal courts.

Second, the Committee reasoned that Advisory Opinion No. 59 permits judges to "recommend and evaluate judicial nominees," which is all that the judicial member of the D.C. nominating commission does. Advisory Op. at 5–6 (cleaned up). But the opinion does not give judges *carte blanche* to make recommendations. To the contrary, it concludes that judges may do so only "if asked," in "respond[ing] to requests from an appointing authority or screening committee." 2B *Guide to Judiciary Policy* § 220, at 79. The opinion further warns that judges "should not initiate communications with federal or state appointing authorities," including any

"screening committees," to support any candidate. *Id.* To participate in the D.C. nominating commission, a judge must go two big steps beyond even this: first, by *serving on* a commission, rather than merely initiating communications with one; and second, by rendering decisions *with the force and effect of law*, rather than merely giving advice. The Committee noted that the President and the Senate "make the ultimate decisions." Advisory Op. at 6. True enough, but the Home Rule Act requires the President to consider only the three candidates formally selected by the Commission. *See* D.C. Code § 1-204.33(a). Moreover, if the President does not make a timely nomination from among the three approved candidates, the Commission itself makes the nomination and appointment. *See id.* § 1-204.34(d)(1). And the Commission itself unilaterally selects the D.C. courts' respective chief judges. *Id.* § 1-204.31(b). This far exceeds the modest, passive involvement allowed by Advisory Opinion No. 59.

Third, the Committee reasoned that Article III judges appoint Article I judges such as magistrate and bankruptcy judges, and D.C. judges likewise are appointed under Article I. Advisory Op. at 6. But D.C. judges bear little resemblance to magistrate or bankruptcy judges. Magistrate judges act as adjuncts "subsidiary to and only in aid of" the district courts. *United States v. Raddatz*, 447 U.S. 667, 681 (1980); *see N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982) (plurality opinion). And bankruptcy judges, while more than mere adjuncts, resolve only specialized disputes involving public rights created by the Bankruptcy Code, in decisions reviewable by Article III courts. *Stern v. Marshall*, 564 U.S. 462, 485–87 (2011). In contrast, the D.C. Superior Court and the D.C. Court of Appeals are independent courts of general jurisdiction, akin to a state trial court and state supreme court respectively. D.C. Code § 1-204.31(a). If a federal judge anywhere else in the country were actively involved in the

selection of home-state judges, the ethics problem would be apparent. Moreover, the appointment schemes for magistrate and bankruptcy judges are fundamentally different from that for D.C. judges. Magistrate judges are appointed solely by the relevant district court, 28 U.S.C. § 631(a), and bankruptcy judges are appointed solely by the relevant court of appeals, *id.* § 152(a)(1). Under those schemes, the appointing judges run far less risk of entanglement with political branches or entities (though it still happens occasionally, *see In re United States*, 463 F.3d 1328 (Fed. Cir. 2006)). In contrast, under the appointment scheme for D.C. judges, participation on the nominating commission requires entanglement with the President, the Senate, and the commission itself.

Fourth, the Committee reasoned that Canon 4F permits a judge to accept a government appointment if "appointment of a judge is required by federal statute." Advisory Op. at 4–5. And the Home Rule Act requires one member of its nominating commission to be "an active or retired federal judge serving in the District." D.C. Code § 1-204.34(b)(4)(E).

This point is more plausible than the others, but still ultimately unpersuasive. To begin, the canons do not by their terms yield to any conflicting federal statute. Precisely the opposite: After permitting judges to accept government appointments if Congress has required "appointment of a judge," Canon 4F then imposes an important qualification. "A judge should not, in any event," accept an appointment if doing so "would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary." As the Committee itself recognized, the "ultimate question" posed by Canon 4F "is whether the extrajudicial position compromises the judiciary's independence, not whether the position was created by statute." Advisory Op. at 4. To be sure, a difficult separation-of-powers question would arise if Congress

purported to compel judges to engage in conduct that the judiciary deems unethical. The Committee avoided that question by concluding that service on the D.C. nominating commission does not violate the canons. *See id.* I would avoid it by concluding that the statute does not require the service of a judge bound by the relevant canons.

As noted above, the statute here requires the appointment of an "active or retired" federal judge serving in the District. Judges who are fully "retired" under 28 U.S.C. § 371(a) are no longer bound by the Code of Conduct. *See* Compliance with the Code of Conduct, pt. C. And judges who have "retired" under section 371(b)—*i.e.*, taken senior status—are not bound by Canon 4F if they "refrain from judicial service" during the term of an appointment. *Id.* The other relevant canons bind senior judges but apply differently if they are not actively hearing cases. The inapplicability of Canon 4F reflects a determination that such judges can serve on government commissions—even ones with political overtones—without undermining confidence in the impartiality and integrity of the judiciary. If so, then their service does not violate the more general Canons 1 or 2A. And because senior judges who do not hear cases have at least temporarily stepped away from the judicial office, they are not lending its prestige in violation of Canon 2B. Finally, because Canon 4F allows these judges to accept appointments that are political in nature, Canon 5C does not apply. So the appointment of a retired judge would satisfy the statutory requirement that an "active or retired" judge serve on the D.C. nominating commission without compelling any judge to act unethically. The Committee was wrong to say that foreclosing service by active judges (or by senior judges while they continue to hear cases) "would in practical terms render the statute ineffective." Advisory Op. at 4.

Nor would this harmonization otherwise distort the statutory appointment scheme. For one thing, there is no apparent reason why Congress, in making active and retired judges eligible to serve on the commission, would have preferred one group over the other. After all, retired judges, like their active counterparts, share in the wisdom that comes from having served in our courthouse. For another, the Home Rule Act cannot reasonably be understood as reflecting a congressional decision to override the canons of judicial ethics. Any such statute would upset the traditional balance between Congress and the judiciary, which has enjoyed not only "[d]ecisional independence" but also "ample institutional independence" to "manage its internal affairs." John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary* 1 (Dec. 31, 2021). To alter this settled balance, Congress would have had to speak much more clearly to ethics issues. *See*, *e.g.*, *Kucana v. Holder*, 558 U.S. 233, 237 (2010); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989).

The appointment statute and the canons thus can and should "mutually coexist." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). The statute permits the Chief District Judge to appoint only retired judges, so we need not turn off the canons to give effect to the statute.

For these reasons, the dissenters on the Committee had it right in concluding that service on the D.C. nominating commission violates the Code of Conduct because it "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)." Advisory Op. at 2 n.1.

D

One last point on the merits. In support of the D.C. scheme, the Commission has noted that some state-court judges serve on judicial nominating commissions. The Committee did not rely on that fact, and for good reason. For one thing, service by federal judges would be undeniably inconsistent with Advisory Opinions No. 93 and 59. And while some states include their judges on nominating commissions, many others do not. *Compare*, *e.g.*, N.M. Const. art. VI, §§ 35–37 (requiring judges to serve), *with* Fla. Stat. § 43.291(b)(2) (prohibiting judges from serving), *and* N.Y. Ethics Op. 94-37 (judicial service on a screening committee "would inevitably be perceived" as political). Moreover, background understandings for federal and state judges differ substantially. The Constitution itself grants federal judges life tenure to make them "steady, upright, and impartial." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 456 (2015) (quoting The Federalist No. 78, at 465 (Hamilton) (C. Rossiter ed., 1961)). And nobody disputes that, as a general matter, federal judges must therefore avoid political activities. In contrast, most states elect their judges—some in partisan elections. Accordingly, the fact that some states regard certain activities as not too political for their own judges sheds little light on the constraints governing Article III judges.

III

On the question of remedy, the Judicial Conduct and Disability Act does not require a sanction for every statutory violation. *See* 28 U.S.C. § 354(a)(1)(C). In determining what if any sanction is appropriate, relevant considerations include the obviousness and seriousness of the misconduct, the intent of the judge, and whether the conduct has been repeated. *See* Canon 1

commentary. Another relevant consideration is whether the conduct has been corrected. Judicial-Conduct Proceedings Rule 4 commentary.

In this case, the imposition of a sanction for past conduct would be inappropriate. Congress at least contemplated that sitting federal judges might serve on the D.C. nominating commission. Five sitting judges have done so, collectively for more than four decades. Until now, no ethics opinion had addressed whether they may do so. And when the subject judge's service on the commission was called into question, he promptly sought and obtained a favorable advisory opinion. The judge thus has acted in complete good faith, and the violation here perhaps was not obvious. Judicial officers should not face personal sanctions under such circumstances, just as executive officials would not. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Nevertheless, I disagree with the unconditional dismissal of the complaint. Dismissal is appropriate only if a complaint fails to allege actionable misconduct. *See* 28 U.S.C. § 352(b)(1). As explained above, service on the D.C. nominating commission by a sitting federal judge does violate the Code of Conduct and is actionable under the statute. Thus, the proper disposition is to conclude this proceeding if, but only if, the subject judge takes "appropriate corrective action" by either resigning from the commission or declining to hear cases while he continues to serve on it. *See id.* § 352(b)(2). I regret that the flawed ethics opinion at issue, and its application to dismiss the complaint under review, all but guarantee the continued service of sitting federal judges on the D.C. nominating commission in perpetuity.

WALKER, *Circuit Judge*, concurring in the denial of the petition for review and joining in part Circuit Judge KATSAS' statement: The Committee on Codes of Conduct erred when it issued its Advisory Opinion on November 5, 2021. With unassailable rigor, Judge Katsas' statement explains why.

But I respectfully disagree with Judge Katsas' proposed remedy.

In my view, a Circuit Judicial Council should not condition its dismissal of an ethics complaint on the cessation of conduct that the Committee on Codes of Conduct has endorsed. An opinion by that Committee is an important shield against an allegation of an ethics violation. So the Committee's endorsement of a judge's conduct should usually mark the end of an ethics complaint — even when, as here, the Committee's opinion is misguided.

I therefore agree with Chief Judge Srinivasan's decision to dismiss without conditions the ethics complaint in this case.