OFFICE OF THE CIRCUIT EXECUTIVE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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May 28, 2003

Mr. Thomas Fitton
501 School Street, S.W.
Suite 725
Washington, DC 20024

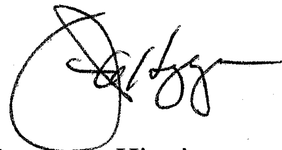
Re: Complaint of Judicial Misconduct No. 03-6-372-07

Dear Mr. Fitton:

Enclosed is a copy of an order entered by Acting Chief Judge Danny J. Boggs and a copy of an order and supporting memorandum entered by Acting Chief Judge Alice M. Batchelder in which your complaint of judicial misconduct against the Honorable Boyce F. Martin, Jr. was dismissed in part pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and concluded in part pursuant to 28 U.S.C. § 352(b)(2).

Pursuant to Rule 6 of the Rules Governing Complaints of Judicial Misconduct or Disability, you have the right to file a petition for review of the chief judge's disposition with the Sixth Circuit Judicial Council. If you wish to file a petition for review, your petition must be received in this office within 30 days of the date of this letter.

Sincerely,



James A. Higgins
Circuit Executive

Enclosure

JAH/jab

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
MAY 28 2003
OFFICE OF THE
CIRCUIT EXECUTIVE

In re: Complaint of Judicial Misconduct No. 03-6-372-07

Before: **BOGGS, Acting Chief Judge.**

I

A judicial misconduct complaint has been referred to me as acting chief judge, pursuant to Rule 3 of the Circuit's Rules Governing Complaints of Judicial Misconduct and 28 U.S.C. § 351(c).

The complaint covers a number of areas. As best as I can analyze it, one portion complains (page 2, ¶ 3) of the action taken by the court in referring a matter to a magistrate judge. This complaint directly relates to the merits of a decision of a judge, and that portion of the complaint is therefore dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

II

In addition, the complaint alleges conduct prejudicial to the effective and expeditious administration of the business of the courts with respect to a number of matters in the administrative handling of two specific cases.

Because of my connection with the events complained of, I recuse myself from consideration of the remaining portions of the complaint.

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In re: Complaint of Judicial Misconduct No. 03-6-372-07

ORDER

Before: **BATCHELDER, Acting Chief Judge**

As explained in the memorandum attached hereto, because this court has taken and is taking corrective action regarding all allegations raised in this complaint, and because the imminent operation of 28 U.S.C. § 45(a)(3)(A) makes additional action unnecessary, this complaint must be and is CONCLUDED pursuant to 28 U.S.C. § 352(b)(2).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Complaint of Judicial Misconduct No. 03-6-372-07

MEMORANDUM

Before: **BATCHELDER, Acting Chief Judge**

I.

A judicial misconduct complaint was filed against a court of appeals judge for the Sixth Circuit[1] on January 30, 2003 and referred to Judge Boggs pursuant to Rule 3 of the Sixth Circuit Rules Governing Complaints of Judicial Misconduct or Disability ("Sixth Circuit Judicial Misconduct Rules") and 28 U.S.C. § 351(c). Judge Boggs, serving as acting chief judge, dismissed that section of the complaint related to the referral of In re: Byrd, Jr. to a magistrate judge because these allegations directly relate to the merits of a decision and therefore may not serve as the basis for a claim of misconduct. See Complaint at p. 2, ¶ 3; see also 28 U.S.C. § 352(b)(1)(A)(ii). Judge Boggs then recused himself from consideration of the remaining portions of the complaint. The complaint was referred to me as acting chief judge, again pursuant to Rule 3 of the Sixth Circuit Judicial Misconduct Rules and 28 U.S.C. § 351(c). This memorandum is filed pursuant to 28 U.S.C. § 352(b) and Sixth Circuit Judicial Misconduct Rule 4(f).

II.

The complaint alleges that the judge in question "may have engaged in conduct prejudicial to the effective and expeditious administration of the business of the court by manipulating established court procedures so as to accomplish his personally desired result." Complaint at 1; see 28 U.S.C. § 351(a). To support this charge, the complaint relies upon two cases: In re Byrd, Jr., 269 F.3d 578 (6th Cir. 2002) ("Byrd") and Grutter v. James, 288 F.3d 732 (6th Cir. 2002). In both cases, the specific allegations are based upon information obtained from dissenting opinions and news reports about the cases. Complaint at 1.

After the entirely appropriate dismissal by Judge Boggs of that portion of the complaint concerning the referral of Byrd to a magistrate judge for an evidentiary hearing, two Byrd-

[1] Sixth Circuit Judicial Misconduct Rule 4(f) requires that this memo "not include the name of the complainant or of the judge whose conduct was complained of." Because the ordinary nomenclature of courts (i.e., "defendant") is not appropriate here, this memo will refer to the judge against whom the complaint was filed as either simply "the judge," or "the judge in question."

related allegations remain. First, the complaint alleges impropriety in the handling of the en banc balloting process. Complaint at 2. The complaint, relying on the dissenting opinions filed in Byrd, alleges that the judge in question "contacted several members of the Court to advocate for a thirty-day stay" despite the fact that the en banc ballot then before the members of the court sought not an extension, but rather to vacate the eight-day stay which was in place. Complaint at 2. The complaint states that the Clerk of the Court was instructed to enter a thirty-day stay prior to the close of balloting on the petition to vacate the existing eight-day stay. Id. Relying upon the dissenting opinions filed in Byrd, the complainant asserts that "several members of the Court were never contacted by [the judge in question] and did not even discover the change in ballot until after the order was delivered granting the thirty-day stay." Id.

The second Byrd-related issue concerns the failure of the judge in question to circulate to the en banc court a motion to stay a hearing until after that hearing had begun, thereby effectively mooting the motion. Complaint at 2-3. The complainant cites to a dissent by Judge Boggs, which states that the motion was withheld from members of the court at the direction of the judge in question until the day of the hearing, at which time it was released only because of an inquiry made by one of the judges. Complaint at 3 (citing In re Byrd, Jr., 270 F.3d 984 (6th Cir. 2001)). The complaint concludes that

> there does not appear to have been a logical reason for [the judge's] delay in distributing the motions. It is logical to conclude however, that by delaying the distribution of the pleadings until after the evidentiary hearing had already begun, [the judge] effectively ensured that the evidentiary hearing would go forward. . . . It would indeed be judicial misconduct if [the judge] deliberately withheld the properly filed pleadings from the members of the Court in order to affect the outcome.

Complaint at 3.

The complainant also raises two issues related to the Grutter case. First, the complaint notes that on May 14, 2002, the Plaintiffs in Grutter petitioned the Sixth Circuit for en banc review but the judge in question withheld the petition from the other members of court until five months later. Id. During this interim period, the complainant notes that Judges Norris and Suhrheinrich took senior status, and "were therefore unable to vote on the petition or sit on any en banc review." Id. The complainant concludes:

> Whatever [the judge's] motive in withholding the petition for five months, the fact remains that the case was decided, en banc, by a margin of 5-4 and was decided just after two conservative Republican judges became ineligible to vote on the petition or participate in the en banc review. It would appear that [the judge] may have deliberately withheld the petition until the make-up of the Court was such that a result would be favorable to his views. This would undoubtedly constitute judicial misconduct.

Complaint at 3-4. The second Grutter-issue raised in the complaint concerns the composition of the panel to which the Grutter case was originally referred. The complainant notes that because this was a second appeal arising from the same case, the composition of the panel is governed by 6th Cir. I.O.P. 34(b)(2). Complaint at 4. While "[t]he original panel from 1999 consisted of Judges Karen Nelson Moore, Martha Craig Daughtrey and a visiting senior district judge, Judge David Stafford," the complainant notes that

> [i]t appears that [the judge] simply appointed himself to fill the vacancy left by visiting Senior District Judge David Stafford. I.O.P. 34(b)(2) clearly allows for Judge Stafford to be recalled as a member of the original panel. However, if the remaining two original panel members, Justices [sic] Moore and Daughtrey had decided to not recall Judge Stafford, I.O.P. (b)(2) clearly states that the vacancy is to be filled randomly.

Id. The complaint concludes that "the appearance of impropriety and judicial misconduct is great, and the fact remains that the Internal Operating Procedures of the Sixth Circuit were not followed." Id.

III.

Complaints of judicial misconduct in this circuit are governed by 28 U.S.C. § 352 and the Sixth Circuit Rules Governing Complaints of Judicial Misconduct or Disability. Pursuant to § 352(b), an acting chief judge, after making an expeditious and limited inquiry pursuant to § 352(a), may dismiss the complaint if it is

> frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or contain[s] allegations which are incapable of being established through investigation; or
>
> [ ] when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.

28 U.S.C. § 352(b)(1)(A)(iii) & 352(b)(1)(B). As previously stated, the complainant draws most of the operative facts in support of the complaint from the dissents filed in Byrd and Grutter, as well as from Grutter's Procedural Appendix. While concurring opinions filed in these cases raised objections to the revelation and/or characterization of these facts, a review of the concurring and dissenting opinions, the documents cited therein, and relevant intra-court correspondence reveals that the following facts relied upon by the complainant have not been disputed:

1. The judge in question failed to give notice to or seek votes from all the active members of this court regarding the sua sponte en banc motion for a 30-day stay in Byrd.

2. The judge did not circulate the October 30, 2001, motion to stay the evidentiary hearing in Byrd until after the hearing had begun on November 5, 2001, and provided no justification for this untimely distribution.

3. The judge did not circulate the May 14, 2001, Grutter en banc petition until October 15, 2001, a date which fell after Judges Norris and Suhrheinrich took senior status and were therefore ineligible to participate in the en banc proceeding.

4. The judge inserted himself into the three-judge Grutter panel–an action which is contrary to the random draw rule prescribed by 6th Cir. I.O.P. 34(b)(2). See Grutter, 288 F.3d at 757 (Moore, J., concurring).

Nothing in the Federal Rules of Appellate Procedure, or in the Sixth Circuit Internal Operating Procedures and the Sixth Circuit Rules adopted by this court authorizes a single judge to withhold a petition for hearing en banc. See Fed. R. App. P. 35; 6 Cir. I.O.P. 35; and 6 Cir. R. 35. Nothing in the Sixth Circuit Internal Operating Procedures or the Sixth Circuit Rules authorizes a judge to fill a vacancy in a "must panel" by means contrary to the random draw rule. See 6 Cir. I.O.P. 34(b)(2). Because the undisputed facts relied on by the complainant "raise an inference that misconduct has occurred," the complaint cannot be dismissed under 28 U.S.C. § 352(b)(1)(A)(iii) or § 352(b)(1)(B).

In the wake of these events, the members of this court performed and continue to perform a comprehensive review of the court's internal procedures, and how those procedures are implemented. In meetings and correspondence, this court has clarified and is continuing to address its procedures governing 34(b)(2) "must panel" cases, motions review, en banc petitions, and emergency or "last minute" capital appeals, and by doing so the court has greatly reduced the potential for future incidents.

The judicial misconduct statute provides that an acting judge may "conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events." 28 U.S.C. § 352(b)(2); see also 28 U.S.C. § 352(a)(1) (directing the acting judge to make a limited inquiry to determine "whether appropriate corrective action has been or can be taken without the necessity for a formal investigation) (emphasis added). Accordingly, pursuant to 28 U.S.C. § 352(b)(2), because this court has taken and is taking corrective action regarding all the issues raised by the complainant, and because the imminent operation of 28 U.S.C. § 45(a)(3)(A) makes additional action unnecessary, Complaint of Judicial Misconduct No. 03-6-372-07 is hereby CONCLUDED.