

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In the Matter of a *
Judicial Complaint * No. 04-24-90094¹
Under 28 U.S.C. § 351 *

MEMORANDUM AND ORDER

On May 24, 2024, *The New York Times* published an essay entitled, “A Federal Judge Wonders: How Could Alito Have Been So Foolish?” by Senior Judge Michael A. Ponsor of the United States District Court for the District of Massachusetts.² Five days later, complainant filed a judicial complaint against Judge Ponsor pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

The Act provides an administrative remedy for judicial conduct that is “prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). After reviewing the complaint and conducting a limited inquiry pursuant to 28 U.S.C. § 352(a), I now conclude this judicial complaint for the reasons set forth below on the basis that appropriate corrective action has been taken. *See* 28 U.S.C. § 352(b)(2).

¹ This judicial complaint was initially filed in the United States Court of Appeals for the First Circuit and was assigned a complaint number in that court, No. 01-24-90013. Pursuant to Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the Chief Justice of the United States transferred the complaint to this Circuit.

² Judge Ponsor has consented to the disclosure of his identity pursuant to Judicial-Conduct Rule 23(b).

I. Background

In his essay for *The New York Times*, Judge Ponsor addressed the flying of an upside-down American flag and an Appeal to Heaven flag outside homes owned by Supreme Court Justice Samuel A. Alito, Jr. Judge Ponsor opined that “any judge with reasonable ethical instincts would have” recognized that the flag displays were improper because they could be perceived as “a banner of allegiance on partisan issues that are or could be before the court.” Acknowledging that the flags may have been displayed by Justice Alito’s wife, Judge Ponsor offered a hypothetical involving his own marriage: he stated that, if his wife had publicly expressed her views on a fundamental issue in one of his cases, he would have been required to recuse himself from the case based on the appearance of partiality. The judge concluded his essay by noting that, although the Supreme Court recently adopted an ethics code, “basic ethical behavior should not rely on laws or regulations. It should be folded into a judge’s DNA. That didn’t happen here.”

In his judicial complaint, complainant alleges that Judge Ponsor’s essay went “well beyond the bounds of appropriate judicial speech.” Although he concedes that Judge Ponsor did not refer explicitly to any pending cases, complainant asserts that reasonable people could view the essay as calling for Justice Alito’s recusal from the January 6 cases that were pending before the Supreme Court at the time. Complainant characterizes Judge Ponsor’s essay as a “highly inappropriate, baseless, and prejudicial political speech by a judge against another judge while he is deciding the legal fates of criminal defendants going through the judicial process.”

II. Legal Considerations

In reviewing this judicial complaint, I considered the ethical canons that apply to federal judges as set forth in the Code of Conduct for United States Judges as well as the advisory opinions issued by the Committee on Codes of Conduct. While judges are encouraged to engage in extrajudicial activities, Canon 4 cmt., they must be mindful of their obligations, *inter alia*, to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety, and to refrain from making public comments on the merits of any pending matters, *see* Canons 1-4.

Specifically, Canon 1 provides that “[a] judge should uphold the integrity and independence of the judiciary.” Under Canon 2A, “[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 3A(6) provides that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” Canon 4 states that “[a] judge may engage in extrajudicial activities, including law-related pursuits . . . , and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” Canon 4 cautions, however, that “a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth” elsewhere in the Canon.

According to the Committee on Codes of Conduct, “a judge may . . . write on substantive legal issues.” *Guide to Jud. Policy*, Vol. 2, Pt. B, Ch. 2, Advisory Op. No. 93

(June 2009). The Committee cautioned, however, that “Canon 2A’s provision that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary may preclude a judge’s participation in law-related activities or organizations concerning highly controversial subjects.” *Id.* “[E]ngaging in law-related extrajudicial activities where the activity is political in nature is fraught with risks for judges.” *Id.*

The Committee advised that judges “should be sensitive to the nature and tone” of extrajudicial activities related to the law “and should not be drawn into an activity in a manner that would contravene Canon 2’s goals of propriety and impartiality.” *Id.* The Committee also has warned that, in extrajudicial writings and publications, judges should be mindful of Canon 4’s caveats and, “[i]n every case, the judge should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the office.” *Guide*, Vol. 2, Pt. B, Ch. 2, Advisory Op. No. 55 (June 2009).

III. Discussion

The principal question is whether, in publishing the essay, Judge Ponsor “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). That question, in turn, requires consideration of two others: (1) Did the publication of the essay diminish the public’s confidence in the integrity and independence of the judiciary? and (2) Could some of the statements in the essay reasonably be viewed by the public as a commentary on partisan issues or as a call for

Justice Alito's recusal from the then-pending January 6 cases? The answer to all three questions is yes.

Although Judge Ponsor "is in a unique position to contribute to the law," Canon 4 cmt., and "may . . . write on substantive legal issues," Advisory Op. No. 93, the essay expressed personal opinions on controversial public issues and criticized the ethics of a sitting Supreme Court justice. Such comments diminish the public confidence in the integrity and independence of the federal judiciary in violation of Canons 1 and 2A. *See* Canon 1 cmt. ("Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges.").

Furthermore, the political implications and undertones of the essay violated Canon 3A(6)'s prohibition on publicly commenting on the merits of a pending matter. I accept that the essay never referenced any pending Supreme Court cases and acknowledge Judge Ponsor's statement in the attached letter that he "did not have any particular case in mind when [he] drafted the piece." But viewed in the timeframe during which the essay was published, including the substantial press coverage detailing the calls for Justice Alito's recusals from the then-pending January 6 cases, it would be reasonable for a member of the public to perceive the essay as a commentary on partisan issues and as a call for Justice Alito's recusal.

After determining that cognizable misconduct has occurred, a chief judge "may conclude a complaint proceeding in whole or in part" upon a determination that "the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies

the problems raised by the complaint.” Judicial-Conduct Rule 11(d)(2); *accord* 28 U.S.C. § 352(b)(2). Such corrective action must be voluntarily undertaken by a subject judge. Although a chief judge may not direct or compel remedial action under Judicial-Conduct Rule 11(d), the chief judge “may facilitate” a subject judge’s “voluntary self-correction or redress of misconduct . . . by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures.” Judicial-Conduct Rule 11 cmt.

Pursuant to Judicial-Conduct Rule 11(b), I communicated with Judge Ponsor regarding this matter to obtain his response to the complaint and to provide him with an objective view of his essay and its ethical implications. *See* Judicial-Conduct Rule 11 cmt. Judge Ponsor was at all times respectful of the judicial complaint process, responsive to the concerns raised by his essay, and reflective in drafting the attached letter in which he publicly acknowledges and apologizes for his violations of the Code of Conduct. I am satisfied that Judge Ponsor’s public letter of apology constitutes voluntary corrective action sufficient to allow for the conclusion of the complaint under 28 U.S.C. § 352(b)(2) and Judicial-Conduct Rule 11(d).

Accordingly, this judicial complaint is concluded pursuant to 28 U.S.C. § 352(b)(2) on the ground that appropriate corrective action has been taken.

IT IS SO ORDERED.

Albert Diaz
Chief Judge



United States District Court
300 STATE STREET, SUITE 350
SPRINGFIELD, MA 01105

**CHAMBERS OF
MICHAEL A. PONSOR
UNITED STATES DISTRICT JUDGE**

November 20, 2024

Dear Chief Judge Diaz,

Thank you for your recent letter pointing out how my New York Times essay of May 24, 2024, violated the boundaries of our Code of Conduct.

With the benefit of an objective perspective, I realize now that my criticism of the ethical judgment of a Supreme Court Justice might have had the effect of undermining the public's confidence in the integrity of the judicial system, in violation of Canon 2A of the Code. Beyond this, I also now see that the piece permitted the inference that I was commenting on matters that were pending before the Court in violation of Canon 3A(6). I particularly regret the fact that my essay might have been interpreted as a call for Justice Alito's recusal from specific cases then under consideration. The fact that I did not have any particular case in mind when I drafted the piece does not reduce the gravity of my lapse.

For these violations of the Code, unintentional at the time but clear in retrospect, I offer my unreserved apology and my commitment to scrupulously avoid any such transgression in the future.

In more than forty years as a Magistrate Judge and District Judge, I have striven to avoid any even arguable violation of the Code. In the future, if I am contemplating any public, nonjudicial writing, I will take advice from our Committee representative before publication. I do not believe this is required by the Code, and I hope that this commitment will be seen as proof of my sincere, ongoing intent to stay well within proper boundaries.

I am proud to participate in a judicial system that gives members of the public an avenue to identify potential violations of the Code and that gives me an opportunity to recognize any misstep, apologize, and amend. Please accept my thanks for your very helpful guidance.

Sincerely

Michael A. Ponsor