

**JUDICIAL COUNCIL OF THE SIXTH CIRCUIT**  
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

In re:  
Complaint of Judicial Misconduct

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\*No. 06-17-90013  
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**MEMORANDUM AND ORDER**

This complaint of judicial misconduct was filed by **REDACTED** (“complainant”) against the Honorable **REDACTED** (“subject judge”), pursuant to 28 U.S.C. § 351. The complainant alleges that the subject judge, who presided over complainant’s criminal trial, (1) “belittled” his counsel before the jury on numerous occasions; (2) swung his gavel at complainant’s counsel’s head in front of the jury; (3) exhibited pro government bias in his rulings, and (4) countenanced prosecutorial misconduct.

After conducting an initial review, the chief judge may dismiss a misconduct complaint as to which he concludes: (A) that the claimed conduct, even if it occurred, “is not prejudicial to the effective and expeditious administration of the business of the courts”; (B) that the complaint “is directly related to the merits of a decision or procedural ruling”; (C) that the complaint is “frivolous,” a term that applies to charges that are wholly unsupported; or (D) that the complaint “lack[s] sufficient evidence to raise an inference that misconduct has occurred.” Rule 11(c)(1)(A)-(D), Rules for Judicial-Conduct and Judicial-Disability Proceedings; see 28 U.S.C. § 352(a), (b).

A review of the records and transcripts in the underlying cases shows a case vigorously contested by both parties. Although the subject judge may have used stern measures to keep control of the courtroom, there is nothing in the record showing behavior on part of the subject judge that transcends the “expected rough-and-tumble of litigation and moves into the sphere of cognizable misconduct.” See *Implementation of the Judicial Conduct and Disability Act of 1980 (“Breyer Report”)*, 239 F.R.D. 116, 241 (2006). Thus, complainant’s contentions that the named judge “belittled” his counsel are subject to dismissal as lacking sufficient evidence that misconduct has occurred pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Review of the trial transcripts shows that the subject judge did not swing his gavel at defense counsel but rather slapped his palm down on the bench. The parties

were having a sidebar, and counsel was leaning in toward the bench, near where the judge's hand hit the bench. The complainant now alleges that the transcript was changed to substitute the word "hand" for "gavel," although he does not charge the subject judge with complicity in that process nor allege who might have changed the transcript, how, or when. Slamming a hand down on the bench is not, without more, cognizable judicial misconduct, as it does not exceed "the expected rough-and-tumble of litigation." *Breyer Report*, 239 F.R.D. at 241. This claim is also lacking sufficient evidence that misconduct has occurred, and is thus dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Complainant's allegations of pro-government bias are based solely on the subject judge's rulings below, which complainant contends were overwhelmingly in favor of the prosecution and against the defense. He points to no other evidence of bias. Because his bias allegations are thus a thinly veiled attempt to challenge the merits of the subject judge's rulings in the underlying proceeding, they are subject to dismissal under Rule 11(c)(1)(B). See also 28 U.S.C. § 352(b)(1)(A)(ii). Any challenge to the merits of judges' rulings is outside the scope of judicial-misconduct proceedings. See Rule 3(h)(3)(A), Rules for Judicial-Conduct and Judicial-Disability Proceedings. The Judicial Council is not a court and has no jurisdiction to review any decision by a judge or panel of judges. See *In re Complaint of Judicial Misconduct*, 858 F.2d 331, 331-32 (6th Cir. 1988).

Although complainant alleges that the subject judge countenanced prosecutorial misconduct, he has not pointed to any specific conduct by the prosecutor, and a review of the record of the underlying case does not show any prosecutorial misconduct. Because the record belies the complainant's contentions in this regard, this allegation of judicial misconduct must be dismissed as lacking any factual foundation pursuant to 28 U.S.C. § 352(b)(1)(B) and Rule 11(c)(1)(G) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

Accordingly, it is **ORDERED** that the complaint be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii), (iii) & (b)(1)(B) and Rules 11(c)(1)(B), (D) & (G) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

*/s/ R. Guy Cole, Jr.*  
Chief Judge

Date: August 4, 2017