January 25, 2024

Office of the Clerk, Judicial Conduct Complaint
United States Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

Dear Chief Judge Sykes:

This is a complaint about ongoing unlawful judicial race and sex discrimination that violates Rule for Judicial-Conduct and Judicial-Disability Proceedings 4(a), Judicial Code of Conduct Canon 2(A), and the Fifth Amendment.

Three judges on the U.S. District Court for the Southern District of Illinois—Chief Judge Nancy J. Rosenstengel, Judge Staci M. Yandle, and Judge David W. Dugan—have established policies of granting oral argument in a case based partly on a lawyer's sex and race. Those policies constitute judicial misconduct because they unlawfully discriminate, evidence judicial bias, undermine faith in the judiciary's integrity, and violate the equal protection guarantee of the Fifth Amendment.

I ask that you carefully consider the contents of this complaint and, upon conclusion of your review, take appropriate corrective action to ensure that no lawyer appearing before the U.S. District Court for the Southern District of Illinois faces discrimination based on immutable characteristics.

I. Background

In January 2020, Chief Judge Rosenstengel and Judge Yandle entered standing orders announcing new policies governing oral argument in cases before them. *See* In Re: Increasing Opportunities for Courtroom Advocacy (Jan. 17, 2020) (standing order of Chief Judge Nancy J. Rosenstengel) (Ex. 1) ["Rosenstengel Order"]; *see also* In Re: Increasing Opportunities for Courtroom Advocacy (Jan. 7, 2020) (standing order of Judge Staci M. Yandle) (Ex. 2) ["Yandle Order"]. In October 2020, Judge Dugan adopted a substantially similar policy. *See* In Re: Increasing Opportunities for Courtroom Advocacy (Oct. 6, 2020) (standing order of Judge David W. Dugan) (Ex. 3) ["Dugan Order"].

In an effort to "encourage[] the participation of newer, female, and minority attorneys in proceedings," the judges instituted a two-part process of discrimination: First, "[a]fter a motion is fully briefed, . . . a party may alert the Court that, if argument is granted, it intends to have a newer, female, or minority attorney argue the motion (or a portion of the motion)." Rosenstengel Order at 1; Yandle Order at 1; Dugan Order at 1. Second, following the request, the court "will," among other things, (1) "grant the request . . . if practicable" and (2) "strongly consider allocating additional time for oral argument beyond what the Court may have otherwise allocated" but for the sex or race of the lawyer. Rosenstengel Order at 2; Yandle Order at 1; Dugan Order at 1–2.

II. Argument

The judges' policies are cognizable misconduct and violate Rule for Judicial-Conduct and Judicial-Disability Proceedings 4(a), Judicial Code of Conduct Canon 2(A), and the Fifth Amendment. This complaint is proper because it challenges the propriety of the judges' policies, not the decision in any case. This complaint alleges enough facts to allow the chief circuit judge to take immediate action to correct the ongoing misconduct or, at the very least, undertake further investigation.

A. The Judges' Conduct is Cognizable Misconduct.

Cognizable judicial misconduct is "conduct prejudicial to the effective and expeditious administration of the business of the courts." Rule for Judicial-Conduct and Judicial-Disability Proceedings 4(a). Cognizable misconduct includes "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability." *Id.*

Sex discrimination. The judges' announced policies constitute intentional sex discrimination. The judges intentionally discriminate based on sex because the object of their policies is to explicitly condition a benefit—the award of oral argument time—on a lawyer's sex. Consider an example: two lawyers appear in any of these three courtrooms. They are identical in all respects except that one is a man and one is a woman. If the man requested oral argument on his motion and oral argument is practicable, it *might* be granted. But if the woman requested oral argument on her motion and oral argument is practicable, it "*will*" be granted. Rosenstengel Order at 1;

Yandle Order at 1; Dugan Order at 1 (emphasis added). In other words, *but for his sex*, the male lawyer's request would be granted so long as oral argument is practicable.

Race discrimination. The judges' policies are essentially oral-argument affirmative action for lawyers. The policies expressly reward "female" and "minority" lawyers. *See* Rosenstengel Order at 1; Yandle Order at 1; Dugan Order at 1. Though "race" is not expressly mentioned in the policies, it need not be, as the use of the word "minority" in context creates an inescapable inference that the judges' shared policy impermissibly considers race. The omission of the word "race" is of no consequence, for "'what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2176 (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). So long as a reasonable observer could infer that the judges' policies award oral argument time based on race, the judges are committing cognizable judicial misconduct.

The announced policies are mandatory. The announced policies discriminate on their face. If a sex- or race-based oral-argument request is made, "the Court *will . . . [g]rant* the request for oral argument on the motion if it is at all practicable to do so." Rosenstengel Order at 1; Yandle Order at 1; Dugan Order at 1 (emphasis

added). While other aspects of the policies contemplate judicial discretion,[1] this part does not.

The mere existence of the policies is misconduct enough. Investigation might be warranted to determine whether the judges actually award or deny oral argument time according to their announced policies. But, even if they do not, the mere existence of the policies is enough to warrant findings of misconduct, as the policies erode public confidence in the judiciary. A reasonable observer would lose faith in the judiciary upon discovering that a court considers a lawyer's sex or minority status when making important decisions about how cases are adjudicated. A reasonable observer would also lose faith in the judiciary on learning that a judge would even contemplate asking about a litigant's attorney's sex or race. That is because the only reason a judge needs to know a lawyer's race or sex in the first place is to discriminate based on it.

1. The misconduct violates judicial canon 2(A).

Judicial Canon 2(A) requires judges to obey the law and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the

[1] The policies do not just govern the award of oral-argument time but also the *duration* of oral argument. Specifically, the policies obligate the court to, upon request of counsel, "*[s]trongly consider* allocating additional time for oral argument beyond what the Court may otherwise have allocated were"—for Chief Judge Rosenstengel—"a newer, female, or minority attorney not arguing the motion"—for Judge Yandle—"a female, or minority attorney not arguing the motion"—for Judge Dugan—"newer, a female, or minority attorney not arguing the motion." Rosenstengel Order at 2; Yandle Order at 1; Dugan Order at 2 (emphasis added). It is unclear if Judge Yandle omitted the word "newer" inadvertently.

judiciary." Few judicial acts are as confidence-shaking as an announcement by a judge that she will handle a case depending in part on the sex or race of a litigant's attorney. Judges do not promote public confidence in the integrity and impartiality of the judiciary when they announce policies expressly favoring persons with certain immutable characteristics. Public confidence in the judiciary is especially threatened when judges effect those policies through contemplated and actual exercise of the judicial power of the United States. By ratifying their discriminatory policies as standing orders, these judges stamped the federal judiciary's imprimatur on long-outlawed forms of discrimination.

Public confidence is all the more imperiled because the judges' discrimination does not end in their courtrooms. Their stamp of approval incentivizes second- and third-order discrimination. That is because giving race and sex preferences to some lawyers creates an incentive for law firms to discriminate on sex and minority status downstream when staffing cases and for clients to discriminate when hiring lawyers. If given a choice to hire two similarly situated lawyers, one man and one woman, what client would pass up the opportunity to go with the lawyer whose sex opens the door to extra argument time?

Putting aside the confidence-eroding effect of perceived race and sex discrimination by judges, public confidence in the judiciary's integrity is further imperiled because the policies adopted by the judges support an inference that oral argument time is awarded based on some criterion other than the demands of the case. Would a judge be allowed to award more oral argument time because an attorney is her

relative? Or a man? If not, neither should argument time be awarded based on whether a lawyer is a woman, a Latino, or two years out of law school. The case—not the courtroom personalities—should be what matters in federal court.

2. The misconduct violates the equal protection guarantee of the Fifth Amendment.

The judges' policies unconstitutionally discriminate based on race. The purpose of equal protection is to do away with all government-imposed discrimination based on race. *See Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 at 2161 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment[2] is the prevention of official conduct discriminating on the basis of race.").

Any exception to the Constitution's requirement of equal protection must satisfy strict scrutiny. The judges' policies flunk that test. First, the policies do not further compelling governmental interests. Outside the now-unconstitutional race-based affirmative action context, the Supreme Court has identified only two compelling interests that allow the government to resort to race-based action. *See Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 at 2162. The first is to remediate specifically

[2] Fourteenth Amendment jurisprudence applies to federal officials under the Fifth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

identified instances of past discrimination that violated the Constitution or statute. *Id.* The second is to avoid imminent safety risks in prisons, such as race riots. *Id.* There is no compelling government interest in judicial race- and sex-balancing for lawyers appearing in federal court. The asserted reason for the judges' policies is to "encourage[] the participation of . . . minority attorneys in" courtroom proceedings. Rosenstengel Order at 1; Yandle Order at 1; Dugan Order at 1. But that is precisely the incoherent, immeasurable, and amorphous goal that the Supreme Court rejected as insufficient to satisfy strict scrutiny in *Students for Fair Admissions*. 143 S. Ct. 2141 at 2166.

Second, the policies are not narrowly tailored to achieve even their own asserted goal, let alone a compelling governmental interest. The stated purpose of the policies is to increase opportunities for courtroom advocacy. But that is both under- and overinclusive, as courtroom opportunities in modern America are, thankfully, not dependent on race and sex. To illustrate, consider two separate cases identical in all respects but the lawyers' races: one is white, one is black, and both are before Chief Judge Rosenstengel. The white lawyer has only ten years of experience, mostly in junior roles, while the black lawyer, a venerable member of the bar with many appearances in court, possibly including in the nation's highest courts, has forty years of experience. Under Chief Judge Rosenstengel's policy, the seasoned advocate already blessed with many oral argument opportunities would benefit, but the relatively inexperienced advocate would not.

If the judges' objective is increasing opportunity, the judges' policies can never be narrowly tailored to achieve their purpose by employing blunt racial classifications.

To the extent the policies discriminate on sex, they also fail intermediate scrutiny. That exacting standard requires the government to advance an exceedingly persuasive justification for any sex-based classification. *United States v. Virginia*, 518 U.S. 515, 531 (1996). The policies themselves advance no such justification warranting government intervention, notwithstanding the promise of equal protection; nowhere have the judges established that female lawyers receive fewer courtroom opportunities than men *because of their sex*. That fact alone makes the use of sex-classification devices in the courtroom an impermissibly overbroad response to the purported harm.

* * *

The judges' policies' stated aim is to create opportunities for certain groups historically discriminated against. That is a noble goal. But using sex and race preferences to accomplish that goal is foreclosed by the Constitution and by the judicial canons. In-court argument time is a precious limited resource—judges are busy. Because there's a finite supply of available oral-argument time, apportioning it based on the immutable characteristics of a litigant's counsel necessarily results in less time available for litigants whose lawyers are of non-favored races, sexes, and experience levels. Those disfavored lawyers notice. So do potential clients who realize they can get a leg up by hiring lawyers whose sexes and races are preferred by the court.

Judicial bias of this sort trickles down through law firms and the client base; in that sense, it is both invidious and insidious. At the very least, judges must not impose inequalities of their own, as "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Even if race and sex preferences succeeded in creating opportunities for some without imposing inequalities on others, the judges' policies would still be judicial misconduct because a reasonable observer would lose faith in the judiciary on learning that a judge believes members of certain races and sexes are more deserving of court time than members of other races and sexes. Indeed, a reasonable observer would lose faith in the judiciary on learning that a judge believes that any factor besides legal merit is relevant to adjudicating cases. That inference alone requires findings of judicial misconduct in this matter. Who could have faith in a system asking a party to submit to the court its counsel's race to receive benefits?

B. This misconduct is properly remedied through the judicial misconduct process.

28 U.S.C. § 352(b) allows a chief circuit judge to dismiss a complaint in some limited circumstances. None of those circumstances exist here. This complaint should, thus, not be dismissed. Instead, the misconduct should be remedied through the misconduct process Congress prescribed.

This complaint does not challenge any judge's ruling in a case. It does not mount a collateral attack on the substance of any case. Nor does it challenge "without more" the correctness or soundness of a judge's official action. *See* 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). This complaint instead challenges the propriety of announced policies to discriminate against lawyers appearing in two judges' courts based on the lawyers' sex and race. This complaint further shows that those policies of discrimination intentionally discriminate, evidence judicial bias, and undermine public confidence in the integrity and impartiality of the judiciary.

To be sure, the judges' misconduct is not immunized by their memorializing the discriminatory policies under court seal in standing orders. Rule 4(b)(1)—the rule excluding from the definition of judicial misconduct merits-related rulings—does not excuse the misconduct in this case. That is because this complaint focuses on the propriety of the judges' telegraphing an illicit motive about the assignment of oral-argument time, not the official action springing from their granting oral-argument time in a given case. *See* Rules for Jud. Conduct & Jud. Disability Proc. r. 4(b)(1) cmt. That is not to say that the standing orders are irrelevant. The fact that the policies were announced under court seal aggravates the severity of the misconduct.

Rule 4(b)(1) does not compel dismissal of this complaint for a second reason. Even if you determine that the complaint somehow challenges a procedural ruling—rather than the policies compelling decisions that in turn constitute procedural rulings—this complaint should still go forward under Rule 4(b)(1) because it does not challenge procedural rulings "without more." *Id.* The object of this complaint is to show that the judges' policies have, by relying on sex- and race-based classifications, lessened public confidence in the judiciary. That diminution of public confidence is

"more," and it precedes and exists outside any ruling contemplated by Rule 4(b)(1). Moreover, the complained-of misconduct is unlikely to be corrected outside of the misconduct process. Retrospective review of the sort that might arise in ordinary litigation cannot fix the problem. The damaging effects of the policies on the public's confidence in the judiciary—not to mention the harmful downstream effects on case staffing and client hiring—cannot be remedied by direct or interlocutory appeal, even if such an appeal could be taken. Because the judges' policies are prospective, prospective relief is needed. And this is precisely what the misconduct process was designed to accomplish.

This complaint also supplies enough evidence to raise an inference that misconduct has occurred. First, this complaint provides copies of the standing orders announcing the discriminatory policies. Those policies discriminate on their face; no further investigation is needed to show misconduct. Yet, if actual in-court discrimination needs to be proved, this complaint, coupled with copies of the standing orders, alleges enough facts to support a limited investigation into the likely discrimination by the chief circuit judge or a special committee. That investigation should determine whether the discriminatory practice telegraphed by the judges has occurred and whether it is ongoing. Complainant avers, however, that such a finding is unnecessary. That is because the mere existence of the policies is misconduct enough.

III. Conclusion

For the reasons described above, Chief Judge Nancy J. Rosenstengel, Judge Staci M. Yandle, and Judge David W. Dugan appear to be committing ongoing judicial

misconduct. That misconduct should be remedied through termination of the discriminatory policies, published acknowledgment that such policies constitute judicial misconduct, and public reprimand or censure.

Respectfully submitted,

/s/ Gene P. Hamilton
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