From:	Minkina, Nataly A.,M.D.
To:	AO Code and Conduct Rules
Subject:	Comments on the proposed changes Rules for Judicial Conduct and Judicial Disability Proceedings
Date:	Tuesday, November 13, 2018 12:11:35 AM
Attachments:	Comments on the Rules for Judicial Conduct and Judicial Disability Proceedings.pdf

"Nataly Minkina, MD" <nminkina@bwh.harvard.edu>

Dear Sir/Madam,

My comments contain graphs and tables from various reports that would be significantly more convenient to read in the PDF file than e-mail. Please, see attached PDF file that contains my proposal.
I will submit my proposal in the body of another e-mail just in case you do not accept e-mails with attachments (there was no instructions about attachments to e-mail).

Best regards.

Nataly Minkina, MD
Clinical Instructor,
Harvard Medical School

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Nataly Minkina, MD (nminkina@bwh.harvard.edu)
Comments on the proposed changes of the Rules for Judicial Conduct and Judicial Disability Proceedings

November 12, 2018

To: **Judicial Conference committees on Codes of Conduct and Judicial Conduct and Disability**
E-mail CodeandConductRules@ao.uscourts.gov

Dear Members of the Judicial Conference committee on Code of Judicial Conduct and Disability,

The proposed revision of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is very important and timely act to improve administration of Justice in the Federal Courts. It contains many important additions and clarifications to the current version of the The Misconduct and Disability rules initially adopted in 2008 that is based on and provides definitions to Congress' Judicial Conduct and Disability Act of 1980. While Founding Fathers foreseen a necessity and possibility of judicial removal despite judicial lifetime tenure, until the Act of 1980 the only possibility to remove a judge was the impeachment. This predicament created a unique situation described by one of the researches in 1970's:

> It is significant that at a time when universities have found it imperative to save themselves from the disabilities of aging professors by making retirement mandatory at age sixty-eight, 15 percent of all sitting circuit judges in January 1966, were over that age. Note too, that almost half of the sitting circuit judges and 45 percent of all sitting district judges were over sixty. Perhaps the problem of disability due to illness and age would not be so great if there were practical and easy ways to remove federal judges who had become unfit. But there are none.[1]

As it was also noted in the same study, "roughly 10 percent of the federal judges are incapable of doing a first-rate job due to disabilities of illness (including falling eyesight and defective hearing) and old age".[2] Apparently, this situation was obvious to members of the Senate as well:

> Senator Joseph D. Tydings has explained fully and well why impeachment is not a suitable remedy for the problem:
> Historically the only method of actually removing a Federal judge from office, so that he is deprived of his title and his right to salary, has been impeachment by the House of Representatives and conviction on the impeachment charge by the Senate of the United States. This has created many difficulties. ... First, constitutionally impeachment lies only

[1] Harold W. Chase, Federal Judges: The Appointing Process. University of Minnesota Press, Minneapolis, 1972, p. 191.
[2] Ibid, p.189.

for "treason, bribery, or other high crimes and misdemeanors." It is uncertain whether senility, insanity, physical disability, alcoholism, or laziness—all of which are forms of unfitness that require remedial action—are covered by the impeachment process.[3]

This situation was not fully corrected by the Judicial Conduct and Disability Act of 1980.[4] As it has been appropriately observed by many, “It almost goes without saying that mental and physical disabilities afflict the old to a greater extent than the young.”[5] However, according to a more recent study Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992[6], out of 2,627 men and women who served as federal judges between 1789 and 1992 only 290 judges retired for various reasons[7], among them only 101 judges retired for age or health reasons:

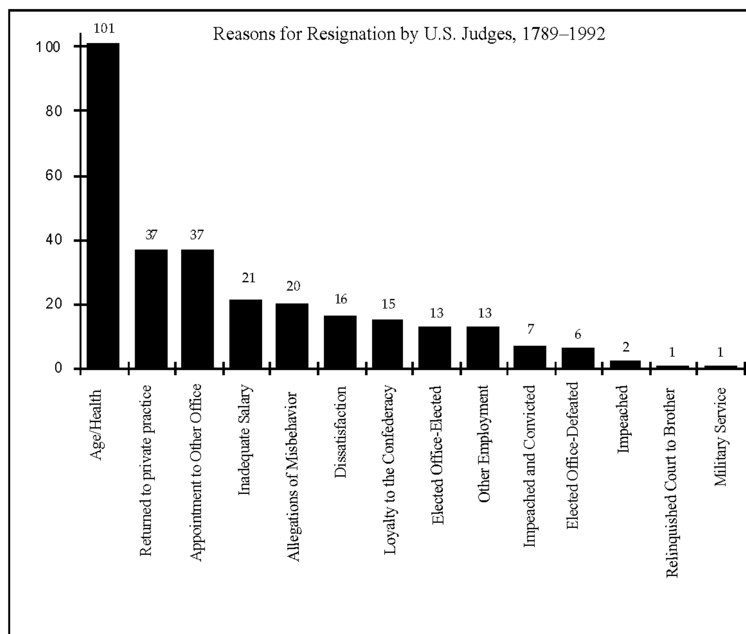


Figure 3

In other words, the Act of 1980 did not significantly change situation because even the most recent data show similar statistics[8] — as death remains the major reason of termination of judicial tenure:

[3] Ibid, p. 191

[4] Article by Geyh, Charles Gardner. Informal Methods of Judicial Discipline. University of Pennsylvania Law Review, Vol. 142, Issue 1 (November 1993), pp. 243-332 provides extensive analysis how disability of judges affected administration of justice before and after Judicial Conduct and Disability Act of 1980.

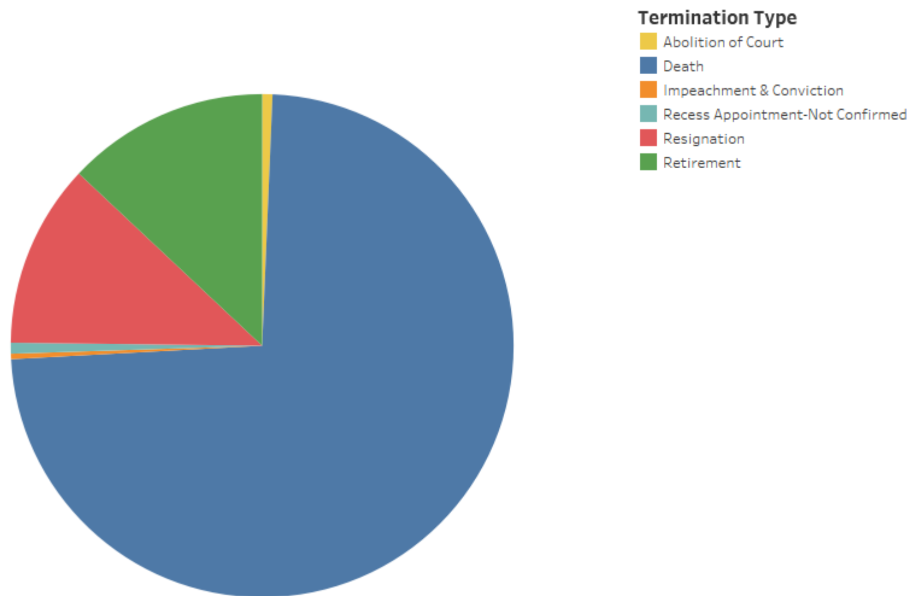
[5] Ibid, page 276

[6] Emily Field Van Tassel, Beverly Hudson Wirtz, Peter Wonders Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992, Federal Judicial History Office, Federal Judicial Center, 1993 available from: https://www.fjc.gov/content/why-judges-resign-influences-federal-judicial-service-1789-1992-0

[7] See Figure 3, page 55 of the Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992.

[8] Termination of Article III Judicial Service, 1789-2017 https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges#_ftnref10

Termination of Article III Judicial Service, 1789-2017



Majority of the judges still take full advantage of lifetime tenure regardless of their actual ability to fulfill their responsibilities as judges and effectively work in the court system even after reduced caseload when they take a seniority status. It should not be a big surprise because as it has been correctly remarked long time ago[9]:

> For lawyers and state judges in virtually all jurisdictions, save perhaps the southern district of New York, a federal judgeship is a highly sought after prize. "The pay is, by most people's standards, substantial. And, when coupled with life tenure and a most favorable retirement arrangement, these judgeships become very attractive."

In fact, while Judicial Discipline and Removal in the United States[10] stated:

> [C]ounci1 members report numerous examples where instances of judicial unfitness — such as intemperance or physical disability were called to their attention and the problems resolved by one form or another of persuasion, cajoling, or threats.[91] Federal Judicial Center researchers who conducted a survey of council operations reported that they "searched for complaints that had been 'swept under the rug,' and found none.[92]

The original publication (references 91-92) titled Operation of the Federal Judicial Councils[11] (prepared before the Judicial Conduct and Disability Act of 1980) provides somewhat different picture:

[9] Harold W. Chase, Federal Judges: The Appointing Process. Minnesota Law Review, vol. 51, 1966, p. 206
[10] Russell R. Wheeler, A. Leo Levin, Judicial Discipline and Removal in the United States. July, 1979, Federal Judicial Center, p.36. Available from:
https://www.fjc.gov/content/judicial-discipline-and-removal-united-states-0

On the basis of our visits to the circuits, we have concluded that the councils have done an effective job, as far as we can determine. We searched for complaints that had been "swept under the rug," and found none. It is only in regard to issues that were unresolved at the time of our visits that our information seems incomplete. We were informed that three problems of individual judge behavior were pending before councils; we were given very little information on them in response to our inquiries and cannot comment further. Judges understandably felt a special need for confidentiality on pending matters.

Among the handful of problems reported to us during our visits, the most common was excessive drinking. In one case, a highly respected judge was pressured into what has been described as a very effective cure following a council threat to take action under 28 U.S.C. § 372(b).[46] In at least two other cases, judges **with alcohol problems took senior status** early following an informal expression of concern from the council or chief judge.

In at least three other cases, judges took senior status because of an expression of council's **concern regarding senility or quasi-senility**. In addition, Judge Mell G. Underwood took senior status in 1966 following a threat that the council would invoke section 372(b).[47]

We were also informed of several instances in which a council took action when a judge's docket became backlogged because of a particular case. One circuit issued a formal order under section 332 that removed a district judge from the assignment list until the case causing the delay had been disposed of. (emphasis supplied)

However, the original report does not explain whether either "**alcoholic problems**" or "**senility or quasi-senility**" problems involved any professional medical or psychological assessment of severity of these problems and their impact on mental facilities of the judges was performed. In some ways, when Judges who are not medical professionals are assessing the severity of "**senility or quasi-senility**" or "**alcoholic problems**" (alcoholism is a disease) and deciding how to go about it, that amounts to practice of medicine without medical license and violates laws in all states across the country. Furthermore, while under Rule 13 **Conduct of Special-Committee Investigation section (a)**[12] **"**The investigation may include use of appropriate experts or other professionals", but **<u>it is not mandatory</u>**. Yet, even before a Special Committee gets involved and decides on whether to "use of appropriate experts or other professionals", Chief Judge single handedly, **without any professional or expert medical opinion**, decides whether to dismiss the complaint or take any actions, including to refer judge to a special committee for investigation. This clearly presents a serious dilemma because Chief Judge **does not have adequate knowledge and information** to decide how serious are medical "problems" such as **alcoholism, senility or quasi-senility** (a quasi-scientific term that is extremely vague) and plethora of other

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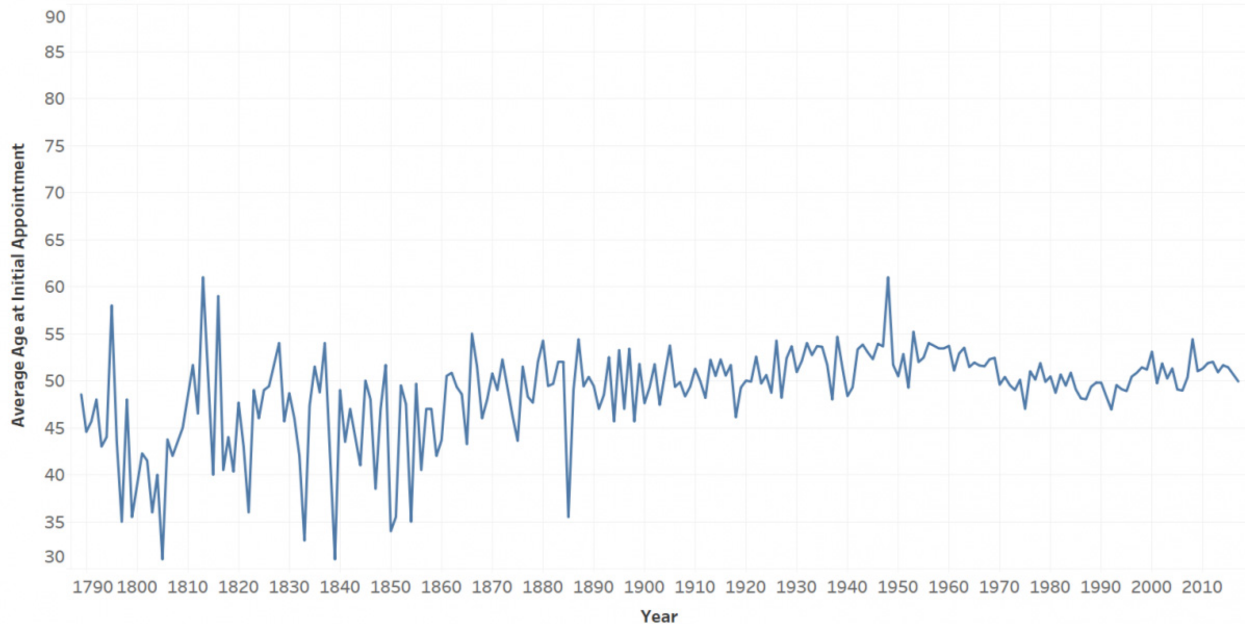
[11] Steven Flanders, John T. McDermott, Operation of the Federal Judicial Councils, December, 1978, Federal Judicial Center, pp30-32. Available from https://www.fjc.gov/content/operation-federal-judicial-councils-0

[12] DRAFT – 9.13.2018, Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. E: Judicial Conduct and Disability Act and Related Materials. Ch. 3: Rules for Judicial-Conduct and Judicial-Disability 4 Proceedings, p. 35.

potential health problems that have impact on mental ability of a Judge to perform his or her duties or to assess degree of that impact. In fact, “seniority” status could very well be a proverbial rug, which would cover judicial inability to perform duty even in lieu of lighter caseload.

According to the statistics provided by the Federal Judicial Center, the average age of article III Judges at Initial Judicial Appointment, 1789-2017, i.e. in the last 60 years, was between 45 and 55 years[13]:



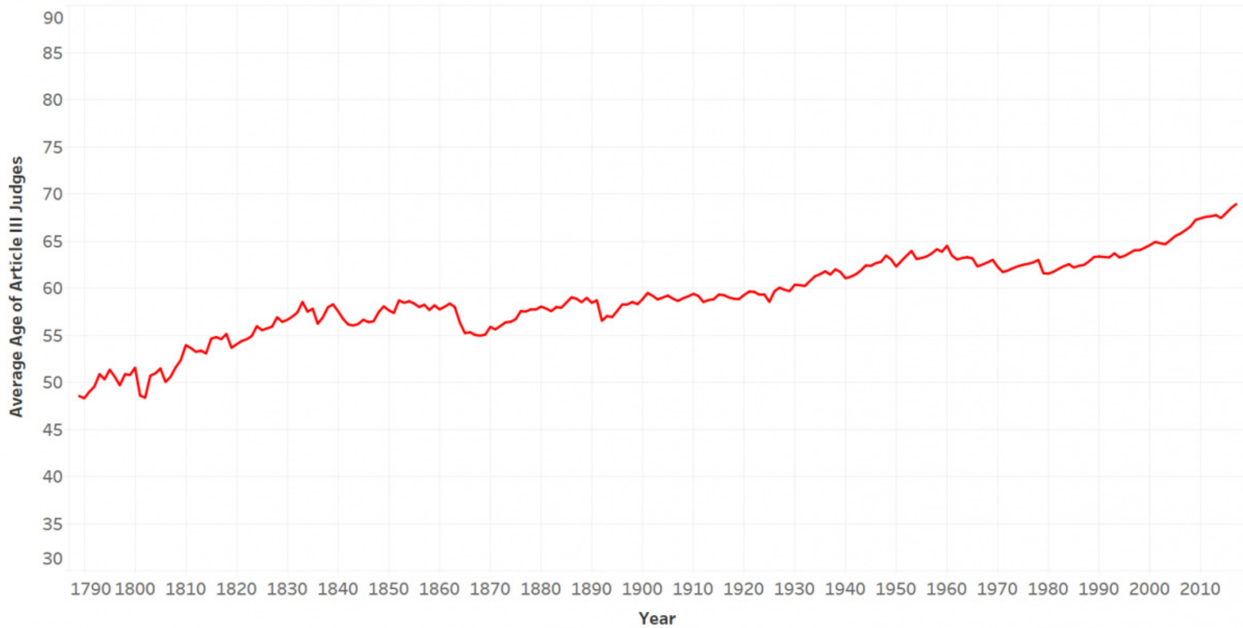
In 1966 when average age of the initial appointments of the Federal Judges was about **52 years old** and comparable to the initial appointments since 2000 till present (see graph above), the average age of the Article III Judges was about **63 years old** (see graph below), the age distribution of Article III Judges was (Table 19[14]) only **10% or 31 Judge** of the **age of 68 years old or over** and **35% or 108 Judges** of the age **between 60 and 67 years old**, and **majority 39% or 120 Judges** of age **between 50 and 59 years old**.

[13] The average age at which judges were appointed to Article III posts https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges#_ftnref10
[14] Harold W. Chase, 1972, p. 190

Table 19. Number of Circuit and District Judges in Given Age Groups on January 1, 1966

	Circuit Judges				District Judges				
Circuit	68 and Over	60–67	50–59	40–49	68 and Over	60–67	50–59	40–49	30–39
D.C.	1	2	6	0	3	6	3	1	0
First	0	1	1	1	2	3	2	2	0
Second ...	1	6	1	1	5	14	15	3	1
Third	2	4	1	0	3	15	10	3	1
Fourth ...	2	2	1	2	2	7	10	3	0
Fifth	1	3	6	2	5	12	25	10	0
Sixth	1	1	4	1	2	10	11	6	0
Seventh ...	3	3	0	2	3	10	7	4	0
Eighth	1	3	2	2	3	5	11	4	0
Ninth	1	2	5	1	2	18	19	8	0
Tenth	0	2	4	0	1	8	7	2	0
Total ...	13	29	31	12	31	108	120	46	2
Percentage of total judges	15	34	37	14	10	35	39	15	1

While **average age** of serving Article III Judges has generally risen over the course of American history and during the same period was above 60 years, it is most recently approaching 70 years[15].



[15] Ibid

Today the **youngest** Judges on the bench are on average **45-55 years old** and **average age** of currently serving Judges is **close to 70 years**. It means that **probably half of the Judges** sitting on the bench are **older than 70 years** and **as old as 85** and possibly even older.

The reason I am discussing the age of the Judges in Federal Court is because of it outmost importance for the issue of judicial disability—something that judges cannot properly evaluate since they do not have sufficient knowledge, training and experience. Meanwhile, medicine in general and neuroscience, psychology and neurology in particular made tremendous progress since 1950's when the studies of cognitive decline with age have begun. "An estimated 5.5 million Americans are currently living with Alzheimer's disease (AD); and with the aging baby boomer generation and longer life expectancies, it is anticipated that this number will exceed 13 million by the year 2050"[16]. The AD affects mostly population older than 60 years, which is exactly the group to which the majority of the Judges belong. Furthermore, what has been known to physicians since mid 2000's "Individuals who ultimately receive a diagnosis of MCI or dementia typically have observable neurological and cognitive differences many years prior to diagnosis"[17] is most certainly is not known to Judges. Furthermore, to answer a question: "When does cognitive decline begin?" is not easily possible because there are many different parameters that define cognitive abilities and their decline, and they depend on many factors such as gender, ethnicity, individual health history, life style, etc[18]. In other words, the beginning of the decline cannot be easily predicted and evaluated without testing and knowledge of medical history of an individual and with some degree of certainty[19]. To rely on the ability of Judges to self-evaluate themselves would be a huge mistake and contrary to well established Dunning-Kruger effect that is explained this way[20]:

> People tend to hold overly favorable views of their abilities in many social and intellectual domains. The authors [Dunning & Kruger] suggest that this overestimation occurs, in part, because people who are unskilled in these domains suffer a dual burden: Not only do these people reach erroneous conclusions and make unfortunate choices, but their incompetence robs them of the metacognitive ability to realize it.

Actually, some well-known jurists publicly admitted this fact. In 2010, in interview to Slate[21] Allan Dershowitz said:

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[16] Justin E. Karr, Raquel B. Graham Scott M. Hofer. When Does Cognitive Decline Begin? A Systematic Review of Change Point Studies on Accelerated Decline in Cognitive and Neurological Outcomes Preceding Mild Cognitive Impairment, Dementia, and Death Psychology and Aging, 2018, Vol. 33, No. 2; pp. 195–218

[17] Ibid, p. 195

[18] Sex Differences in Cognitive Trajectories in Clinically Normal Older Adults, Psychology and Aging, 2016, Vol. 31, No. 2; pp. 166–175

[19] Deborah Finkel, Chandra A. Reynolds, John J. McArdle, Nancy L. Pedersen. Age Changes in Processing Speed as a Leading Indicator of Cognitive Aging. Psychology and Aging, 2007, Vol. 22, No. 3, 558–568

[20] Kruger, Justin, Dunning, David. Unskilled and unaware of it: How difficulties in recognizing one's own incompetence lead to inflated self-assessments. Journal of Personality and Social Psychology. 1999; 77.6: 1121–1134.

[21] Schulz, Kathryn Alan Dershowitz on Being Wrong, Part I: Lawyers, Pundits, Error, and Evil, Slate, May 12, 2010, https://slate.com/news-and-politics/2010/05/alan-dershowitz-on-being-wrong-part-i-lawyers-pundits-error-and-evil.html

> I think that lawyers are *terrible* at admitting that they're wrong. And not just admitting it; also realizing it. Most lawyers are very successful, and they think that because they're making money and people think well of them, they must be doing everything right.

Dershowitz was echoed by Jill Switzer[22] "The Dunning-Kruger effect is at play in our [legal] profession all the time." Leaving it up to a Chief Judge of the Court to decide whether another Judge of his/her Court suffers physical or mental disability essentially requires from the Chief Judge being able to make a medical diagnosis of his/her colleague without not only having necessary knowledge, but without knowing prior medical history and necessary tests to make a reasonable serious conclusion about either physical or medical disability. In fact, it is a violation of law in every state that does not allow practice medicine without a medical license. It is deeply flawed practice and unfounded expectation to anticipate that Chief Justice of the Court is able to decide on judicial disability without any professional medical opinion. Every professional driver in the country is required to pass physical and mental tests to be able to operate a vehicle (school bus, 18 wheeler, etc). There are many other professions, which require a person to pass medical evaluation of physical and mental abilities to be able to perform professional duties. Why should Judges in the presence of factual and substantiated complaints of their physical or mental disability be spared of professional medical evaluation before Chief Justice could make a final decision?

Unfortunately, proposed version of the Rules for Judicial Conduct and Judicial Disability Proceedings does not contain provisions or provide mandate to obtain medical evaluation at the Chief Justice level at which majority complaints are dismissed. Even if the investigation is elevated to the level of a Special Committee, professional medical evaluation is not obligatory, but only a possibility. Such clearly purposeful avoidance of professional evaluation of judiciary's physical and cognitive abilities cannot and does not provide reassurance that disability complaints would be investigated objectively and impartially. As it was summarized in one study[23]:

> In an institution as large as the federal judiciary, which counts more than 1200 judges among its members,[10] it is not surprising that there are a few bad apples. Nor is it surprising that, if left unchecked, those few could exact a cost disproportionate to their number by damaging the integrity of the branch as a whole. If, on the other hand, judges who cross the line are thoroughly investigated and appropriately sanctioned, public confidence in the federal judiciary will remain strong. Unfortunately, thorough investigations and appropriate sanctions are not always forthcoming because federal judges, whose job it is to police their colleagues, often fail to do so. This problem is a serious one.

There is no reason to expect bias from physicians who would evaluate physical and cognitive abilities of a Judge and present the report to a Chief Justice or a Committee. The final decision

[22] Switzer, Jill Why Some Lawyers Need To Admit They're Incompetent. Above the Law, April 25, 2018 https://abovethelaw.com/2018/04/why-some-lawyers-need-to-admit-theyre-incompetent/
[23] Lara A. Bazelon. Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It, Kentucky Law Journal, 2008 / 2009, vol. 97; p. 440

remains in the hands of Chief Judge or Special Committee who will be able to apply legal standards based on objective and knowledgeable medical opinion. There is no reason to pass on professional medical evaluation that should include expert examination of Judge's medical records and running few tests necessary to evaluate physical and cognitive abilities of the Judge. Executive director of the Alaska State Commission attested to the fact what happens when medical assessment of judicial disabilities becomes reality[24]:

> Anecdotally, the vast majority of serious disability cases are settled privately and informally and result in a judge's voluntary disability retirement. There are many reasons for this result. One of the main reasons for informal settlement is that many of the areas asked about in a commission proceeding include extremely personal and private information about medications, physical health, relationships, and mental health treatment.

Americans expect from the Judges highest levels of fairness and absence of bias combined with deep knowledge of the law and its reasonable application. These expectations would be ungrounded and futile if Judge does not have sufficient physical and mental fitness. It might seem unfair to a Judge who has to retire even if he/she has a life-time tenure, but it is even more unfair to any party in the litigation if judge cannot be fair or effective in making the correct decision due to his/her physical or mental disabilities.

I propose that any Judge who is accused in either of disabilities, if the accusations pass factual and evidentiary standards, would be required to submit for medical evaluation of physical and mental abilities and required to provide his medical records to a physician appointed by the court. This physician would be required to prepare and submit a written report of the evaluation and findings to a Chief Judge of the Court who makes final decision on the complaint. If the Chief Judge decides that the case must be elevated to the Special Committee, the latter after reading the initial medical report could request additional medical evaluation before making a final decision. This way the American public expectations about fairness and abilities of Judges to perform their duties would be rightfully and completely fulfilled.

Thank you for your consideration of the proposed amendments.

Sincerely,

Nataly Minkina, MD
Clinical Instructor
Harvard Medical School

[24] Maria N. Greenstein. Judicial Disability and Judicial Ethics, Judges' Journal, Spring 2006, vol. 45; p. 34