Judicial Council Opinion(/Order)
№ 07-18-90037
Annotated

This document, **"JCOp2Ann"**[†] (dated Jun 21 2018), presents the Judicial Council's Opinion(/Order) **"JCOp2"** (dated May 18 2018), regarding Judicial Misconduct **Complaint2,** *reformatted* into a table, together with *annotations* thereto (keyed by annotation numbers, *1*, *2*, …). The annotations occur both as (i) *brief side-comments* embedded within the table itself (with arrows attaching each annotation to its associated JCOp2 text), and as (ii) *expanded remarks* on the pages following the table.

References are routinely made throughout to our website **http://JudicialMisconduct.US** (and especially its webpage at http://judicialmisconduct.us/CaseStudies/RYANvUS(ALSCHULERvEASTERBROOK)), which has already been submitted to the Judicial Council in connection with this Complaint2 — especially, its critically important "amazing exegesis" **Memoir Annotated, "MemAnn,"** http://judicialmisconduct.us/sites/default/files/2018-05/MemoirAnnotated.pdf.

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† • For clarity/simplicity, we write **Complaint2, JCOp2, JCOp2Ann, Petition2** when referring to the instant Judicial Misconduct Case, **№07-18-90037.** The numeral "2" is used to distinguish it from the earlier/related Judicial Misconduct Case, **№07-18-90014,** which we herein designate **Complaint1, JCOp1, JCOp1Ann, Petition2.**

Judicial Council Opinion(/Order)
(JCOp)
Annotations,[α] Brief Comments

Judicial Council Opinion ("JCOp")	Annotations
ORDER	
For the reasons stated in the accompanying [actually, attached] memorandum, this complaint is dismissed under 28 U.S.C. §352(b)(1)(A)(ii).	1 This is "B.S." (see MemAnn ℘7B for definition of "B.S.").
† [Frank H. Easterbrook, Circuit Judge] Handling this complaint as the most senior non-recused active judge. See 28 U.S.C. §351(c); Rule 25(f) of the Judicial-Conduct and Judicial-Disability Proceedings.	2 This already raises a serious *new* issue of Judicial Misconduct: **"reasonable <u>appearance</u> of bias."**
MEMORANDUM	
In an earlier proceeding (No. 07-18-90014), complainant alleged that a circuit judge committed misconduct by misstating facts and law in an opinion. That complaint was referred to the Chief Judge, as 20 U.S.C. §352 requires, and was dismissed on the ground that the statute does not apply to grievances that are "directly related to the merits of a decision or procedural ruling". 28 U.S.C. §352(b)(1)(A)(ii). A petition for rehearing or rehearing en banc, or certiorari, supplies the remedy for errors made in judicial opinions.	3 Complaint1, against Easterbrook. 4 Wood (who, we argue in Complaint2, should have recused herself from Complaint1). 5 Cf. Ann. 1. 6 Yes, of course, but …
This follow-up complaint accuses the Chief Judge of misconduct for dismissing the first complaint. It asserts (a) that the Chief Judge, having been on the panel whose opinion was written by the subject judge in No. 07-18-90014, should have recused herself, and (b) that the first subject judge's misconduct was so clear that not acknowledging and punishing it must be an independent act of misconduct.	7 The instant Complaint2. 8 Rendering six rulings (plus even more in related cases). 9 Easterbrook.

α • *Notation:* **JCDA** = Judicial Conduct and Disability Act, 28 USC §332(d)(1),351–364 (1980). **JCDR** = Rules for Judicial-Conduct and Judicial-Disability Proceedings, http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf

Judicial Council Opinion ("JCOp")	Annotations
The complaint does not attempt to show how it is compatible with §352(b)(1)(A)(ii), even though the order dismissing the initial complaint alerted complainant to that statute. The current complaint, like the first, is foreclosed by that law.	*10* Obvious. *11* Done, but not recognized. *12* No it isn't, for the same reasons as Ann. *1 supra.*
"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). This includes a contention that a judge erred by deciding to serve in a particular matter. See Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. The current complaint concerns official actions by the Chief Judge — first the action of hearing No. 07-18-90014 at all, and second the action of dismissing it under §352(b)(1)(A)(ii). It therefore must be dismissed.	*13* This harping on "merits-related/correctness" has already been addressed in Ann. *1 supra,* and will be dealt with further in Ann. *14 infra.* *14* *"Breyer Committee Report,"* Standard 2, etc.
A few words are I order about why I am hearing this complaint. The Chief Judge, as the subject judge, is disqualified, and the judge next in seniority is recused. Under the statute and rules, the matter comes to me. I am also the judge complained about I No. 07-18-90014. But I do not think that a reasonable observer would perceive a conflict. Judges are not recused forever just because complained about in the past. I have no stake in the outcome of the current proceeding, and the complaint is so clearly frivolous that there is little point in passing the matter to another judge.	*15* Fail; already covered in Ann. *2 supra.* *16* *Any* "reasonable observer" *will* perceive ***appearance*** of conflict, which suffices. *17* Absurdly false; ego; "saving face." *18* This comment is, itself, frivolous.

Judicial Council Opinion (“JCOp”)	Annotations
There is a potential for infinite regress. Complainant says that his goal is to have the matter transferred to some other circuit. Filing complaints against each judge in turn — whoever acts on a given becomes the next target, and judges complained about earlier cannot return to serve — is not a strategy that can be permitted to succeed. The statute has a limited scope, which complainant must accept. He was entitled to seek review by the Judicial Council of the Chief Judge’s order in No. 07-18-90014. He is not entitled to keep filing more complaints in the hope of exhausting the pool of non-recused judges.	*19* And your point is?… *20* Not “goal,” just “tactic.” *21* Only if justified, of course. *22* *Any* strategy that non-trivially advances the cause of Justice is worthy. *23* Not really. *24* Of course that’s not the “plan;” justice is the only goal.

Annotations, Expanded Remarks

1 • **JCDA 28 U.S.C. §352(b)(1)(A)(ii)** (repeated in essence at **JCDR 3(h)(3)(A),** emphasis added): "[T]he chief judge … may dismiss the complaint if the chief judge finds the complaint to be ***directly related to the merits*** *of a decision or procedural ruling.*"

This so-called **"merits-related clause"** is given by Easterbrook as his **(bad-faith, "false") reason** for dismissing our Complaint2. It cannot be accepted. For, "merits-relatedness" is equivalent to **"related-to-correctness (of the decision issued in the underlying case, *Ryan v. U.S.*),"** as discussed in JCDR 3 and its Commentary. Yet, the twin Judicial Misconduct Complaints on-the-table (Complaint1 = №07-18-90014, Complaint2 = №07-18-90037) nowhere base any of their complaints on such "correctness" of any underlying decisions.[β,γ] Instead, our two Complaints speak everywhere about totally non-merit/correctness-related topics, involving misconduct/misbehavior in the **practice/process/procedure of <u>arriving at</u> that decision** (as documented by the Alschuler Memoir, and its Annotated version, **MemAnn,** which have been offered into "evidence" before the Judicial Council and Conference). That makes our Complaints cognizable under the JCDA/JCDR.

2 • **JCDA 28 U.S.C. §351(c):** "[I]f the conduct complained of is that of the chief judge [here, Wood], [the clerk shall transmit the complaint] to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this chapter only, included in the term 'chief judge')."

JCDR 25(f): "Substitute for Disqualified Chief Judge. If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge, those duties must be assigned to the most-senior active circuit judge not disqualified."

This (JCOp2 reasoning, which attempts to (falsely) rationalize Easterbrook's sitting in hearing of the instant Complaint2) is absurd, on multiple levels (hence it raises a *new* serious issue of Judicial Misconduct, against Easterbrook, separate/apart from Com-

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β • The "merit" of the case, *Ryan v. U.S.,* is that George Ryan's appeal was rejected, and he served-out his prison sentence. Nobody (in our two/twin Complaints) is arguing that this result wasn't "substantial justice." In fact, Alschuler himself doesn't argue it either in his Memoir: "Ryan deserves a pardon, not because he's a saint, but because his government has treated him badly" — MemAnn ℘16. Instead, what is being argued in our Complaints is **the process ("treated him badly"), not the result ("not a saint").**

γ • Whether-or-not the complained-of Judicial Misconduct may-or-may-not have led to a correct-or-incorrect (merits) decision is *separate-and-beside-the-points* of our Judicial Misconduct Complaints. We make no statements/arguments on the merits matter.

plaint1) — all of which suggest/demand that Easterbrook <u>should not be hearing</u> the instant Complaint2, due to his own <u>self-bias (*defined* as "real or reasonably perceived/appearing/suspect")</u>:

(i) §351(c) speaks of the "circuit judge in regular active service next senior in date of commission." Upon information/understanding/belief, the said next-senior active judge is *not* Judge Easterbrook, but rather Judge Joel Flaum (noting that Judge William Bauer, the one judge more-senior than Judge Flaum, is on senior-status, hence not "regular active"); Easterbrook next follows Flaum in order of seniority. The statutory language of §351(a) does not make any provision for "disqualification/restriction" of Flaum. Judges (the Judicial Branch) cannot make "rules" that violate/abridge Legislative Branch statutory law. Therefore, Flaum (and not Easterbrook) should have heard the instant Complaint2. Easterbrook's hearing/decision of the instant Complaint **violates the letter of statute §351(c).**

(ii) §359(a) discusses "restrictions" on judges who are subjects of investigation. Judge Easterbrook is the subject of Complaint1, which is <u>precedent-to/very-closely-related-to</u> the instant Complaint2 (and of which Wood is the complained-of judge). *Strictly/formally/legalistically speaking,* it is correct to say that Easterbrook is not "restricted" by §359(a) from hearing the instant Complaint2. Nevertheless, *logically/informally* speaking, the *in-context gravamen* (namely, **<u>self-bias</u>**) of §359(a) makes it "obvious" that the contemplated silent intention of §359(a) is that "loopholes" such as permitting Easterbrook to hear the instant Complaint2 should/are to be disallowed. Therefore, Easterbrook's hearing/decision of the instant Complaint2 **violates the plain/obvious intent/spirit of statute §359(a).**

(iii) JCDR 25(f), as quoted just *supra,* is inconsistent with 359(a), inasmuch as it injects/incorporates a "not disqualified" clause (no such clause is contemplated/permitted by §359(a)). Therefore JCDR 25(f) is itself invalid/illegal, to the extent that it **violates statute §359(a).**

(iv) It is nowhere stated in JCOp2 *why* Judge Flaum is "disqualified/restricted" from hearing the instant Complaint2. This leaves lingering questions remaining in the mind of the instant Petitioner, and the general public. The reason this is a problem is closely related to the content/subject-matter of the instant Complaint2 itself. Namely, it is one of the explicit complaints of the Alschuler Memoir (MemAnn *c.* ℘38f156) that **judicial assignments in the Seventh Circuit are "suspected of being 'suspicious,'"** where "suspicious" can be (and here is) interpreted as "bringing 'shame' (of the type quoted in item (v) just *infra*) upon the Judiciary." That is, such "suspicion" is precisely the kind of thing this Judicial Council should be investigating zealously, instead of "blindly/silently 'dismissing'."

(v) It is a **violation of the mores/tenets of Judicial Misconduct** (self-bias) for any judge to sit in hearing/judgment of a Complaint so closely related to his/her own self-interest: it contributes to **"a substantial and widespread lowering of public confidence ['shame'] in the courts**

among reasonable people” — JCDR 3(h)(2).

(vi) It is a **violation of Judicial Ethics** (self-bias) for any judge to sit in hearing/judgment of a Complaint so closely related to his/her own self-interest: **“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might *reasonably* be questioned”** — Code of Conduct for United States Judges, Cannon 3C(1); ABA Model Code of Judicial Conduct Rule 2.11 (emphasis added).

(vii) It is a violation of Supreme Court edict/precedence/*stare decisis* (judicial self-bias): “A fair trial in a fair tribunal is a basic requirement of due process. … [N]o man can be judge in his own cause, and no man is permitted to try cases where he has an interest in the outcome. … [T]o perform its high function in the best way, **“justice must satisfy the *appearance* [i.e., perception, not merely reality] of justice.”** *Offutt v. United States,* 348 U.S. 11, 14 (1954) (emphasis added).

(viii) It is a **violation of Federal statutory Law** (judicial self-bias) for any judge to sit in hearing/judgment of a Complaint so closely related to his/her own self-interest: “Any justice, judge, or magistrate judge of the United States **shall disqualify himself** in any proceeding in which his **impartiality might *reasonably* be questioned**.” — 28 USC 455(a) (emphasis added).

(ix) It is a **violation of Constitutional Due Process** (judicial self-bias) for any judge to sit in hearing/judgment of a Complaint so closely related to his/her own self-interest. See generally https://en.wikipedia.org/wiki/Due_Process_Clause, which includes this pertinent citation: “**Due process of law in the [Fifth and Fourteenth Amendments]**[δ] refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those **fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,** and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.” — *Hurtado v. California,* 110 U.S. 516 (1884) (emphasis added). Amongst the said **“fundamental principles”** is, of course, the precept that **“no man can be judge in his own cause”** (already quoted in item (vii) just *supra,* see also https://en.wikipedia.org/wiki/Nemo_iudex_in_causa_sua).

3 • *(N/A)*

4 • *(N/A)*

δ • “To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection. [So we reject it summarily.]” — *Malinski v. New York,* 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

5 • *(N/A)*

6 • (i) We're all well-aware (though Easterbrook pretends he's bestowing great wisdom unto us) of this obvious platitude concerning the protocol for mainline "remedy for errors made in judicial opinions."[ε]

(ii) We're all also well-aware (though Easterbrook pretends not to be) that *Ryan v. U.S.* has indeed already traveled that route (unsuccessfully).

(iii) We're all also well-aware (though Easterbrook pretends to be wishing it away) that the instant proceeding is one of Judicial Misconduct, not one of "merits/correctness/errors." Ann. 1 *supra.*

(iv) Finally we're all cognizant that "an allegation that is otherwise cognizable under the Act [JCDA] should not be dismissed merely because an appellate remedy appears to exist" (*Breyer Report,* Standard 2, see Ann. 14 *infra*).

So, given all this well-awareness (i–iv), it's not at all clear why Easterbrook felt motivated to superfluously recite this mainline protocol. A reader disinclined toward charitability might conjecture he included it solely for self-puffery purposes of disdain, pomposity, bloviation, and superciliousness.

7 • *(N/A)*

8 • The panel consisted of Easterbrook, Wood and Tinder. The panel published two full-blown Opinions: 645 F.3d 913 and 688 F.3d 845. The panel also denied Petition for Rehearing, twice. The panel also denied Petition for Rehearing *en banc,* twice. *In addition,* Wood and Easterbrook were involved together in other panels and/or *en banc* for two other closely related cases (in which they also consistently rendered rulings negative to Ryan): 498 F.3d 666 and 506 F.3d 517. Given the extensive intimate intertwined involvement of Wood with Easterbrook in all these various Ryan cases, it was wholly inappropriate (far too "incestuous," in a Judicial Misconduct sense) for Wood to hear Easterbrook's Judicial Misconduct Complaint1 — she should have recused herself from Complaint2, for reasons of self-bias[ζ] (namely, self-protection/preservation of her own reputation, given that she aligned herself with Easterbrook in all these rulings). Or, perhaps, for reasons of embarrassment/fear/cowardliness.[η]

ε • Not coincidentally, JCOp1 also carried a similar "lecturette," see JCOp1Ann 11. Thus, this seems to be a standard element of the Judicial Council's "form letter" dismissing Complaints of Judicial Misconduct.

ζ • See also the discussion of self-bias (in the context of Easterbrook hearing Wood's Judicial Misconduct Complaint2) in Ann. 2 *supra.*

η • This conjecture (Wood's embarrassment/fear/cowardliness) is Alschuler's, at Memoir ℘75ƒ306.

9 • *(N/A)*

10 • This Complaint2 really has no need to "show how it is compatible with §352(b)(1)(A)(ii)," because that compatibility is "just too obvious to belabor." Nevertheless, since Easterbrook has now decided to "make a big deal" of this matter, said compatibility is herein addressed, in Ann. *1 supra.*

11 • Indeed, the "order dismissing the initial complaint [Complaint1, JCOp1, JCOp1Ann]" did "alert" Complainant about §352(b)(1)(A)(ii), "merits-related" (see JCOp1Ann *1*, *2*, *5′*) — but that "alert" was in the context of that earlier Complaint1, as distinguished from the instant Complaint2. And accordingly, that point was indeed addressed in the appropriate place — which is *not* in the course of the instant Petition2, but rather in the Petition1 itself.

However, this Judicial Council refused to accept/recognize filing of that said Petition1, under false/specious circumstances. That (false rejection of Petition1) has been complained-of in a **Judicial Conference Petition for Review of Complaint1/№07-18-90014** (available online at http://judicialmisconduct.us/sites/default/files/2018-05/JConfPetition.pdf), as mentioned in the instant Petition2 (to which the instant document, JCOpp2Ann, is an accompaniment) — with the conclusion that the said Petition1 is *now* (at Petition2-time) indeed properly before this Judicial Council.

12 • *(N/A)*

13 • *(N/A)*

14 • Easterbrook is double-talking here (of the same sort that Alschuler's Memoir complains about, though admittedly we're taking the liberty of "putting the word 'double-talk' into Alschuler's mouth," see https://en.wikipedia.org/wiki/Double-talk).

The cited "Standard 2" (for assessing compliance of the JCDR with the JCDA, with respect to the statutory language "directly related to the merits of a decision or procedural ruling," see Ann. *1*) appears in Appendix E of the *Breyer Report*. However, the *Breyer Report* was only an *input document* to the JCDR, attempting to interpret/divine the intent of the authors/drafters of the JCDA (as the *Report* itself admits) — it was not the *final word,* and hence Standard 2 is not the final word on the sub-subject of "merits-related." Instead, the final word is the text of the JCDR itself; and for "merits-related" in particular, the final word is (the relevant portion of) the JCDR 3 Commentary (see Ann. *1*) — which omits much of the language of Standard 2. Such omissions must be valued as intentional/purposive/meaningful (the omitted language may be viewed as "historical/informative guide," but not

as “current/mandated commandment”).

Easterbrook asserts that Standard 2 “includes the teaching that a contention that a judge erred by deciding to serve in a particular matter is merits-related” (paraphrasing Easterbrook here). There are several things wrong with that assertion:

(i) To begin with, Easterbrook did not quote Standard 2; the words-as-asserted by Easterbrook don’t appear in Standard 2, so Easterbrook is at best asserting a paraphrase of Standard 2.

(ii) Perhaps (indeed, it is likely) Easterbrook meant to implicate the following sentence of Standard 2: “A mere allegation that a judge should have recused is indeed merits related; the proper recourse is for a party to file a motion to recuse.” But if so, then Easterbrook is to be faulted for failing to also note (i.e., for neglecting/hiding/concealing) the immediately succeeding sentence of Standard 2 (emphasis added): “The very different allegation that the judge failed to recuse *for illicit reasons* — i.e., not that the judge erred in not recusing, but that the judge knew he[/she] *should recuse* but deliberately failed to do so for illicit purposes — is not merits related.” This latter is, of course, our claim (in the “Ground for Complaint #1” section of Complaint2, bolstered by Ann. 2(vi–ix),8,16 *supra*).

(iii) If Easterbrook had wanted to actually quote Standard 2, he probably should have chosen these words: “[A] complaint challenging the correctness of a judge’s determination to dismiss a prior misconduct complaint would be properly dismissed as merits related.” However, in addition to item (ii) *supra,* these words from Standard 2 didn’t survive into the final draft of the JCDR, and such omission must be viewed as intentional/purposive/meaningful (that is, as rejected for final approval), and hence may/should be discounted here.

(iv) What did survive into the final JCDR is the language (occurring in the first paragraph of Standard 2, *sans* the failure-to-recuse clause): “An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, **without more,** is merits-related” (emphasis added). As Standard 2 and the JCDR Commentary 3 then go on to explain (seconded by JCOp1Ann 1, 2, 5′), **“with more,” all bets are off** (i.e., as is the case here, yield fair game for a charge of Judicial Misconduct).

(v) Finally, Easterbrook suppresses the really substantive import/intent of Standard 2, which is expressed in its first two sentences: “The core policy reflected here is that the complaint procedure cannot be a means for collateral attack [for which, see MemAnn ℘40C] on the substance of a judge’s rulings. The interest protected is the independence of the judge in the course of deciding **Article III cases and controversies**” (emphasis added). It’s the final, emphasized words here (in coordination with the omission noted in item (iii) *supra*) that are “the tell” of Standard 2: a judge’s acts in reviewing/hearing a Judicial Misconduct Complaint do ***not*** constitute “Article III cases and controversies,” hence are ***not*** protected by the JCDA/JCDR. Re-

wording (to avoid double-negatives): a judge's acts in reviewing/hearing a Judicial Misconduct Complaint ***are*** subject to Judicial Misconduct (JCDA/JCDR) review.

15 • *(N/A)*

16 • For **"reasonable appearance of conflict,"** see Ann. *2*(vi–ix) *supra.*

17 • For Easterbrook to claim he "ha[s] no stake in the outcome of the current proceeding" is ridiculous on its face. For, lawyers report about Easterbrook's "arrogant and intolerant" ego (Memoir ℘9), and Alschuler himself conjectures about Easterbrook's stake in "saving face (preserving dignity)" (Memoir ℘65).

18 • There is no possible sense in the world that the instant Petition2 can be characterized as "frivolous," given that the two charges Complaint2 asserts are themselves each individually and in combination deeply non-frivolous:

(i) Wood's non-recusal; highly non-frivolous "reasonable appearance of conflict," in light of the "incestuousness" relationship of Easterbrook and Wood, see Ann. *2*(vi–ix),*8*,*16* *supra*.

(ii) Wood's dismissal of Complaint1; the basis of obvious misconduct by Easterbrook being Alschuler's Memoir, which is with quite some certainty the most non-frivolous academic study/critique of judicial misconduct ever published.

As the *Breyer Report* Standard 2 itself states, the very definition of "frivolous" (in the context of Judicial Misconduct, if not elsewhere) is "lacking in factual substantiation." Our Complaint1 and Complaint2 (which are inextricably linked, not to be treated separately in isolation) are chock-full of "factual substantiations" — the biggest "fact" of all being Alschuler's Memoir, the contents of which cannot be reasonably doubted by any serious/sincere ("non-frivolous") reader (especially when such readers, even lay readers, have the aid of the "amazing exegesis" MemAnn available).

19 • The prospect of "infinite regress" (so-called, "infinite" being used in a metaphorical sense), far from being fearsome/off-putting/undesirable, is an honorable/laudable goal, well-known to philosophers and mathematicians: "justifications for reasons *(ad infinitum),*" "ultimate/axiomatic foundations (of theories/facts)," etc. http://www.informationphilosopher.com/knowledge/infinite_regress.html.

20 • *(N/A)*

21 • *(N/A)*

22 • *(N/A)*

23 • Alongside the theme of "infinite regress," the JCDA/JCDR's stated theme — **"to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts"** — does not admit of "limited scope" ("no known outer bound").

24 • Insipid insults/threats like this are beneath the dignity of the Courts, and should be disciplined.