

17-90118-jm
February 5, 2018
Judicial Council

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
COMPLAINT OF JUDICIAL MISCONDUCT

Docket No. 17-90118-jm

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Before: The Judicial Council of the Second Circuit.

On Thursday, December 14, 2017, the Chief Judge of the Ninth Circuit identified a complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351(b) (the “Act”), and Rule 5(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), against then-Circuit Judge Alex Kozinski of the Ninth Circuit “based on allegations contained in a December 8, 2017, Washington Post article entitled ‘Prominent 9th Circuit Judge Accused of Sexual Misconduct’ and any other related articles.” Cplt. at 1. On Friday, December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council. *See* Rule 26.

Three days later, on Monday, December 18, 2017, then-Judge Kozinski permanently and irrevocably relinquished the office of United States circuit judge by retiring, effective immediately, pursuant to 28 U.S.C. § 371(a).

We recognize that the complaint references grave allegations of

inappropriate misconduct, which the federal judiciary cannot tolerate. Indeed, the federal judiciary has taken steps to ensure that the workplace is free of misconduct. We note that Chief Justice John G. Roberts, Jr., in his 2017 Year-End Report on the Federal Judiciary charged James C. Duff, Director of the Administrative Office of the U.S. Courts, with establishing a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the judiciary to protect employees from inappropriate conduct in the workplace. That working group has now been formed.

As to the instant matter involving former-Judge Alex Kozinski, the Second Circuit Judicial Council is obligated to adhere to the Act. The Act is concerned with individuals who *currently* exercise the powers of the office of federal judge. Its emphasis is on correction of conditions that interfere with the effective and expeditious administration of the business of the courts. The Act defines “judge” as “a circuit judge, district judge, bankruptcy judge, or magistrate judge.” 28 U.S.C. § 351(d)(1). Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act.

Accordingly, the Judicial Council must “conclude the proceeding because

[of] . . . intervening events” Rule 20(b)(1)(B); *see also* Rule 11 cmt. (identifying “resignation from judicial office” as such an intervening event); *In re Charge of Judicial Misconduct*, No. 12-90069, at *2 (2d Cir. Jud. Council June 20, 2013) (“Because Judge Martin has informed the president that he will retire from office, the Judicial Council has decided that it should ‘conclude the proceeding because . . . intervening events have made the proceeding unnecessary.’” (quoting Rule 20(b)(1)(B)));¹ *In re: Complaint of Judicial Misconduct*, No. 16-01, at *2 (Comm. on Jud. Conduct & Disability of U.S. Jud. Conf. Jan. 26, 2017) (same); *In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Jud. Council 1996) (same); *In re Complaint of Judicial Misconduct*, 10 F.3d 99, 99–100 (3d Cir. Jud. Council 1993) (same).

In sum, within the space of three days, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council and then-Judge Kozinski resigned, completely relinquishing his office, placing himself outside the

¹ The Second Circuit Judicial Council referred the order concluding the Martin proceeding to the Public Integrity Section of the Department of Justice, which was appropriate because then-Judge Martin retired from office only after (i) he had submitted a preliminary response to the complaint, *see* Rule 11(f), (ii) the Chief Judge of the Second Circuit had appointed a special committee, (iii) the special committee had hired outside counsel, (iv) the outside counsel, in conjunction with the special committee, had conducted an expansive nine-month investigation, and (v) the special committee had directed then-Judge Martin to testify under oath at a hearing—none of which has happened here. By way of comparison, the pending matter did not even reach step one; *i.e.*, then-Judge Alex Kozinski wholly relinquished his office before even submitting a preliminary response to the complaint, thereby precluding any further investigation under the Act.

parameters of the Act and precluding any inquiry by the Judicial Council.

Because the Judicial Council is without statutory authority to do anything more, we must close this matter.

The complaint proceeding is therefore concluded. In so doing, the Judicial Council does not reach the merits of the complaint. Given the seriousness of the conduct alleged, however, the Judicial Council acknowledges the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint. Accordingly, the Judicial Council requests that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States forward a copy of this order to any relevant Congressional committees for their information, and that the Secretary of the Judicial Council forward a copy of this order to all other judicial councils.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED that the above-referenced complaint proceeding is **CONCLUDED**.