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Judicial Council of the Second Circuit
Thurgood Marshall United States Courthouse
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Committee on Judicial Conduct and Disability
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle Northeast
Washington, D.C. 20544

Dear Members of the Judicial Council of the Second Circuit and the Committee on Judicial Conduct and Disability of the Judicial Conference:

We write to address the recent dismissal of complaints of judicial misconduct concerning two judges who hired a law clerk with a documented history of racist and hateful conduct. The written orders justifying that dismissal seem untethered from the facts. Subsequent reporting has only further called those conclusions into question.

We are also concerned with the manner in which the Second Circuit conducted this proceeding. Put simply, the process here appears to deviate significantly from precedent and from the requirements of the Judicial Conduct and Disability Act. As we explain below, the Second Circuit Judicial Council should vacate the dismissal order and mandate that a special committee be appointed to investigate the complaints.

The Chief Justice has assured us that the federal judiciary is willing to keep its own house in order.[1] Episodes like this put that assurance to the test. At base, this case looks like yet another instance of judges ignoring clear misconduct and closing ranks to protect their own. We

[1] *See* John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary* 5–6 (Dec. 31, 2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf ("[T]he Judicial Conference . . . is up to the task . . . . [T]here is plenty of work to be done, and it will be done."); *but see* The Judicial Conduct and Disability Act Study Committee, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, 96–97 (2006), https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf (noting that "chief judges and councils made a greater number of mistakes" among high-visibility misconduct cases).

trust that you will appreciate that context as you examine the record and consider the appropriate next steps.

I. SUMMARY

After reports that two judges in the Eleventh Circuit (the "subject judges") had hired a law clerk for successive terms who had a widely publicized, repeatedly documented history of racist and disparaging conduct, seven senior members of the House Judiciary Committee wrote a letter to the second-most senior active judge on the Eleventh Circuit and the Chief Justice of the Supreme Court recounting the known, public facts about the law clerk, noting that no response or explanation from the judges or the judiciary for this hiring decision had been forthcoming, and asking for an investigation.

The letter caused the Acting Chief Judge of the Eleventh Circuit to identify a judicial misconduct complaint, which was transferred to the Second Circuit. Two weeks later, the Chief Judge of the Second Circuit dismissed the complaint without referring the matter for investigation by a special committee. A journalist subsequently obtained two letters sent to the Chief Judge as part of the misconduct proceeding, one from one of the subject judges and another from an associate justice of the Supreme Court. The rest of the docket is not publicly available.

The Second Circuit Judicial Council (the "Judicial Council") summarily affirmed the Chief Judge's dismissal with a one-page order three weeks later. After the Judicial Council issued its decision, additional reporting confirmed earlier reporting of the law clerk's past behavior.

II. STATEMENT OF FACTS

A. The Law Clerk's Widely Reported History of Hateful Conduct

For approximately five years, the law clerk in question worked as national field director at Turning Point USA. Shortly after she left that position, media reported several instances of her highly problematic conduct:

- She sent text messages to a colleague stating "I HATE BLACK PEOPLE. Like f[---] them all . . . I hate blacks. End of story."[2]

[2] Jane Mayer, *A Conservative Nonprofit That Seeks To Transform College Campuses Faces Allegations Of Racial Bias And Illegal Campaign Activity*, NEW YORKER (Dec. 21, 2017), https://www.newyorker.com/news/news-desk/a-conservative-nonprofit-that-seeks-to-transform-college-campuses-faces-allegations-of-racial-bias-and-illegal-campaign-activity; Joseph Guinto, *Trump's Man on Campus*, POLITICO MAGAZINE (April. 6, 2018), https://www.politico.com/magazine/story/2018/04/06/trump-young-conservatives-college-charlie-kirk-turning-point-usa-217829/; Caleb Ecarma, *EXCLUSIVE: Clarence Thomas's Wife Hired Ex-TPUSA Staffer Known For Saying 'I Hate Blacks'*, MEDIAITE (Sept. 6, 2018, 12:57 p.m.), https://www.mediaite.com/online/exclusive-clarence-thomas-wife-hired-ex-tpusa-staffer-known-for-saying-i-hate-blacks/; *see also* Ruth Marcus, *Opinion: Why is a prominent federal judge hiring a law clerk who said she hates Black people?*, THE WASHINGTON POST (Oct. 8,

- "Numerous sources" who worked with the individual "detailed how she would exchange racist remarks regularly" with her coworkers.[3]
- She sent a photo to at least two coworkers of a man with brown skin with the caption, "[j]ust thinking about ways to do another 9/11."[4]
- She and her coworkers "would often send similar anti-Muslim messages that included remarks like 'a bacon a day keeps the Islams away' and 'Ramadan bombathon,' as well as tak[e] pictures of their heads wrapped in towels to mock head coverings commonly worn by Arabs, according to sources who received the messages."[5]
- She fired her organization's only Black employee on Martin Luther King, Jr., Day. That employee later stated that Turning Point USA was a "racist" workplace and that she felt "very uncomfortable working there because I was black."[6]

Different aspects of this conduct were documented by several journalists working independently for separate publications.[7]

When asked by a reporter about this conduct as it was first reported in 2017, the law clerk made no apology. Nor did she deny telling a coworker "I HATE BLACK PEOPLE. Like f[---] them all . . . I hate blacks. End of story," in a text message.[8] Instead, she claimed in a written, on-the-record statement that she "had no recollection" of the messages.[9]

The law clerk left Turning Point shortly after the organization was made aware of these messages. At the time, Turning Point's CEO stated that "Turning Point assessed the situation and took decisive action within 72 hours of being made aware of the issue."[10] For the next five years, Turning Point staff repeated this explanation for the law clerk's departure. "We dealt with it immediately," the CEO told a reporter in 2018, as part of a story describing how Turning Point had fired the clerk after her messages were made public.[11] As recently as this January, a

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2021, 2:00 p.m.), https://www.washingtonpost.com/opinions/2021/10/08/crystal-clanton-racist-comments-william-pryor-clerkship/.

[3] Ecarma, *supra* note 2.

[4] *Id.*

[5] *Id.*

[6] Mayer, *supra* note 2.

[7] *Id.*; Guinto, *supra* note 2; Ecarma, *supra* note 2; *see also* Ruth Marcus, *Opinion: The curious case of the clerk and the racist texts*, THE WASHINGTON POST (Jan. 18, 2022, 7:13 p.m.), https://www.washingtonpost.com/opinions/2022/01/18/clerk-texts-appeals-court-clanton/.

[8] Mayer, *supra* note 2.

[9] *Id.*

[10] Mayer, *supra* note 2; Marcus, *supra* note 7.

[11] Guinto, *supra* note 2.

spokesperson for Turning Point told another journalist that the individual was "terminated from Turning Point after the discovery of problematic texts."[12]

B. Subject Judges' Hiring of the Law Clerk

In October of last year, several outlets reported on the subject judges' decisions to hire the individual at issue, with many editorials expressing significant concern about the public message of the judges' actions.[13] Commentators referred to the individual's past comments as "an open embrace of racism" [14] and "racist and incendiary rhetoric" [15] and argued that no one who espouses such views should be giving "counsel . . . to our federal judges[,]"[16] nor could such a person "be trusted to act fairly and impartially."[17] Commentary focused especially on the subject judges' refusal to comment on the individual's past conduct and explain why they hired her,[18] with one law professor describing the judges' silence as "unforgivable."[19]

C. House Members' Letter and Initiation of Misconduct Proceedings

On November 10, 2021, after five weeks without any comment from the subject judges, the law clerk, or anyone else in the judiciary, seven senior members of the House Committee on the Judiciary sent a letter requesting an investigation into the subject judges' hiring decisions.[20]

Following receipt of that letter, the acting chief judge of the Eleventh Circuit identified a misconduct complaint against the subject judges and asked the Chief Justice to refer the matter to

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[12] Marcus, *supra* note 7.

[13] *See, e.g.*, Kathryn Rubino, *Law School Student Famous For Saying 'I HATE BLACK PEOPLE' Now Has Prestigious Federal Clerkship*, ABOVE THE LAW (Oct. 5, 2021, 2:45 p.m.), https://abovethelaw.com/2021/10/law-school-student-famous-for-saying-i-hate-black-people-now-has-prestigious-federal-clerkship/; Marcus, *supra* note 2; Kyle Whitmire, *Whitmire: What have you done, Bill Pryor?*, AL.COM (Oct. 8, 2021, 10:47 a.m.), https://www.al.com/news/2021/10/whitmire-what-have-you-done-bill-pryor.html.

[14] Kali Halloway, *She Said 'I HATE BLACK PEOPLE' – Now She's a Rising GOP Star*, DAILY BEAST (Nov. 23, 2021, 12:00 a.m.), https://www.thedailybeast.com/she-said-i-hate-black-peoplenow-shes-a-rising-gop-star?ref=scroll.

[15] Katheryn Hayes Tucker, *'That Is Unforgivable': Law Professor Says 11th Circuit Chief Judge, Law Clerk Need to Address Racist Rant*, LAW.COM (Oct. 15, 2021, 3:58 p.m.), https://www.law.com/dailyreportonline/2021/10/15/law-professor-calls-for-mea-culpa-from-judge-and-law-clerk-over-racist-rant/ (quoting a statement from Javeria Jamil, Legal and Policy Director, of the Georgia chapter of the Council on American-Islamic Relations (CAIR), the country's largest Muslim civil rights and advocacy organization).

[16] *Id.* (quoting Jamil).

[17] *Id.* (quoting CAIR National Deputy Director Edward Ahmed Mitchell).

[18] *See, e.g.*, Whitmire, *supra* note 13 ("Pryor needs to explain. Perhaps, one day, a U.S. Senator will ask him to answer these questions. For now, his silence will have to speak for him.").

[19] Tucker, *supra* note 15 (quoting Georgia State University Law Professor Eric Segall).

[20] Letter from members of the U.S. House Comm. on the Jud. to the Hon. John G. Roberts, Chief Justice, Sup. Ct. of the U.S., and Hon. Charles Wilson, Circuit Judge, U.S. Ct. of Appeals for the 11th Cir. (Nov. 10, 2021), https://judiciary.house.gov/uploadedfiles/house_chairs_letter_2_11.10.21.pdf; *see also, e.g.*, Nate Raymond, *Lawmakers seek probe of judges' hiring of clerk mired in racism controversy*, REUTERS (Nov. 10, 2021, 7:47 p.m.), https://www.reuters.com/legal/legalindustry/lawmakers-seek-probe-judges-hiring-clerk-mired-racism-controversy-2021-11-11/.

another circuit. On December 9, 2021, the Chief Justice referred the matter to the Second Circuit Judicial Council.[21]

D. The Chief Judge's Dismissal

The Chief Judge of the Second Circuit dismissed the complaint less than two weeks after receiving it. The Chief Judge's Order stated that she received letters from the subject judges "providing information about their hiring processes and their hiring decisions in this case" which were "corroborated by letters from references and a law school professor of the [law clerk]."[22] It does not appear from the order that any additional investigation occurred.

The Chief Judge ultimately dismissed the misconduct complaint on the grounds that "the record lacks any evidence supporting the allegation that the [subject judges] engaged in misconduct."[23] The order stated that the subject judges were "in possession of information that the allegations were false—that the anonymous sources relied on in the media accounts were not trustworthy," and that "they have been repeatedly informed that the allegations of racist text messages and remarks are not true."[24] In support of its conclusions, the order cited an anonymous source—someone who "held a leadership role at the nonprofit organization" where the law clerk worked when she reportedly engaged in the racist conduct.[25]

The order stated that the anonymous leadership source had said that the "media accounts are not accurate."[26] The order also noted that the source said that a former employee had fabricated some text messages "to be used against co-workers[,]" but did not say that the text messages at issue were fabricated.[27] The order also only addressed the text messages and did not address the named sources described in the media reports nor any of the other instances of the law clerk's reportedly racist conduct recounted above.[28]

The order stated that "the undisputed record shows that the [subject judges] carefully reviewed the allegations in the media" and "made a considered judgement, based on the information before them, that the media allegations were not true."[29] The order further stated

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[21] *In re Charge of Judicial Misconduct*, Nos. 21-90142-jm, 21-90143-jm, slip op. at 2 (2d Cir. Jud. Council Dec. 22, 2021) (Livingston, C.J.), https://www.ca2.uscourts.gov/decisions/isysquery/95bdeb6a-2b83-4923-a6b1-e6906bc59658/2/doc/21-90142-jm%2C%2021-90143-jm.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/95bdeb6a-2b83-4923-a6b1-e6906bc59658/2/hilite/ [hereinafter *Chief Judge's Order*].

[22] *Id.* at 3. The full content of these letters is not public, though, as described below, some of these letters appear to have been acquired by journalists and were the subject of additional reporting.

[23] *Id.*

[24] *Id.* at 3–4.

[25] *Id.* at 4.

[26] *Id.*.

[27] *Id.*

[28] *See id.* at 3–6.

[29] *Id.* at 5.

that the Judicial Conduct and Disability Act was not designed to "second-guess" the subject judges' hiring decisions.[30]

The order also opined that "nothing in the record . . . provides a basis for disqualification under 28 U.S.C. § 455," which requires judges to recuse themselves from a case where their "impartiality might reasonably be questioned."[31]

E. The Second Circuit Judicial Council's Affirmance

In its one-page order affirming the Chief Judge "for the reasons stated in the Chief Judge's memorandum and order," the Second Circuit Judicial Council stated that "we need not and do not consider whether the information the [subject judges] elicited and received regarding their hiring decisions was accurate."[32]

F. Reporting on Materials Submitted as Part of the Proceeding

Although the docket of a judicial misconduct proceeding is supposed to be confidential,[33] journalists obtained a letter that one of the subject judges allegedly sent to the Chief Judge as part of the misconduct proceeding. In the letter as reported, the subject judge described the complaint as "reckless," "outrageous," a "smear," "an unfounded accusation" against him, "meritless," "without any evidence," and offering "no credible evidence."[34] He described one article written by an investigative journalist as a "scandalous report" with "false insinuations" written by a "tabloid reporter" whose work he "distrusted."[35] He said that he requested and received from Turning Point's CEO a letter asserting that the clerk was "the victim of a smear campaign launched by disgruntled ex-employees and carried out by negligent journalists."[36] The subject judge quoted the CEO as saying that "the media has alleged that [the clerk] said and did things that are simply untrue" and "that the media has made serious errors and omissions," and impugning the motives of the alleged sources of the evidence of the clerk's racist conduct.[37]

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[30] *Id.* at 6.

[31] *Id.* at 6 n.1 (quoting 28 U.S.C. § 455(a)).

[32] *In re Charge of Judicial Misconduct*, Nos. 21-90142-jm, 21-90143-jm (2d Cir. Jud. Council Jan. 13, 2022), https://www.ca2.uscourts.gov/decisions/isysquery/0492e26e-74c3-42f7-9c4c-3e7d02553d39/1/doc/21-90142-jm%2C%2021-90143-jm%20Judicial%20Council.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/0492e26e-74c3-42f7-9c4c-3e7d02553d39/1/hilite/ [hereinafter *Judicial Council Order*].

[33] 28 U.S.C. § 360(a).

[34] Bill Rankin, *Judge Pryor cleared of allegations involving hiring of controversial clerk*, ATLANTA J.-CONST. (Jan. 14, 2022), https://www.ajc.com/news/georgia-news/judge-pryor-cleared-of-allegations-involving-hiring-of-controversial-clerk/X3JAHI2TQBCUBMTQ5MDHO56FU4/; Marcus, *supra* note 7.

[35] Marcus, *supra* note 7.

[36] *Id.*

[37] Rankin, *supra* note 34.

The subject judge also asserted that the investigative journalist "relied entirely on an anonymous source" when she reported that the clerk had sent racist text messages to a coworker.[38]

Journalists also obtained a letter from an associate justice of the Supreme Court sent to the Chief Judge defending the subject judges.[39]

G. Subsequent Reporting Confirms Earlier Reporting

One reporter with access to the above letters directly addressed several of the assertions in the subject judge's letter, noting where those assertions were incorrect, contradicted by reporting, or in conflict with previous on-the-record statements by both the clerk and officials at Turning Point:

- First, the reporter noted that none of the letters specifically stated whether any of the clerk's racist messages were in fact fabricated. The subject judge's letter quotes Turning Point's CEO's statement that he had fired an employee "after learning that [the employee] created fake text messages to be used against other employees," but the CEO's statement never said whether *the clerk's* messages had been faked. The associate justice's letter apparently described the situation slightly differently, explaining that the employee had "compromised the accounts of several coworkers, including [the clerk]." Neither letter identified a specific message from the clerk that had been fabricated or hacked.[40]

- Second, the reporter noted that the subject judge wrote that it was a "false insinuation" that the clerk had been fired after her employer learned of her text messages; the subject judge claimed that the CEO's statement that he took "decisive action" following reporting on the clerk actually referred to firing the employee who had allegedly fabricated the messages. The reporter claimed this assertion was untrue based on her own and another journalist's reporting and was directly contradicted by a statement from the CEO's own spokesman that the clerk was "terminated from Turning Point after the discovery of problematic texts."[41]

- Finally, the reporter noted the subject judge's statement that an attorney told him that "one of the reasons" the clerk had not publicly denied the reporting was that she is bound by a nondisclosure agreement with Turning Point; [42] however, the

[38] Marcus, *supra* note 7.

[39] *Id.*; Rankin, *supra* note 34.

[40] *See* Marcus, *supra* note 7.

[41] *Id.*

[42] *Id.*

> clerk had previously made an on-the-record statement about the text messages, which contradicts the subject judge's assertion.[43]

The same reporter then quoted the individual that the law clerk reportedly fired on Martin Luther King, Jr., Day, who said: "I don't believe for a second somebody hacked that—that's literally how she talked on other subjects. She would say 'I hate this, I hate all of this.'"[44] The article stated that the individual recalled "having several former colleagues share the texts with her shortly" after she was fired.[45]

The reporter printed, for the first time, the text exchange of this particularly incendiary remark:

> Clerk: "I HATE BLACK PEOPLE" "Like f--- them all" (with the expletive spelled out)
> Coworker: "Well, that's certainly direct"
> Clerk: "Are u free"
> Coworker: "At Starbucks right now" "What happened"
> Clerk: "Can I come to Starbucks in 5?"
> Coworker: "Yes"
> Clerk: "Are u with ppl" [46]

The reporter also quoted another coworker: "not fake."[47]

III. DISCUSSION

Pursuant to the Judicial Conduct and Disability Act, the Chief Judge and the Judicial Council were obligated to investigate all allegations of judicial misconduct "using careful procedures and applying strict statutory standards."[48] This complaint could not have been dismissed if the Act's procedures had been followed and its strict standards properly applied.

In addition, the Chief Judge should not have issued an advisory ruling regarding whether the record might require the subject judges to recuse themselves from future cases pursuant to 28 U.S.C. § 455, and the Judicial Council should not have affirmed the Chief Judge's ruling.

The Judicial Council should vacate the Chief Judge's Order and mandate that a special committee be appointed to investigate the complaint.

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[43] Mayer, *supra* note 2 (noting that when contacted, the clerk first declined to comment, but then subsequently emailed about having "no recollection" of this text).

[44] Marcus, *supra* note 7 (this individual's name is reported; *i.e.*, she is not an anonymous source).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, *supra* note 1, at 1.

A. The Chief Judge Misconstrued the Scope and Purpose of the Judicial Misconduct Statute

The Chief Judge's Order was premised on a fundamental error of law: that the Judicial Conduct and Disability Act was not intended to be used to "second guess" the subject judges.[49] To the contrary: the multitude of problems arising from a judge's hire of a law clerk with a documented history of racism and bigotry are clearly within the scope of the judicial misconduct statute. To hold otherwise would eviscerate the Act's core functions of uncovering and correcting judicial misconduct in order "to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice."[50]

Indeed, the Act's "central thrust . . . is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the performance of judicial duties."[51] Judges have been investigated and sanctioned for a wide range of misconduct, including, for example, being a member of a country club that excluded women and racial minorities despite the judge's good faith efforts to integrate it;[52] sending racist, sexist, and xenophobic personal emails using his court email account;[53] and even being late to hearings because of a standing lunchtime basketball game.[54]

These examples of cognizable misconduct are arguably less connected to a judge's judicial duties than hiring a law clerk with a history of hateful conduct. As the Judicial Conference's advisory opinions emphasize, law clerks "are in a unique position since their work may have direct input into a judicial decision."[55] Their presence in a judge's chambers therefore can potentially jeopardize the "basic right to a fair trial in a fair tribunal" that undergirds our judicial system.[56] So too might a judge's broader failure to protect the integrity of their proceedings from the taint of invidious discrimination.

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[49] *Chief Judge's Order*, *supra* note 21, at 6.

[50] *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1182 (9th Cir. Jud. Council 2005); *see also In re Complaints of Judicial Misconduct*, 9 F.3d 1562 (U.S. Jud. Conf. 1993); *Matter of Certain Complaints Under Investigation by an Investigating Comm. of the Jud. Council of the Eleventh Circuit*, 783 F.2d 1488, 1509 (11th Cir. 1986).

[51] *In re Complaint of Judicial Misconduct*, 37 F.3d 1511, 1515 (U.S. Jud. Conf. 1994).

[52] *In re Complaint of Judicial Misconduct*, 664 F.3d 332 (U.S. Jud. Conf. 2011).

[53] *In re Complaint of Judicial Misconduct*, 751 F.3d 611 (U.S. Jud. Conf. 2014).

[54] *In re Complaint Under the Judicial Conduct and Disability Act*, No. 10-18-90022 (10th Cir. Jud. Council Sept. 30, 2019) (finding that the judge "committed judicial misconduct by . . . demonstrating habitual tardiness for court engagements" as well as sexually harassing judiciary employees and engaging in an extramarital relationship with an individual on probation for state-court felony convictions).

[55] *Guide to Judiciary Policy, Vol. 2B, Ch. 2, § 220*, Committee on Codes of Conduct Advisory Opinions, No. 51, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

[56] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009).

The Judicial Conduct and Disability Act is a dead letter if it cannot reach this type of misconduct. The record contains substantial evidence of cognizable judicial misconduct that could not—and should not—have been ignored.

In its summary affirmance of the Chief Judge's Order, the Judicial Council compounded that Order's errors by stating that the truth did not matter: that the Council "need not and d[id] not consider" whether the law clerk told coworkers she hated Black people, fired her only Black employee on the one holiday of the year commemorating a civil rights leader, and regularly exchanged remarks with coworkers demeaning, for example, racial, ethnic, and religious minorities.[57] The Judicial Council's decision conflicts with one of the judicial misconduct statute's core purposes of uncovering the truth.[58]

The record does, in fact, matter in this case. It matters that an individual with a record of racist, hateful conduct will be working as a law clerk for two federal judges. And it matters that two judges who claim to be "in possession of information that the allegations were false" and who purportedly "carefully reviewed" the record, have arrived at a conclusion that so starkly departs from the evidence at hand.[59] The Judicial Council has an obligation to investigate.[60]

B. The Record Indicates That There Are Reasonable Questions of Fact Concerning Whether the Subject Judges Failed to Adequately Investigate the Evidence of their Clerk's Racist, Xenophobic, and Anti-Muslim Conduct

The Chief Judge erred by concluding that "[t]here [was] nothing in the record to dispute" that the subject judges "performed all the due diligence that a responsible Judge would undertake" and made a "considered judgment, based on the information before them, that the media allegations were not true."[61] The weight of the available record indicates that whatever "diligence" the subject judges conducted was clearly insufficient.

At this stage of the proceeding, the Chief Judge is not empowered to dismiss the complaint if there are any material issues of fact or law that are reasonably in dispute.[62] The

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[57] *Judicial Council Order*, *supra* note 32, at 1.

[58] *See Matter of Certain Complaints*, 783 F.2d at 1509; *see also* 28 U.S.C § 353(c) (the special committee "shall conduct an investigation as extensive as it considers necessary").

[59] *Chief Judge's Order*, *supra* note 21, at 3.

[60] *See* 28 U.S.C. § 353(c); *see also* IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, *supra* note 1, at 97 ("The main cause of the problematic dispositions . . . [of] the high-visibility complaints is the lack of adequate chief judge inquiries before dismissing the complaint, and the related failure to submit clear factual discrepancies to special committees for investigation").

[61] *Chief Judge's Order*, *supra* note 21, at 5-6.

[62] 28 U.S.C. § 352(a)(2) ("The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute."); 28 U.S.C. § 352(b)(1)(B) (chief judge may dismiss a complaint "when a limited inquiry [is] conducted" only if "the allegations in the complaint *lack any factual foundation or are conclusively refuted by objective evidence*") (emphasis added); *see also Guide to Judiciary Policy*, *Vol. 2E, Ch. 3*, Rules for Judicial-Conduct and Judicial-Disability Proceedings, R. 11 [hereinafter JC&D Rules], https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf.

Chief Judge may neither disregard parts of the record nor choose to believe the subject judges' accounts (or any other source) over other evidence.[63] The standard here is akin to the summary judgment standard, which should be familiar to any federal judge: dismissal is appropriate only if there is no genuine dispute as to any material issue. [64] The Judicial Conduct and Disability Act adds an additional requirement: the Chief Judge has an independent duty to consider every reasonably accessible source of evidence, including contacting witnesses.[65]

The Chief Judge's dismissal of this case was inconsistent with those standards.

1. *The subject judges apparently did not directly refute that the clerk engaged in racist and hateful conduct.*

The subject judges admitted to the Chief Judge that they were aware of the multiple accounts that described how their prospective law clerk repeatedly engaged in hateful, discriminatory conduct in her capacity as a manager at a previous job.[66] These accounts were specific and supported by multiple sources, including physical evidence and on-the-record, well-sourced statements, [67] but there appears to be no evidence that the subject judges actually determined that each reported instance of hateful conduct was, in fact, false. Nor is there any evidence that the judges made certain that the clerk did not engage in other hateful behavior that had not (yet) been reported. The record does not even show that that the subject judges concluded that *any* of the reported instances of the clerk's hateful conduct were false.

At best, it appears that the subject judges determined "that the anonymous sources relied on in the media accounts were not trustworthy,"[68] but the media accounts did not rely solely on anonymous sources.[69] The subject judges told the Chief Judge that they had learned that someone at the clerk's workplace had been fired for creating fake text messages "to be used against co-workers,"[70] but the clerk's reported misconduct was not limited to text messages.[71] According to media reports, one subject judge told the Chief Judge that he had determined, "after

[63] JC&D R. 11(b), *supra* note 62 ("In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.").

[64] *Id.* at R. 11 cmt. ("Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56.").

[65] *See id.* ("[I]f potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute"). It does not appear from the face of the order that the Chief Judge spoke with the journalists cited herein or any of their sources.

[66] *Chief Judge's Order*, *supra* note 21, at 3.

[67] *See supra* notes 2–12 and accompanying text.

[68] *Chief Judge's Order*, *supra* note 21, at 3.

[69] *See* Marcus, *supra* note 7; Mayer, *supra* note 2; Ecarma, *supra* note 2.

[70] *Chief Judge's Order*, *supra* note 21, at 4.

[71] Ecarma, *supra* note 2.

careful investigation," that the clerk had been the victim of "a false accusation of racist behavior" by one journalist,[72] but multiple journalists independently confirmed the clerk's racist conduct.[73]

From the available public record, it does not appear that the subject judges said any (let alone all) of the clerk's text messages were fake or that she had not sent them. They did not refute that the clerk regularly engaged in racist remarks with her coworkers. They did not refute that the clerk had fired her only Black employee on the Martin Luther King, Jr., holiday. They did not even say that they had spoken with the clerk about the racist behavior and that she had denied doing these things. The record is remarkable for the near total absence of any verifiable statements by the subject judges regarding their supposed diligence.

2. *At least one of the subject judges' explanations for discounting past media reports do not square with the details of the reporting.*

The order noted that both subject judges determined that the reports of the clerk's conduct were "not true," and one subject judge's letter to the Chief Judge reportedly explains in further detail why the judge dismissed that reporting.[74] But these explanations also raise questions.

Some of these statements are demonstrably incorrect. For example, this subject judge reportedly asserted that a reporter had "relied entirely on anonymous sources" for evidence of one of the clerk's messages to a coworker.[75] But the reporter had in fact relied on physical evidence—screenshots of the text messages—that had been confirmed by two named sources.[76] This factual mistake is not consistent with the subject judge's reported assertion that he conducted a "careful investigation"[77] or the Chief Judge's conclusion that the subject judges "carefully reviewed the allegations in the media."[78]

That subject judge also reportedly claimed that the reporter had made "false insinuations" that the clerk left her organization soon after her text messages were discovered.[79] But, as explained above, that fact has been repeatedly confirmed over the last five years. Most recently, a spokesman for the clerk's former employer went even further, stating that clerk had been

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[72] Marcus, *supra* note 7.

[73] *See* Marcus, *supra* note 7; Mayer, *supra* note 2; Ecarma, *supra* note 2; *see also* Guinto, *supra* note 2.

[74] *Chief Judge's Order*, *supra* note 21, at 3–4; Marcus, *supra* note 7. The order does not distinguish between the two subject judges' explanations or conclusions, to extent that they were different. *Cf.* 28 U.S.C. § 352(a).

[75] Marcus, *supra* note 7.

[76] Mayer, *supra* note 2; *see also* Marcus, *supra* note 7 (describing how two named sources verified the original reporting).

[77] Marcus, *supra* note 7.

[78] *Id.*; *Chief Judge's Order*, *supra* note 21, at 5.

[79] Marcus, *supra* note 7.

"terminated from Turning Point after the discovery of problematic texts."[80] That evidence remains unrebutted.

Some of the subject judge's assertions are also self-evidently disputed by the record. For example, there are obvious problems with the subject judge's claim that an attorney who advised the clerk told the subject judge that a nondisclosure agreement was "one of" the reasons the clerk had not publicly denied the allegation.[81] But if a nondisclosure agreement—assuming that it existed and was operative—was only "one of" the reasons the clerk never denied the allegation, what were the other reasons? Second, if a nondisclosure agreement barred the clerk from speaking publicly about her racist text messages, why did she speak publicly about them, telling a reporter that she had "no recollection of these messages"?[82] The tensions between the record and these claims can only be resolved by a special committee and thus were not appropriately dismissed outright.

3. The subject judges relied on vague nondenials from a source of doubtful credibility.

The subject judges should also have been skeptical of the assertions made by the CEO of the organization the clerk worked for and whose identity the subject judges disclosed to the Chief Judge.[83] This person seems to have been the only person recounted in the record who may have had first-hand knowledge about the law clerk's past conduct. The record states only that the CEO claimed the allegations were "not accurate" and blamed the existence of these allegations on disgruntled former employees.[84] The order does not recount any direct evidence that the CEO provided to support his assertions. This is problematic because more contemporaneous statements provided by the CEO tied the law clerk's departure to her reported texts and conduct, including telling a reporter that "We dealt with it immediately."[85] That response was echoed by a spokesperson just last year who said the law clerk was "terminated from Turning Point after the discovery of problematic texts."[86]

The CEO led at least one of the subject judges to believe that reporters had misconstrued his public statements suggesting that he had fired the clerk.[87] If that is the case, the CEO has never corrected the record despite repeated opportunities to do so over the last five years. It is also not clear whether the CEO actually denied firing the clerk, nor would that be a point in his favor—if the text messages were real and if the clerk did mistreat her only Black employee, then the CEO's decision not to fire the clerk reflects poorly on his own judgment and credibility. The

[80] *Id.*

[81] *Id.*

[82] Mayer, *supra* note 2.

[83] *Chief Judge's Order*, *supra* note 21, at 4; Marcus, *supra* note 7; Rankin, *supra* note 34.

[84] *Chief Judge's Order*, *supra* note 21, at 4.

[85] Guinto, *supra* note 2; *see also* Mayer, *supra* note 2.

[86] Marcus, *supra* note 7.

[87] *Id.*

CEO's strained attempt to disavow his own public statements should have been a red flag for both the subject judges and the Chief Judge.

Perhaps more importantly, a "responsible judge" would also have been aware that this CEO is not necessarily a credible or disinterested observer. He has a long and documented history of making false or misleading statements. Among other public and demonstrable falsehoods, he has, for example:

- Falsely claimed that he did not get into West Point because of a "far less qualified applicant" of "a different gender and a different persuasion" whose test scores he claimed to have seen—and then flatly denied making that false claim;[88]
- Circulated phony statistics created by a QAnon conspiracy theorist that the CEO falsely attributed to a government agency.[89] The CEO later deleted his message without acknowledging the error.[90]
- Falsely claimed that one of his organizations was sending "80+ buses full of patriots to DC to fight for" ex-president Trump in the January 6, 2021 insurrection.[91] The CEO later deleted his message without acknowledging its false statements.[92] Subsequently, a Turning Point spokesman claimed that there were in fact 7 buses of *students*. However, a 55-year-old retired firefighter charged with attacking a Capitol police offer with a fire extinguisher stated in a court filing that he traveled to the insurrection in a bus organized by the CEO's organization.[93]

The CEO's record of false and misleading statements were not the only red flags a responsible judge should have detected. The CEO's organization has a detailed record of hiring individuals who express similarly hateful views as the clerk—a record documented, in part, as part of a broader examination of the organization's hiring practices after the clerk's conduct was brought to light.[94] The CEO also had close ties to the clerk, who he highly praised before the

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[88] *Compare Charlie Kirk ~ The Conservative Forum ~ 9-8-2015*, YOUTUBE (Sept. 10, 2015), https://www.youtube.com/watch?v=ihaMOHCVYsQ&t=96s (Kirk making the statement quoted above) *with Charlie Kirk Lying About Why He Didn't Go to West Point*, YOUTUBE (Apr. 12, 2020), https://www.youtube.com/watch?v=1Z78tI2c-w4 ("I never said that, that's fake news. I never said that.").

[89] *See* Travis View, *How Conspiracy Theories Spread from Internet's Darkest Corners,* WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/outlook/2018/09/18/how-conspiracy-theories-spread-internets-darkest-corners/.

[90] *Id.*

[91] Sarah Al-Arshani, *A former firefighter charged in the Capitol riot took a bus organized by Turning Point USA to DC, filing says*, BUSINESS INSIDER (Mar. 3, 2021, 2:05 a.m.), https://www.businessinsider.com/man-charged-capitol-riot-went-dc-bus-turning-point-usa-2021-3.

[92] *Id.*

[93] *Id.*

[94] Ecarma, *supra* note 2*; see also* Ashley Feinberg, *Turning Point USA Keeps Accidentally Hiring Racists*, HUFFPOST (April 25, 2018, 2:28 p.m.), https://www.huffpost.com/entry/turning-point-usa-racist-tweets_n_5ad65b06e4b029ebe01ed1ac.

allegations of her misconduct came to light.[95] And the CEO's original statements about how the clerk had been terminated put him at odds with the influential people in his professional network who have come to the clerk's defense.[96]

Given these credibility issues with what appears to be the subject judges' principal named source, dismissal was clearly improper. The rules governing judicial misconduct proceedings are clear: If the situation "involves a reasonable dispute over credibility, the matter should proceed" to a full investigation by a special committee.[97] If anything, the Chief Judge should have disregarded the CEO's evasive story as "facially incredible" and "lacking in indicia of reliability," and should have recognized that a responsible judge should not have taken the CEO's nondenials, strange logic, and personal attacks as sufficient to lay to rest concerns about the clerk's own misconduct.[98]

4. The subject judges' principal tactic appears to have been to attack the credibility of other sources rather than offer their own evidence.

In lieu of facts, the subject judges appear to dispute the motives and credibility of the various sources of evidence of the clerk's misconduct and the allegations against the subject judges themselves. The subject judges' argument is, as one judge put it, that the complaint offered "no *credible* evidence."[99] This approach should have precluded the Chief Judge from dismissing the complaint. The subject judges made credibility a key element of their defense. The Chief Judge is prohibited from making such credibility determinations.[100]

For example, one subject judge asserts that his own "record of public service proves that [he] abhor[s] invidious discrimination."[101] The judge's reliance on his own record contrasts markedly with his characterization of one of the journalists who disclosed the clerk's racist conduct, who he described as a "tabloid reporter."[102] The reporter who broke this story is no tabloid journalist—her record as an award-winning investigator at a national magazine with a

[95] Charlie Kirk and Brent Hamachek, TIME FOR A TURNING POINT: SETTING A COURSE TOWARD FREE MARKETS AND LIMITED GOVERNMENT FOR FUTURE GENERATIONS (2016) (describing the law clerk as "the best hire we ever could have made" and claiming that "Turning Point needs more [people like the law clerk]; so does America").

[96] Marcus, *supra* note 7.

[97] JC&D R. 11 cmt., *supra* note 62.

[98] *Id.*; *cf., e.g.*, *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) ("[T]he denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.").

[99] Rankin, *supra* note 34 (emphasis added).

[100] *See* JC&D R. 11 cmt., *supra* note 62 ("If, however, the situation involves a reasonable dispute over credibility, the matter should proceed."); 28 U.S.C. § 352(a).

[101] Rankin, *supra* note 34.

[102] Marcus, *supra* note 7.

reputation for exhaustive fact-checking itself provides strong indicia of the reporting's trustworthiness.[103]

If it is the subject judge's word against the journalist and his reputation against hers, there is no way to resolve those issues without an investigation and, if the resulting evidence is not conclusive, a careful credibility determination.[104] Similar issues present themselves when weighing the account of the clerk's ex-employees against the CEO's statements, the journalists' investigations against the subject judges' purported diligence, or the bulk of the unrebutted evidence against the subject judges' assertions. The record is replete with these credibility questions; for that reason alone, the Chief Judge could not lawfully dismiss the matter.[105]

5. *The Chief Judge disregarded unresolved factual questions in the judges' description of their supposed "diligence."*

The face of the order recounts only that the subject judges seemingly made a set of vague statements that directly bear on whether they conducted a careful investigation before hiring the clerk.[106] These assertations raise a set of question that go the heart of the judges' supposed "diligence." The Chief Judge should have recognized that the judges' diligence could not be evaluated until these questions were answered and those answers were supported by proof.

Who, for example, were "the numerous people with knowledge of . . . the allegations" that the subject judges spoke with, and which of them "repeatedly informed" the judges that the allegations "are not true?"[107] When did the judges speak with these numerous people? Did the Chief Judge speak with them herself? What questions did they ask? What answers did they receive? Did the subject judges speak with the clerk about the racist conduct (and did the Chief Judge)? If so, did the clerk herself state unequivocally that she did not do *any* of the hateful things reported in the media? These questions become even more urgent based on subsequent reporting, which provides even more evidence to support the earlier reports.

The Chief Judge could only have dismissed the complaint if the record was "conclusively refuted by objective evidence," and nothing in the Chief Judge's order or in the reports of the subject judges' defense meets that high standard.[108]

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[103] *See About Jane Mayer*, JANE-MAYER.COM (last visited Mar. 1, 2022), https://www.jane-mayer.com/bios/jane-mayer; Shelley Hepworth, *The New Yorker's chief fact-checker on how to get things right in the era of 'post-truth'*, COLUMBIA JOURNALISM REV. (Mar. 8, 2017), https://www.cjr.org/the_delacorte_lectures/new-yorkers-fact-checker-post-truth-facts-fake-news-trump.php; Evan Osnos, *"I Was Fact-Checked By* The New Yorker*"*, THE NEW YORKER (Sept. 14, 2009), https://www.newyorker.com/news/evan-osnos/i-was-fact-checked-by-the-new-yorker (describing *The New Yorker*'s exhaustive fact-checking procedures).

[104] JC&D R. 11 cmt., *supra* note 62.

[105] *Id.*

[106] *Chief Judge's Order*, *supra* note 21, at 3–4.

[107] *Id.*

[108] 28 U.S.C. § 352(b)(1)(B).

C. The Chief Judge's Decision Not to Authorize an Investigation Conflicts with Recent Precedent

Special committees have been appointed, and thorough investigations conducted, for arguably less egregious misconduct than two judges hiring a law clerk with a widely publicized history of racist and hateful conduct and who did nothing to reassure the public that their proceedings will not be tainted by actual or apparent bias.

One such previous investigation concerned a single speech where a chief circuit judge was alleged to have made improper remarks regarding race, intellectual disability, and foreign nationals, among other topics.[109] The matter was transferred to the D.C. Circuit Judicial Council. Noting that he was prohibited from making factual findings about any reasonably disputed matter, the Chief Judge of the D.C. Circuit convened a special committee to investigate the matter.[110] The special committee retained a law professor to act as special counsel, who, after "extensive investigative efforts," determined that the event was not recorded.[111] He then interviewed 45 attendees and corresponded by email with an additional eight attendees; obtained photographs of the event, the judges' handwritten notes, contemporaneous notes from other attendees, a text message sent after the speech, and reviewed the dockets and published opinions of all the cases the judge mentioned in her speech.[112] He submitted a report to the special committee, which held a hearing where it took testimony from the judge and one of the attendees at the speech.[113]

Another investigation was initiated after news broke that a district judge had forwarded to six acquaintances a racist email insulting the then-President and his parents.[114] The incident was widely reported in the press, the ensuing notoriety was extensive, the incident received attention from members of the House Judiciary Committee, and there was a substantial response from the public.[115] The judge admitted that he had sent the email and personally apologized to the President.[116] After a number of complaints were filed, the Chief Judge of the Ninth Circuit convened a special committee to investigate the matter.[117] The special committee reviewed the judge's cases concerning labor, employment, civil rights, prisoner rights, and criminal sentencing, as well as his cases that were appealed.[118] The special committee also interviewed key individuals in the state's legal community, court staff, and the judge's professional and

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[109] *In re Charges of Judicial Misconduct*, 769 F.3d 762 (D.C. Cir. Jud. Council 2014).

[110] *Id.* at 764.

[111] *Id.*

[112] *Id.* at 764–65.

[113] *Id.* at 765.

[114] *In re Complaint of Judicial Misconduct*, 751 F.3d 611, 613 (U.S. Jud. Conf. 2014).

[115] *Id.*.

[116] *Id.* at 619 (published opinion of the 9th Cir. Jud. Council).

[117] *Id.* at 614.

[118] *Id.* at 615.

social contacts.[119] The special committee also discovered hundreds of inappropriate emails in the judge's court email account.[120]

Yet another investigation was initiated after reporting disclosed pornography on a chief circuit judge's publicly accessible web site.[121] The matter was transferred to the Third Circuit Judicial Council.[122] A special committee was appointed which retained counsel from two major law firms to assist with the investigation as well as a consultant to advise on technology issues.[123] The special committee obtained from the judge technical information about his website, lists of its contents, and the files downloaded by the newspaper that broke the story, among other information.[124] The judge testified under oath and on the record for nearly three hours and was questioned by both counsel and the judges on the special committee.[125]

In contrast to these precedents, the Chief Judge did not appoint a special committee and dismissed the matter only two weeks after receiving the complaint. As detailed above, there are many unresolved questions of fact that would make the appointment of a special committee appropriate—and, in fact, required. We urge the Judicial Council to vacate the Chief Judge's order and mandate that such a special committee conduct an investigation.

D. The Chief Judge Failed to Identify Additional Instances of Potential Misconduct

While the Chief Judge addressed the subject judges' diligence in hiring, the Chief Judge had an independent obligation to identify "*any* misconduct . . . issues" raised by the allegations in the complaint.[126] The integrity of the judicial misconduct process depends on a Chief Judge appropriately discharging this duty because judicial misconduct proceedings are not adversarial, and "the Rules do not give the complainant the rights of a party to litigation."[127] Instead, the Judicial Conduct and Disability Act is premised on Congress's faith that, once a complaint "reveals information of misconduct," the Chief Judge and the Judicial Council will identify and investigate every instance of misconduct that the evolving record reveals.[128] The available record indicates that other potential judicial misconduct issues should also have been considered.

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[119] *Id.*

[120] *Id.* at 616.

[121] *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 280 (3d Cir. Jud. Council 2009).

[122] *Id.*

[123] *Id.* at 282.

[124] *Id.* at 282–83.

[125] *Id.* at 283.

[126] JC&D R. 11 cmt., *supra* note 62 ("The chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues.").

[127] *Id.* at R. 16 cmt.

[128] *Id.*

For example, the reported evidence indicates that the subject judges have not addressed the serious public-perception problems that have arisen from their hire in a manner required by basic standards of judicial conduct. A judge who hires a clerk with a widely publicized history of racist and hateful conduct must do much more than privately decide that, for whatever reason, this history is not disqualifying. Such a hiring decision will inevitably diminish public confidence in the judge's handling of cases involving race, national origin, religion, and employment. Lawyers and litigants will reasonably worry that their faith, background, or skin color might affect the adjudication of their rights, especially if the clerk is involved in their case. Staff and colleagues in the judge's courthouse and across the judiciary might wonder what the judge thinks of them or the kind of conduct they tolerate in their chambers. A judge should do whatever they can to ameliorate these legitimate concerns.[129] That has not happened here.

The subject judges could have publicly explained their reasons for hiring the clerk. They could have announced that the clerk would not work on cases where her involvement might create an appearance of impropriety. Given the risk of harm to public confidence in the courts, they could also have announced that they would proactively recuse themselves from cases where their own impartiality could reasonably be questioned. They could even have self-initiated a misconduct proceeding, as one judge did when his racist personal emails were publicly reported.[130] At the very least, they could have said that the clerk had no place in their chambers if any of the reports of her hateful conduct were true.

The subject judges' inaction is inconsistent with their obligations to uphold the integrity of the judiciary and avoid the appearance of impropriety in all activities.[131] The Chief Judge should have recognized and addressed these apparent violations of the Judicial Conduct and Disability Act. Given that the Act is generally forward-looking, the judges may still be able to take some kind of "corrective action that acknowledges and remedies" these problems, at least in part.[132] It is certainly not too late for the Judicial Council to remedy these problems itself.[133]

E. The Chief Judge's Order Exceeded Statutory and Constitutional Limits by Opining on Recusal, Substantially Prejudicing Future Litigants

A separate, concerning error in the Chief Judge's Order can be found in the Order's single footnote: "nothing in the record supports an allegation that the [subject judges'] 'impartiality might reasonably be questioned' or otherwise provides a basis for disqualification under 28 U.S.C. § 455."[134] Although it may seem like an afterthought, this single sentence

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[129] *Cf. Guide to Judiciary Policy, Vol. 2A, Ch. 2*, Code of Conduct for United States Judges, Canon 2A cmt., https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf ("A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.").

[130] *In re Complaint of Judicial Misconduct*, 751 F.3d 611, 614 (U.S. Jud. Conf. 2014).

[131] *Code of Conduct for United States Judges*, Canon 1, *supra* note 129.

[132] JC&D R. 11(d)(2), *supra* note 62.

[133] *Id.* at R. 19(b).

[134] *Chief Judge's Order*, *supra* note 21, at 6 n.1.

transformed the order into an impermissible advisory opinion that exceeded the Chief Judge's jurisdiction, violated a basic tenet of Article III of the Constitution, and prejudiced future litigants' statutory and constitutional rights to a fair hearing.[135] It was also factually incorrect.

The record is replete with facts that bear directly on the subject judges' recusal obligations. Consider, for example, the following examples incorporating elements of the current record:

- A Black employee sues her employer for racial discrimination, alleging, among other things, that she was fired on the Martin Luther King, Jr., holiday; that the supervisor who fired her regularly exchanged racist remarks with coworkers; and that the employer attempted to cover up the supervisor's misconduct by falsely blaming another employee. The judge assigned to the case had himself hired an employee with a similar record as the supervisor. The judge rules against the employee.

- An employer is sued for negligent hiring and retention. The plaintiff alleges that the employer had actual notice of the employee's record of antisemitic conduct; failed to adequately investigate that record by relying, among other things, on implausible and self-serving claims from the employee's previous supervisor; and later ignored clear evidence that the investigation was flawed and that the employee's antisemitism presented a clear risk to the employer's customers and workforce. The judge assigned to the case had himself hired and retained an employee under similar circumstances. The judge rules for the employer.

- An investigative journalist and his publication are sued for defamation by someone seeking revenge for an article disclosing evidence of their xenophobic and illegal conduct. The judge assigned to the case previously stated in strong terms that he distrusted the journalist and the publication. The judge rules against the journalist.

- A whistleblower has strong evidence that her employer acted illegally. The employer's defense hinges on the argument that the whistleblower held a grudge against the employer. The whistleblower does not want her identity made public because she fears retaliation. The judge hearing the case had previously decided to discount evidence of his employee's misconduct because the employee's coworkers had asked for confidentiality and because the judge doubted their motives. The judge refuses to protect the whistleblower's identity and rules against her on the merits.

[135] *Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.").

- The CEO of an organization has been sued for making false statements. The judge hearing the case recently relied on the CEO to have a judicial misconduct complaint dismissed. The judge rules for the CEO.

- A litigant is deciding whether to file a motion to recuse a judge. The judge had previously lashed out at the people who questioned the propriety of his decision to hire a law clerk with a widely publicized record of hateful conduct. The litigant had strongly condemned the judge's actions. The judge rules against the litigant.

In each of these examples, a reasonable observer could question the judge's impartiality. Depending on the other circumstances of the case, the judge could have a statutory obligation to recuse himself under 28 U.S.C. § 455.[136] These hypotheticals are by no means exhaustive, but they illustrate how the Chief Judge's blanket statement absolving the subject judges of any recusal issues cannot be correct.

But these hypotheticals, though illustrative, are unnecessary because the Chief Judge should not have issued an advisory opinion regarding 28 U.S.C. § 455 at all. In doing so, the Chief Judge exceeded both her statutory jurisdiction and her authority under the constitution. Congress has not authorized the judicial councils to construe 28 U.S.C. § 455 in a judicial misconduct proceeding, and the Judicial Conduct and Disability Act cannot be used to evaluate the merits of a judge's recusal decisions, let alone preemptively endorse a judge's decision not to recuse.[137]

The Chief Judge also exceeded the limits of Article III's grant of judicial power, which prohibits federal judges from issuing advisory opinions.[138] Federal courts are "without power to decide questions that cannot affect the rights of *litigants in the case before them*."[139] Here, the Chief Judge's order prejudged how 28 U.S.C. § 455 would apply to a hypothetical case, prejudicing future litigants' rights to fair treatment before an unquestionably impartial judge. Those litigants are not parties in this judicial misconduct proceeding. Indeed, there are no

[136] The judge might also be required to recuse himself under the Constitution's Due Process clause because of the risk of actual bias. *See Caperton,* 556 U.S. at 884–85.

[137] *See* 28 U.S.C. § 352(b)(1)(A)(ii); JC&D R. 3(h), *supra* note 62 (providing a non-exclusive definition of what constitutes misconduct); *see also In re Cudahy*, 294 F.3d 947, 953 (7th Cir. 2002) ("an erroneous failure to recuse oneself from considering a particular matter is a legal error rather than judicial misconduct"); *In re United States*, 791 F.3d 945, 959 (9th Cir. 2015). In addition, the Committee on Codes of Conduct of the Judicial Conference is authorized to issue advisory opinions on the nonbinding Code of Conduct for United States Judges, which includes its own recusal provisions, but neither the Judicial Councils nor the Judicial Conference is authorized to interpret 28 U.S.C. § 455 at all. *See, e.g., Guide to Judiciary Policy, Vol. 2B, Ch. 2, § 220*, Committee on Codes of Conduct Advisory Opinions, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

[138] *See, e.g.*, *Flast*, 392 U.S. at 96; *In Matter of Motors Liquidation Co.,* 829 F.3d 135, 167–68 (2d Cir. 2016) (collecting authorities).

[139] *Motors Liquidation*, 829 F.3d at 168 (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

"parties" at all in a judicial misconduct proceeding, which is inquisitorial rather than adversarial.[140]

This error alone requires the order to be vacated and the matter referred to a special committee. The severe prejudice this advisory opinion will cause cannot be minimized, and it cannot be remedied if the order is simply amended and reissued.

IV. CONCLUSION

The flaws in the Judicial Council's decision have grown more visible in the short time since it was issued. The evidence of the clerk's racist conduct was unrebutted when the Judicial Council made its ruling, and that record is even stronger now, after new reporting has confirmed the original record and refuted the subject judges' few provable claims.[141]

The Second Judicial Council's affirmance should be vacated, and a special committee should convene to investigate this matter.

* * *

We thank the Judicial Council and the Committee on Judicial Conduct and Disability for their continued attention to this urgent matter.

Sincerely,

Jerrold Nadler
Chair
House Committee on the Judiciary

Henry C. "Hank" Johnson, Jr.
Chair
Subcommittee on Courts, Intellectual Property, and the Internet
House Committee on the Judiciary

CC: The Honorable John G. Roberts, Jr., Chief Justice, Supreme Court of the United States

The Honorable Charles Wilson, Circuit Judge, United States Court of Appeals for the Eleventh Circuit

[140] *See, e.g.*, JC&D R. 3 cmt. & R. 16 cmt., *supra* note 62.

[141] *See In re Memorandum of Decision of Jud. Conf. Comm. on Jud. Conduct & Disability*, 517 F.3d 563, 568 (U.S. Jud. Conf. 2008) ("[T]here cannot be public confidence in a self-regulatory misconduct procedure that, after the discovery of new evidence or a failure to investigate properly or completely serious allegations of misconduct, allows misconduct to go unremedied in the name of preserving the 'finality' of an earlier, perhaps misfired, proceeding.").