

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 7th day of March, 2023.

On February 23, 2023, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 22-2, pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee Opinion 22-2

An active judge may not concurrently serve on the United States Court of Military Commission Review.

ISSUE:

May an active judge concurrently serve on the United States Court of Military Commission Review?

Answer: No. Under the facts presented, the judge may not accept appointment to the United States Court of Military Commission Review and serve concurrently as an active judge in the Commonwealth of Virginia under the Code of Virginia or the Canons of Judicial Conduct for the Commonwealth of Virginia (the "Canons").

FACTS:

In the wake of the attacks of September 11, 2001, the United States Congress passed, and the President signed, an Authorization for Use of Military Force (AUMF). *In re Al-Nashiri*, 835 F.3d 110, 114 (D.C. Cir. 2016). After its passage, enemy combatants were detained and tried by military commission at Guantanamo Bay Naval Base. *Id.* In *Hamdan v. Rumsfeld*, the U.S. Supreme Court found the military commissions did not comply with procedural protections of the Uniform Code of Military Justice and Geneva Conventions. 548 U.S. 557, 613, 620-28 (2016). In response, Congress passed the Military Commissions Act, establishing a system of military commissions, and created the Court of Military Commission Review to review judgments of military commissions. *In re Al-Nashiri*, 835 F.3d at 115.

The 2009 Military Commissions Act modified the court, now known as the United States Court of Military Commission Review (CMCR). *See* 10 U.S.C. § 950f. "[T]he CMCR is composed of military and civilian judges who sit in panels of at least three." *In re Al-Nashiri*, 835 F.3d at 115; *see also* 10 U.S.C. § 950f(a). The CMCR reviews final decisions of military commissions, *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016), and its authority includes review of both questions of fact and of law. *In re Al-Nashiri*, 835 F.3d at 115.

The President, with the advice and consent of the Senate, appoints all judges to the CMCR. Civilian judges serve at the pleasure of the President — there are no tenure limitations. Because the work is not regularly scheduled and depends solely on whether there are cases in litigation before the CMCR, employment as a civilian CMCR judge is considered part-time. Civilian CMCR judges are paid at an hourly rate, and do not earn leave or creditable time toward retirement in the Federal Employees Retirement System.

The current Chief Judge of the CMCR wishes to submit the requesting judge’s name to the President for nomination as an Associate Judge on the CMCR. Any such nomination must be confirmed by the Senate. The judge has asked whether he may serve on the CMCR concurrently with the judge’s position as an active judge in the Commonwealth of Virginia.

Due to the specialized nature of the court, the requesting judge could not envision any case or issue litigated before the CMCR would ever come before the sitting judge in his Commonwealth service. The judge has advised that should the CMCR be convened to hear argument, the judge would take personal leave to attend.

DISCUSSION:

This Committee has previously reviewed and analyzed various questions as to whether judges may ethically engage in certain activities outside of their judicial duties.¹ The Canons maintain that a judge’s judicial duties take precedence, but also recognize that as long as certain values are upheld, judges need not separate themselves from the communities in which they live and serve.

Intrinsic to these Canons are the precepts that judges, individually and collectively, must respect and honor the judicial office as a *public trust* and strive to enhance and maintain confidence in our legal system. Judges should engage and serve their communities, and these Canons should not be construed as requiring judges to live and work in isolation from their communities. Judges should aspire at all times to live a life that ensures the greatest possible public confidence in the judge’s independence, impartiality, integrity, and competence.

Va. Sup. Ct. R., Part 6, § III, Preamble (emphasis added).

The Committee’s prior opinions involved activities fairly characterized as extrajudicial activities; in this matter, the Committee is of the opinion that there is a more direct prohibition.

1. Applicable Code Section, Canons and standards

Code § 17.1-102 provides: “No justice or judge shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any nonjudicial elective office, *or hold any other office of public trust*, or engage in any other incompatible activity.” (Emphasis added.)

In addition to the Preamble to the Canons cited above, Canon 2A also describes the office of judge as a “public trust:”

Judges, by virtue of their office, have been placed in a position of public trust. While judges should engage in public matters and serve their communities, they must govern their public and private behavior to ensure the greatest public confidence in the judge’s independence, impartiality, integrity, and competence.

Finally, Canon 2V stresses the necessity of a judge’s adherence to the law, noting that “[a] judge must respect and comply with the law.”

2. Analysis

Whether an active judge may accept nomination and appointment to another judicial position, even one that would be part-time, is a question of first impression for the Committee.

Pursuant to Paragraph 19 of the Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee, (April 18, 2019), “[t]he Committee may not issue an advisory opinion that interprets any constitutional provision, statute, rule or regulation *that does not relate to judicial ethics.*” (Emphasis added.) In this case, the interpretation and application of Code § 17.1-102 relates to judicial ethics because that statute prohibits judges from engaging in certain activities, and in the opinion of the Committee, the request falls squarely within those prohibited activities.

Code § 17.1-102 prohibits a judge from holding any other office of public trust during his continuance in office. By virtue of the judge’s current position as an active judge, he already holds one office of public trust. *See* Va. Sup. Ct. R., Part 6, § III, Preamble (“judges . . . must respect and honor the judicial office as a public trust”); *see also* Canon 2A (“[j]udges, by virtue of their office, have been placed in a position of public trust.”). Serving as a judge on an Article I court such as the CMCR can only be interpreted as holding another office of public trust, and thus is prohibited by Code § 17.1-102. Because Canon 2V requires that a judge respect and comply with the law, the Canons would similarly prohibit serving on the CMCR.

There is a natural tendency to view this request through the lens of an extrajudicial activity such as is addressed in Canon 2L, or even akin to a governmental appointment addressed in Canon 2N(3). The Committee declines to undertake either analysis because the requested appointment is prohibited by Code § 17.1-102.²

CONCLUSION:

The Committee finds that under the facts presented, the judge may not concurrently serve on the CMCR. Viewed in isolation, the recommendation for nomination and appointment to such a prestigious position represents a great honor, for which the judge is well-qualified. The Committee feels strongly the judge would serve

with great distinction, were it permitted. However unfortunate, the fact remains that concurrent service on two judicial positions — two offices of public trust — is simply not permitted under the Code or Canons.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 2A, Canon 2V.

In re Al-Nashiri, 835 F.3d 110 (D.C. Cir. 2016).

Hamdan v. Rumsfeld, 548 U.S. 557 (2016).

10 U.S.C. § 950f.

In re Khadr, 823 F.3d 92 (D.C. Cir. 2016).

Va. JEAC Op. 17-1 (2017).

Va. JEAC Op. 20-3 (2021).

Va. JEAC Op. 21-1(2021).

Va. Code § 17.1-102.

Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee (April 18, 2019).

Art. VI, § 147, Ala. Const. 1901 (Off. Recomp.).

Ala. Jud. Eth. Op. 85-240 (1985).

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Teste:



Clerk

FOOTNOTES:

¹ See, e.g., Va. JEAC Op. 17-1 (2017) (opining that a judge may serve and participate in an honorary capacity during a festival and related events sponsored by a community-based non-profit organization); Va. JEAC Op. 20-3 (2021) (opining that a retired judge on the recall list may serve as a Title IX administrative hearing officer); Va. JEAC Op.

21-1 (2021) (opining that a judge may serve as a member of the judiciary board of a church).

² The Constitution of Alabama has a constitutional provision similar to Code § 17.1-102. “No judge, except the judge of a probate court, shall seek or accept any nonjudicial elective office, or hold any other office of public trust, excepting service in the military forces of the state or federal governments.” Art. VI, § 147(b), Ala. Const. 1901 (Off. Recomp.) (previously found at § 6.08 of Amendment 328, Ala. Const. 1901). The Alabama Judicial Inquiry Commission (“Alabama Commission”) has considered a number of inquiries regarding judges serving in other, extrajudicial capacities, and analyzed those inquiries terms of this constitutional provision, their Canon 5 (governing extrajudicial activities) and their Canon 2A, (requiring judges to respect and comply with the law). For example, in deciding whether a district court judge could serve as a member of a county districting commission the Alabama Commission noted that

In order to read the foregoing provisions consistently, Canon 5 cannot be read to permit that which the Constitution prohibits. The Constitution clearly prohibits a judge from holding any other position of public trust. Therefore, if a member of the Sumter County Districting Commission holds a “position of public trust”, then a judge would not be permitted to hold the extra-judicial position. Further, under Canon 2A, a judge, who held such a position would necessarily fail to respect and comply with the law as required by Canon 2A.

Ala. Jud. Eth. Op. 85-240 (1985). While not controlling, the Committee finds that reasoning particularly instructive — the Canons governing extrajudicial activities or governmental appointments could not permit what Code § 17.1-102 prohibits. While the Alabama Commission stopped short of opining whether the districting commission position actually constituted a position of public trust, in this case, the appointment to the CMCR would clearly constitute an office of public trust.

AUTHORITY:

The Judicial Ethics Advisory Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered April 18, 2019.