

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT  
219 South Dearborn Street  
Chicago, Illinois 60604

October 29, 2009

FRANK H. EASTERBROOK  
Chief Judge

No. 07-09-90092

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant was convicted of a federal crime and has filed a motion for collateral relief under 28 U.S.C. §2255. He believes that the district judge assigned to both the original case and the §2255 motion has committed misconduct by not recusing himself and by facilitating an unlawful search.

Any complaint that is “directly related to the merits of a decision or procedural ruling” must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). See also Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability proceedings. “Any allegation that calls into question the correctness of an official action of a judge ... is merits related.” Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). The allegations of this complaint fit that description, because a judge’s decision not to recuse himself meets the statutory description. *Id.* at 146. The *Report’s* exception for situations in which the judge knows himself to be disqualified does not apply; complainant has not established that the subject judge actually knows that recusal is mandatory. The complaint proceeds as if accusations of judicial misconduct are the same thing as evidence of judicial misconduct, and that because he has accused the judge of misconduct the judge must know that recusal is essential. This is not so. Allegations must be supported by proof. Otherwise it would be easy to remove any judge from any case on any litigant’s whim.

Complainant asserts that the judge committed misconduct by ruling on the motion for recusal, because “the law states” that such motions must be assigned to other judges. The complaint does not identify any such law, and I am not aware of one. Whatever the practice may be in state courts, the norm in federal court is that motions for recusal are addressed to, and ruled on by, the judge said to be disqualified. If the judge decides to continue serving, review may be sought by a petition for mandamus. That is the proper way to obtain review of an adverse decision.

According to complainant, an email he has received leads him to think that, during the criminal trial, the judge started proceedings early one day to lure complainant from his home, so that an illegal search could be conducted there. That would be misconduct in office, but the materials accompanying the complaint do not raise any substantial basis for thinking that the judge's reason for scheduling judicial proceedings was to allow an unlawful search. I am willing to assume that an unlawful search occurred; the inference that the judge set a trial schedule *knowing* that such a thing was to happen, and *because he wanted it to happen*, is unsupported by reliable information. Messages from unknown senders, stating "facts" that are not capable of verification, are not reliable. What's more, because complainant had to go to court eventually, it is unclear why starting court early would have facilitated a break-in. Why would the burglars who knew that complainant would be in court later the same day try to enlist a judge, and thus greatly increase the chance of exposure?

If complainant is willing to make his accusations under oath—and thus subject himself to a prosecution for perjury—the way to proceed is to file an affidavit under 28 U.S.C. §144. If such an affidavit is filed, and accompanied by a certificate of counsel that it has been made in good faith, then the judge "shall proceed no further" in the case, and another district judge will be assigned. (Complainant is a lawyer, but he cannot make the attestation himself because he has been suspended from practice. The certificate must be signed by a member in good standing of the district court's bar.) A complaint under the Judicial Conduct and Disability Act of 1980 is not a substitute for the §144 procedure. If complainant uses that procedure, and the allegation is substantiated in the criminal investigation that may follow, then I will identify a complaint under the 1980 Act. But it is inappropriate to use the 1980 Act's procedures to pursue what may be no more than unwarranted, if not paranoid, suspicions. See Rule 11(c)(1)(C), (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and the accompanying commentary.