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.[1] 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

[1] 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).[2]

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)[3]) 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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[2] 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).

[3] 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.[4] 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-

[4] 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.[5] 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

[5] 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.[6] 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-

[6] 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).

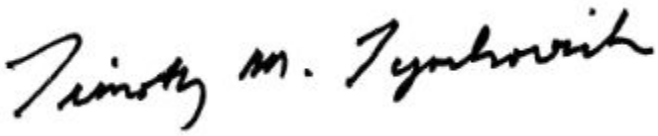
The Judicial Council dismisses the allegations that Judge Roberts had a continuing duty to report his pre-appointment conduct both before he became a judge and afterward pursuant to 28 U.S.C. § 354(a)(1)(B) and RJCD 20(b)(1)(A)(i) (permitting the judicial council to dismiss a complaint because "even 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: 

Honorable Timothy M. Tymkovich
Chief Circuit Judge