The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BANK OF NEW YORK MELLON, a Delaware corporation, as trustee for Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates Series 2005-AR2,

Plaintiff,

vs.

SCOTT STAFNE, an individual; TODD STAFNE, an individual; and REAL TIME RESOLUTIONS, Inc., a Texas corporation,

Defendant

Case No.: 2:16-cv-00077 TSZ

MOTION TO RECONSIDER

NOTED: June 5, 2017

Relief requested:

Scott Stafne requests this Court reconsider its ORDER ON REVIEW OF REQUEST TO RECUSE.

Issue:

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1. Does this Court's outright refusal to consider Stafne's contention that a semi-retired volunteer judge is not an Article III judge because he is not paid compensation for exercising judicial power because no one has made a similar argument violate this Court's duty under the Constitution to declare the meaning of the "compensation clause" requirement set forth in U.S. Const. Art III §1?

Argument:

Standards for Reconsideration:

"[E]very order short of a final decree is subject to reopening at the discretion of the trial judge," and "may be altered or amended before final judgment if sufficient cause is shown." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983). Courts consistently cite three grounds that merit reopening and revision of an interlocutory order: (1) "an intervening change in controlling law;" (2) "the availability of new evidence;" and (3) "the need to correct a clear error of law or prevent manifest injustice." Craig C. Reilly, *Interlocutory Orders: Getting it Right the Second Time*, 22 Litig. 43, 44 (1996) (citations omitted).

Stafne contends here this Court made an error of law by failing to declare what the law is with regard to Stafne's challenge to Judge Zilly's Article III status as a judge because he receives no compensation for exercising Article III judicial power.

This Court has a Constitutional duty to Construe the meaning of Art. III, § 1

Scott Stafne made a direct attack on whether semi retired Judge Zilly can act as an Article III judge because he exercises judicial power without being compensated for doing so. *See* Motion to recuse. As support for this contention Stafne cited to a government web site for the United States Courts, which states:

> What is a senior judge?
>
> The "Rule of 80" is the commonly used shorthand for the age and service requirement to assume senior status as set forth in Title 28 of the US Code, Section 371 (c). Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge (65+15=80) A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of ten years of service (70+10=80). *Senior judges, who essentially provide volunteer service to the courts*, typically handle about 15 percent of the federal court's workload annually. (emphasis supplied)

See http://www.uscourts.gov/faqs-federal-judges#faq-What-is-a-senior-judge?

> 28 U.S.C. § 371 provides in pertinent part:
>
> Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

Under the system described senior judges are receiving a pension paid through annuities as part of their retirement, not compensation for volunteering to exercise judicial power. Stafne does not want a volunteer judge to exercise judicial power in his case.

Facts about Judge Zilly's age and retirement (i.e. senior status) are well known and capable of judicial notice. See https://en.wikipedia.org/wiki/Thomas_Samuel_Zilly See also https://www.fjc.gov/history/judges/zilly-thomas-samuel

Judge Thomas Zilly was born in Michigan in 1935. He was appointed by President Reagan to replace federal district court Judge Walter Thomas McGovern in 1988. Judge Zilly retired in 2004 when he was either either 69 or 70 years old. He was succeeded by Judge James L. Robart, who retired retired in 2016.

Doing the math is simple. Judge Zilly served 16 years as an active Article III judge. Now 17 years later after his retirement Judge Zilly satisfies the "Rule of 80" requirement and according the U.S. Court's web site serves as an "essentially volunteer judge".

Ignoring that Stafne cited information from the U.S. Court "gov" web site, this Court states in footnote 2 of its order:

> A simple internet search would have revealed the inaccuracy of Defendant Stafne's allegations. 'Senior status' is a form of semi-retirement of United States federal judges that allows them to receive the full salary of a judge but have the option to take a reduced caseload (although many senior judges chose to maintain a full caseload.)

Dkt. 137, Order, p. 2.

This footnote is disingenuous because it fails to reference the website the Court is referring to and does not acknowledge Stafne's reference to the authoritative US Courts website. Moreover, while the Court may believe senior status is a form of semi-retirement, 28 U.S.C. 371 states that it sets up a "retirement" system based on the payment of annuities to federal judges regardless of whether they exercise judicial power. Stafne has challenged the constitutional appropriateness of this system to the extent it allow senior judges to act as volunteer judges when they are not receiving any compensation for doing so.

U.S. Const. Art. III, § 1 states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, *and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.* (emphasis added.)

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The annuities senior judges receive as part of a federal retirement system established by Congress, *see* 28 U.S.C. 371, are paid regardless of whether a judge exercises judicial power and thus are not paid for the performance of services.

At the time the Constitution was ratified the average life expectancy was less than 40 years. Legacy.com, Life and Death in the Liberty Era. The average age of the signers of the Declaration of Independence was 44. Journal of the American Revolution, Ages of the Revolution: How old were they on July 4, 1776? .

The purpose of the "compensation clause" was to attract good judges and keep them independent from the manipulation of the other branches of government. Hamilton, Alexander,The Federalist Papers No. 78, 79., and 80[1].

The desire to obtain competent judges who can maintain the legitimacy of the federal judicial department based on the authority of their judgments is not consistent with the interpretation that our founders wanted old judges, statistically likely to be mentally and cognitively challenged, to be deciding cases as volunteers because they enjoy exercising judicial power. The very notion of old judges working for free would have been troubling to them because it promotes the prospect of governmental tyranny and judicial tyranny. *Id*.

Stafne is not the first one to voice concern about this "retirement system" which allows judges to exercise the judicial power of the United States for too long. *See* Motion to Recuse. *See also* Greene, James, "Revisiting the Constitution: We Need Term Limits for Federal

[1] All of the Federalist Papers are available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers

Judges" New York Times (July 31, 2015). Greene, a Columbia Law School Professor and former clerk to Supreme Court Justice John Paul Stevens, writes:

> The drafters of the 1787 Constitution had good reasons for giving life tenure to federal judges. Colonial judges generally served at the pleasure of the crown, hence the ninth grievance in the Declaration of Independence, that the king "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."
>
> But the average life expectancy of an American in 1787 was about 36, less than half what it is today. The 21st century reality is that when Supreme Court vacancies arise, one of the criteria for selection is that the judge be young enough to serve for several decades. Many of our most distinguished jurists, judges like J. Harvie Wilkinson and Diane Wood, both in their sixties, are by now too "distinguished" for our highest court.
>
> A great many Supreme Court judges, William O. Douglas most famously, have outlasted their own lucidity. What's more, as tenures on the Supreme Court have grown over time, the frequency of vacancies has shrunk. The ad hoc nature of Supreme Court retirements increases the political stakes — and the attendant political circus — of each new appointment.
>
> There are better paths to judicial independence ...

This Court's response to Stafne's argument was terse and unreasoned: "[n]otably, Defendant fails to cite a single legal precedent tending to establish that the fact of a presiding judge's 'senior status' has ever been held a proper ground for recusal." Dkt. 137, p 2. This is incorrect. Stafne cited Due Process cases requiring recusal. This Court simply ignored these cases and focused only on statutory bases for recusal.

Forcing parties to litigate in an Article III Court before a judge who does not have the attributes of an Article III Judge was found unconstitutional by the Supreme Court in *N. Pipeline Const. Co. v Marathon Pipeline Co.*, 458 US 50, 58-59 (1982). Stafne's argument is virtually identical to that entity which claimed it did not have to litigate judicial inquires before bankruptcy court judges because they did not have the attributes of Article III judges.

Additionally, the fact an identical legal argument has not been pressed before a court before is not a basis for refusing to perform this Court's duty of saying what the law is. In *Marbury v. Madison* the Supreme Court held

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. … *This is of the very essence of judicial duty.*" (emphasis added.)

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

That duty identified in *Marbury* so many years ago requires this Court to construe the "compensation clause" of the Constitution and the federal statutes relating to judges retirement to determine whether Judge Zilly is still an article III judge when he exercises judicial power in his retirement without receiving compensation therefore. As the Court can see from the following citations this duty is a longstanding one owed by the Federal Judicial Department to its sovereign, the people of the United States[2]. *See e.g. NLRB v. Canning*, 134 S. Ct. 2550, 2560, (U.S. June 26, 2014); *United States v. Windsor*, 133 S. Ct. 2675, 2688 (U.S. June 26, 2013); *Vieth v. Jubelirer*, 541 U.S. 267, 277 (U.S. Apr. 28, 2004); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130-131 (U.S. Dec. 10, 2001); *Clinton v. Jones*, 520 U.S. 681, 703 (U.S. May 27, 1997); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-219 (U.S. Apr. 18, 1995); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (U.S. June 16, 1980); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 818 (9th Cir. 2016); *United States v. Bueno-Vargas*,

[2] It is Stafne's contention this Court cannot ignore its duty to construe the meaning of the Constitution without committing "misconduct" within the meaning of U.S. Const. Art. III,§ 1.

383 F.3d 1104, 1109-1110 (9th Cir. 2004); *United States v. Enas*, 255 F.3d 662, 673 (9th Cir. 2001).

> That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence. See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). With the Eighth Amendment, whose broad, vague terms do not yield to a mechanical parsing, the method is no different. See, *e. g., Furman* v. *Georgia*, 408 U.S., at 268-269 (BRENNAN, J., concurring); *Coker* v. *Georgia*, 433 U.S., at 598 ("We have the abiding conviction" that the death penalty is an excessive penalty for rape).

Thompson v. Okla., 487 U.S. 815, 833 (U.S. June 29, 1988).

This court has a duty to interpret the meaning of of the "compensation clause" of Art. III, § 1. *See United States v. Will*, 449 U.S. 200, 217-221 (1980). Federal judges have no more standing to have this clause interpreted because it affects their salaries than does Stafne when the separation of powers values that underlie his liberty interests and property rights are affected by its meaning. *See e.g. Bond v. United States,* 564 U.S. 211, 220-224 (2011); *INS v. Chadha,* 462 U.S. 919, 935-6 (1983); *United States v McIntosh*, 833 F.3d 1163, 1173-74 (9th Cir. 2016).

By not considering whether Judge Zilly, a semi-retired judge, who receives no pay for voluntarily exercising judicial power remains an Article III judge this Court has abused its power and should reconsider whether this issue merits judicial reconsideration.

Conclusion.

This Court should grant Stafne's motion to reconsider and provide a reasoned decision discussing the meaning of the compensation clause in the context of Stafne's arguments.

DATED this 26th day of May 2017 at Arlington, Washington.

BY: */s Scott E. Stafne*

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on this date I electronically filed the foregoing Motion to Reconsider in support of said Motion with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the (Washington State Superior Court Rules OR Federal Rules of Civil Procedure).

DATED this 5th day of June, 2017 at Arlington, Washington.

BY: *s/ Pam Miller*
Pam Miller, Paralegal
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