Before the Chief Judge of the
United States Court of Federal Claims

Memorandum and Order
Nos. CL-24-90395 & CL-24-90406

The Court received two citizen complaints against a judge of the United States Court of Federal Claims alleging judicial misconduct under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364, Rule 6 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("RJCP"), and Rule 40.3 of the Rules of the Court of Federal Claims ("RCFC"). The complaints arise out of a May 6, 2024 letter addressed to a university president that was co-signed by the subject judge and twelve other federal judges. The complainants also cite a related newspaper opinion piece authored by the subject judge that was published a few days later.

I have completed my review of the complaints in accordance with 28 U.S.C. § 352(a) and RJCP 11(a) and 11(b). Because the complaints arise out of the same set of facts and make similar claims, I am consolidating them for purposes of rendering this decision.

For the reasons set forth below, I find that the claims made in the complaints are based on allegations "lacking sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii); see also RJCP 11(c)(1)(D). Therefore, the complaints are **DISMISSED**.

BACKGROUND

On May 6, 2024, thirteen federal judges—including a judge on this court—penned a letter to a university president, copying the dean of the university's law school. The letter opens with the following paragraph:

> Since the October 7 terrorist attacks by Hamas, [the university] has become ground zero for the explosion of student disruptions, anti-semitism, and hatred for diverse viewpoints on campuses across the Nation. Disruptors have threatened violence, committed assaults, and destroyed property. As judges who hire law clerks every year to serve in the federal judiciary, we have lost confidence in [the university] as an institution of higher education. [The university] has instead become an incubator of bigotry. As a result, [the university] has disqualified itself from educating the future leaders of our country.

The letter continues by recommending a series of actions the university should undertake to "reclaim[] its once-distinguished reputation": 1) impose "[s]erious consequences for students and faculty who have participated in campus disruptions and violated established rules concerning the use of university facilities and public spaces and threats against fellow members of the university community"; 2) practice "[n]eutrality and nondiscrimination in the protection of

freedom of speech and the enforcement of rules of campus conduct"; and 3) ensure "[v]iewpoint diversity on the faculty and across the administration—including the admissions office." The thirteen signatories advised that, "absent extraordinary change, we will not hire anyone who joins the [university] community—whether as undergraduates or law students—beginning with the entering class of 2024."

Several days after the letter was sent, an opinion piece that the subject judge authored was published in a nationally syndicated newspaper. In the piece, the judge sought to clarify that the boycott announced in the letter was not intended "to inflict punishment on students but to send a clear message to [the university] that its approach to campus antisemitism and anti-Americanism is unacceptable." In addition, the judge observed, "[o]ur boycott is prospective only, which means everyone is on notice." The judge concluded by stating that they did not "begrudge judges who choose not to join us in this effort," but that they "continue to believe that we who have chosen to boycott are justified in using the tools at our disposal—prestigious clerkship slots—as a force for good."

DISCUSSION

I. Authority to Exclude Candidates from Consideration

Complainant in No. 24-90395 alleges that the subject judge lacks the authority to decline to hire law clerks who attended the university. They observe that the Judicial Conference of the United States establishes qualifications or "minimum requirements" for law clerks. See Guide to Judiciary Policy, Vol. 12, App. 5F, Q21. This observation is largely accurate. The Judicial Conference, however, does not impose any rule that requires judges to consider for hire all applicants who meet the basic qualifications. Nor does it prescribe the criteria that a judge may use when choosing among qualified candidates. Indeed, judges can—and typically do—employ their own screening and selection criteria to suit their respective dockets, experiences, and expectations of chambers staff. And they routinely make decisions about which candidates they will consider based on their impressions of the quality of the law school and/or other educational institutions the candidates attended.

To be clear, a judge is prohibited from making selection decisions on the basis of race, religion, sex, or the other protected classes set forth at RJCP 4(a)(3). Nor may a judge make hiring decisions that violate other affirmative prohibitions codified in the judicial-conduct rules. See, e.g., RJCP 4(a)(1)(A) (cognizable misconduct includes "using the judge's office to obtain special treatment for friends or relatives"). But absent an affirmative prohibition in the rules, or clear guidance in the Code of Conduct for United States Judges, a judge has plenary authority to make distinctions among qualified candidates based on any reasonably relevant factor including, as here, the quality of the education the candidates received at the undergraduate and/or law school level.

The complainant's citation to 28 U.S.C. § 794 in No. 24-90395 is similarly misplaced. This statutory provision simply authorizes judges on this court to appoint law clerks and judicial assistants up to the number of chambers staff approved by the Judicial Conference for federal district court judges. It does not otherwise impose limitations on hiring practices or decisions.

II. Political Activity

Both complainants allege that the announced boycott of the university's future students constituted improper political activity under RJCP 4(a)(1)(D) and/or Canon 5 of the Code of Conduct. Each claim is addressed below.

A. RJCP 4(a)(1)(D)

RJCP 4(a)(1)(D) prohibits judges from "engaging in partisan political activity or making inappropriately partisan statements." Neither complainant identifies any conduct on the part of the subject judge that involved political parties or campaigns for or against candidates for public office, or that can otherwise fairly be characterized as involving "partisan political activity." Nor do they identify any statements by the subject judge that could be considered "inappropriately partisan."

Complainant in No. 24-90406 speculates that "[g]iven the geographical diversity of the judges, it is highly likely that the very same partisan and political organizations that lobbied for their appointment to the bench prompted them to submit the letter at issue." But that improbable theory is not grounded in any facts or reasonable inferences drawn from the facts. The claim that the subject judge engaged in partisan political activity within the meaning of RJCP 4(a)(1)(D) is therefore dismissed.

B. Canon 5

Canon 5 is entitled "A Judge Should Refrain from Political Activity." Canon 5A sets forth prohibited political activities: 1) "act as a leader or hold an office in a political organization"; 2) "make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office"; and 3) "solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate."[1] As noted above, there is no evidence that the subject judge engaged in any partisan political activities, and that would include those listed in Canon 5A.

Canon 5B is similarly inapplicable. It requires a judge to resign from judicial office if the judge becomes a candidate for any office in a primary or general election.

Canon 5C is a catchall provision, but its breadth is not unlimited. It states that a judge should not engage in "any other political activity," but clarifies that "[t]his provision does not prevent a judge from engaging in activities described in Canon 4." Canon 4, in turn, provides that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic,

[1] The Commentary on Canon 5 states that "[t]he term 'political organization' refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office."

charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." It cautions, however, that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification," or violate other enumerated limitations.

The activity complained of here is not "political activity" for purposes of Canon 5C. The May 6 letter and the subject judge's opinion column criticize a private university's perceived tolerance of antisemitism on campus and among faculty. The letter also targets what the judges view as the university's failure to hold students accountable for engaging in misconduct, including violence and threats of the same. Finally, the letter criticizes what the judges believe is a lack of viewpoint diversity among the university's faculty and administration. What the letter and column do not address are governmental actions or policies—the topics that are the focus of the political process.

To be sure, the issues surrounding the university's response to the protests (as well as the responses of other universities and colleges to similar protests at their campuses) garnered significant attention on the part of elected officials. The House Committee on Education and the Workforce held contentious and highly publicized hearings in December 2023 and April 2024 at which members criticized universities for what they perceived as tolerance of antisemitism or failures to hold students who engaged in misconduct accountable. Members of Congress from both major political parties, including the Speaker of the House, travelled to the university to hold press conferences in which they expressed their dissatisfaction with the university and demanded changes. See Andrew Solender, Columbia University Becomes a Congressional Pilgrimage, Axios (April 24, 2024), https://www.axios.com/2024/04/23/columbia-university-mike-johnson-congress. But that elected officials and others politicized the issues does not mean that the judges were engaged in improper political activity when they wrote to the university to explain their loss of confidence in it as an institution of higher learning and what changes they believed necessary to restore the university's reputation.

Further, as noted, the prohibition on political activity set forth in Canon 5C does not prevent judges from engaging in the extrajudicial activities described in Canon 4. Those activities include, among many others, speaking or writing about "both law-related and nonlegal subjects." The right to write or speak about law-related topics encompasses writing or speaking about the qualities of educational institutions that a judge believes are most likely to produce the best law clerks. In fact, judges are frequently asked to speak to current law school students and other law-related organizations about the characteristics of successful clerkship candidates. They may also speak and write more generally about what they believe are essential components of a good legal education such as, among other things, the promotion of diversity, including diversity of viewpoint.

To be sure, there are prudential limitations on the circumstances in which it is appropriate for judges to speak or write about either law-related or nonlegal subjects. Canon 4 requires that such extrajudicial activities not "detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality," or "lead

to frequent disqualification." Canon 2A states that "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of judiciary." And a judge's right to speak or write about both law-related or nonlegal topics is also subject to RJCP 4(a)(7), which states that cognizable misconduct includes "conduct occurring outside the performance of official duties if the conduct is reasonably likely to 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."

The letter and the opinion column do not violate these limitations. They do not reflect adversely on the dignity of the subject judge's office. Nor do they interfere with the subject judge's ability to perform their official duties. And while some no doubt disagree (perhaps passionately) with the views expressed in the letter and opinion piece, the expression of those views does not cast doubt upon the subject judge's ability to be impartial in their treatment of parties, counsel, and the legal issues that come before them.

With regard to impartiality and public confidence, the undersigned finds unpersuasive the assertion of complainant in No. 24-90406 that the judge's decision to be a signatory on the letter and to write the opinion piece shows that the judge would exhibit bias against, among others, the university, persons who have made statements critical of Israel or supportive of Palestinians, and attorneys and litigants who are current or former members of the university community (or graduates of other schools at which similar protests occurred). There is nothing in the letter or opinion piece that would cause a reasonable person to question whether the subject judge could be impartial in cases where a party or their counsel attended the university or another school at which similar protests occurred. Nor would a reasonable person question whether the judge could be impartial where a litigant or their counsel had taken a position critical of Israel or supportive of Palestinians. Neither the letter nor the column addressed the underlying issues that gave rise to the protests. Rather, the focus of both the letter and column was on the university's response to the protests, particularly its handling of antisemitic incidents, threatened violence, assaults, and the destruction of property.

Further, in the very unlikely event that a case were to come before the subject judge that might cause a reasonable person to question their impartiality, recusal would be an option. Such recusals would necessarily be exceedingly rare because the Court of Federal Claims' jurisdiction is limited by statute to civil actions against the United States seeking money damages. Cases in which universities are parties seldom come before the Court of Federal Claims. And the undersigned is unaware of any case involving issues related to academic freedom, campus hiring, admissions, or disciplinary actions that has ever been before the court.

III. Remaining Claims

The remaining claims that are set forth in No. 24-90406 are similarly based on allegations that lack sufficient evidence "to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii); see also RJCP 11(c)(1)(D). For example, the complainant alleges that the subject judge's conduct violated RJCP 4(a)(2)(B). That rule provides that cognizable misconduct includes "treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner." It is directed at a judge's treatment of their court staff or other persons

directly involved in the judicial process. The complainant cites no evidence that the subject judge mistreated staff or litigants or their attorneys or otherwise violated RJCP 4(a)(2)(B).

Similarly unsupported by any facts is the complainant's allegation that the subject judge violated RJCP 4(a)(3). That rule states that cognizable misconduct includes "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability." The complainant makes no allegations that—if true—would support inferring that misconduct had occurred.

There is also no factual basis for the allegation in No. 24-90406 that the subject judge violated RCJP 4(a)(1)(A). That rule states that cognizable misconduct includes "using the judge's office to obtain special treatment for friends or relatives." The complainant has not identified any friend or relative to whom the subject judge allegedly provided special treatment. Nor have they explained the substance of the "special treatment" the unidentified friend or relative might have received. Their allegations therefore lack sufficient evidence to raise an inference that the subject judge violated RJCP 4(a)(1)(A).

CONCLUSION

For the reasons set forth above, the complaints are **DISMISSED**.

The complainants and the subject judge have the right to file a petition for review of this decision by the entire court. The deadline for filing such a petition is within forty-two (42) days after the date of this decision. See RJCP 11(g)(3), 18(a)–(b).

IT IS SO ORDERED.

ELAINE D. KAPLAN
Chief Judge

Date: October 1, 2024