JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-19-90024

In re Complaint of John Doe[1]

This is a judicial complaint by a non-party against a United States circuit judge ("subject judge"), alleging that the subject judge made "derogatory" and "partisan-charged" remarks against two other circuit judges and a district judge in a dissenting opinion.

According to the judicial complaint, the subject judge "engag[ed] in conduct that was prejudicial to the effective and expeditious administration of the business of the courts, undermined public confidence in the integrity of the judiciary, and created a strong appearance of impropriety" by making "highly partisan and insulting personal comments about [the subject judge's] federal judicial colleagues" in the dissenting opinion.

The judicial complaint identifies three statements in support of the allegation. These statements must be considered in the context in which they were made—a vote-dilution case. The district judge had concluded that vote dilution occurred and ordered the adoption of the plaintiffs' proposed map as a remedy. The defendants sought a stay of the judgment. The panel majority granted in part and denied in part the stay. The panel majority concluded the defendants failed to show a high likelihood of succeeding on the merits. But the panel majority also concluded that the

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[1]Under Rule 4(f)(1) of the Rules Governing Complaints of Judicial Misconduct and Disability of the Eighth Circuit, the names of the complainant and the judicial officer complained against are to remain confidential, except in special circumstances not here present.

defendants satisfied the stay factors based on the need to afford the state legislative and executive branches the opportunity to remedy the violation.

The subject judge dissented. In the first of the challenged statements, the subject judge stated, "I dissent from the panel's refusal to grant the stay in its entirety. Unless we act now, the [upcoming] election . . . is all but decided. True, predictable election results are not uncommon. *What is uncommon, however, is for a federal district judge to be the one to decide them.*" (Emphasis added.)[2]

Thereafter, the subject judge identified flaws in the district judge's imposed remedy and challenged the panel majority's attempted justification of the district judge's judgment:

> Looking at the record, I have no idea why [the district judge][3] preferred one plan over another. I do not understand why [the district judge] selected the one plan in which the splitting of [the city] was not offset in some other way. I do not understand how [the district judge] could endorse increasing the black voting age population of one district without discussing the effect that the change would have on the black voting age population of adjacent districts. And I do not understand why [the district judge] did not hold a hearing before making [the district judge's] decision. The fact remains that [the district judge's] order—perhaps, inadvertently—eliminated meaningful competition for [a candidate] in the upcoming election. The majority says that [the district judge's] plan is "narrowly tailored." *Agreed—it is "narrowly tailored" to win [the candidate] the election.* In my view, our circuit's strong preference for the legislature to have the first say on redistricting, combined with the obvious defects in [the district judge's] remedy, make it likely that [the district judge's] redistricting plan will ultimately be reversed.

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[2]Italicized portion hereinafter referred to as "Statement 1."

[3]The subject judge referred to the district judge by name.

(Emphasis added.)[4] In a footnote, the subject judge recognized that the panel majority characterized the italicized portion of Statement 2 as "irresponsibl[e]." (Alteration in original.) In response to this criticism, the subject judge responded:

> But even though the slate of candidates had not and could not have been finalized at the time of the district court's order, it does not require a crystal ball to foresee the result of [the district judge's] remedy. [The district judge] eliminated the Republican base in [a certain district], essentially making the primary election dispositive. As far as we know, [the candidate] is the only previously-elected State Senator running in that primary and as far as we know, his only two Republican challengers are now in another district.

Finally, in the subject judge's conclusion, the subject judge stated:

> This case presents several extraordinary issues. Unfortunately, this court's usual procedures do not appear to permit en banc review of this denial of a stay even if a majority of the active judges would otherwise grant it. *I am afraid defendants have simply had the poor luck of drawing a majority-minority panel.* I trust that in light of this, the State will pursue a stay in the Supreme Court because of the injustice that results from the joint efforts of the district judge and the motions panel majority. I also encourage the State to move for an expedited appellate process before this court . . . it might be possible for this court to undo its own mistake.

(Emphasis added.)[5]

According to the judicial complainant, the challenged statements "offered no substantive legal analysis" and instead "served only to malign [the subject judge's]

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[4]Italicized portion hereinafter referred to as "Statement 2."

[5]Italicized portion hereinafter referred to as "Statement 3."

fellow judges and directly question 'the integrity and impartiality of the judiciary.'" The judicial complainant also asserts that the subject judge showed "a lack of respect for [the district judge] by referring to [the district judge] by name throughout the [the] dissenting opinion, rather than taking the traditional approach of referring to only the 'district court.'"

Allegations that are directly related to the merits of a judge's decisions are not cognizable in a judicial complaint. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (J.C.U.S.) Rules 4(b)(1), 11(c)(1)(B). Indeed, the judicial complainant "recognize[s] that such allegations would not be proper grounds for a complaint."[6] Nevertheless, the judicial complainant asserts that the judicial complaint "does not concern the merits of [the subject judge's] dissent" but instead "takes issue with the *highly partisan* and insulting personal comments about [the subject judge's] federal judicial colleagues." (Emphasis added.) "Cognizable misconduct" includes "making inappropriately *partisan* statements." J.C.U.S. Rule 4(a)(1)(D) (emphasis added).

"Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling." J.C.U.S. Rule 4(b)(1). If a complainant alleges that the decision or ruling is the result of "improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision." *Id.* The exclusion of allegations "[d]irectly related to the merits of a decision or procedural ruling" from the definition of misconduct "preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a

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[6]The judicial complainant does not contest that the subject judge's dissenting opinion constitutes that judge's "decision." *See also Dissenting Opinion*, Black's Law Dictionary (11th ed. 2019) (defining "dissenting opinion" as "[a]n opinion by one or more judges who disagree with the decision reached by the majority").

judge's decision or procedural ruling." J.C.U.S. Commentary on Rule 4 at 11 (alteration in original) (quoting 28 U.S.C. § 352(b)(1)(A)(ii)).

The Commentary to Rule 4 gives examples of allegations that are *not* merits-related; for example, "[a]n allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake." *Id.* at 12. But "[b]ecause of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive." *Id.* Under this standard, "[i]f the judge's language was relevant to the case at hand—for example, a statement that a claim is legally or factually 'frivolous'—then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive." *Id.* However, if "the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11(b) is necessary." *Id.*

Having reviewed the subject judge's dissent in its entirety, I conclude that the challenged statements were "relevant to the case at hand," making the statements "presumptively merits-related and excluded." *Id.* I also conclude that the judicial complainant has offered no evidence in the judicial complaint to rebut this presumption. None of the statements are partisan on their face or disparaging when read in context. Statement 1 is relevant to the subject judge's conclusion that the district judge's decision was legally flawed and must be reversed. In other words, Statement 1 expressed the subject judge's belief that the district judge had exceeded the judge's legal authority in finding a vote-dilution violation and imposing the challenged remedy.

Likewise, Statement 2 is relevant to the subject judge's conclusion that the panel majority misapplied the narrowly tailored standard. The subject judge followed up Statement 2 by explaining that it should be the legislature, not the court, to craft

a remedy. And, in the footnote following Statement 2, the subject judge explained why the district judge's remedy is flawed.

As to Statement 3, the judicial complainant surmises that it

> plainly referred to the fact that [the two other members of the panel] were appointed by Democratic presidents when the overwhelming majority of the sitting [circuit] judges were appointed by Republican presidents. The statements falsely, harshly, and disrespectfully assumed that [the two panel members] decided the case not on the merits, but on partisan considerations, simply because they were appointed by Democratic Presidents.

The judicial complainant's assertion that the subject judge was referring to the partisan leanings of the two other panel members in commenting that the "defendants have simply had the poor luck of drawing a majority-minority panel" is pure speculation and "lack[s] sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii); *accord* J.C.U.S. Rule 11(c)(1)(D).

Finally, the judicial complainant's allegation that the subject judge intended to disrespect the district judge by referring to that judge by name instead of referring to the judge as the "district court" "lack[s] sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii); *accord* J.C.U.S. Rule 11(c)(1)(C)-(D). Accordingly, the allegations must be dismissed.

The complaint is dismissed.

June 18, 2019

Lavenski R. Smith, Chief Judge
United States Court of Appeals
for the Eighth Circuit