

Editorial

More progress (and politics) in federal judicial accountability

The Judicial Conference's new Rules for Judicial-Conduct and Judicial-Disability Proceedings are a major step toward realizing the promise of the Breyer Committee Report.

The new Rules for Judicial-Conduct and Judicial-Disability Proceedings adopted by the Judicial Conference of the United States (the "New Rules") represent additional progress in demonstrating the federal judiciary's renewed commitment to promote public confidence in judicial accountability through systems of self-regulation. That effort began with former Chief Justice Rehnquist's appointment of the Judicial Conduct and Disability Act Study Committee (known as the Breyer Committee). It gained significant momentum in 2006 with the virtually simultaneous release of the Breyer Committee's report, endorsement of software that facilitates recusal for financial conflicts of interest, and adoption of a robust policy regarding judges' attendance at privately-funded educational programs.

In our editorial discussing these developments (see "Politics and progress in federal judicial accountability," September-October 2006), we deemed especially noteworthy the

fact that "[f]ar from hiding the federal judiciary's dirty linen in the closet," the Breyer Committee Report discussed situations in which the judiciary's performance was deficient and possible causes of those deficiencies. We also expressed the view that implementation of the report's numerous recommendations "should measurably reduce instances in which the judiciary fails to police itself as envisioned in the 1980 [Judicial Councils Reform and Judicial Conduct and Disability] Act." We acknowledged, however, that it would "take time ... to see how all three of these initiatives play out and whether the promise we see in them is realized."

The New Rules are a major step toward realizing the promise of the Breyer Committee Report. They are responsive to, and in a number of important respects go beyond, that report's recommendations. Thus, instead of merely facilitating the compendium of substantive interpretations that the Breyer Committee

recommended as one means to advance understanding of the 1980 Act (codified at 28 U.S.C. § 351 et seq.) and uniformity in its application, the New Rules incorporate the most important of those interpretations. Moreover, the Judicial Conference took the controversial steps of making the New Rules mandatory in all circuits and of giving the Conference and its Committee on Judicial Conduct and Disability continuing oversight responsibility and enhanced power to review certain determinations.

We are aware that both the process by which the New Rules were developed and the rules themselves have been the subject of criticism. As to the former, the decision not to make public the comments submitted during the notice and comment period purchased candor from judges at the price of disabling the public from assessing the rulemakers' responsiveness to the comments received. As to the latter, having submitted some suggested revisions that were not adopted, AJS could follow the lead of other organizations and individuals that reject as insufficient a disciplinary process that does not conform to their preferred model. We choose not to do so for three reasons.

First, many of the criticisms of the New Rules are predicated on models of judicial discipline, associated with systems in place in the states, that Congress rejected in 1980, a position from which it has not receded when amending the Act. For instance, many critics seem not to have considered the prominent role that Congress intended informal resolutions—in the shadow of the 1980 Act—to play

Editorials are prepared by a committee of the American Judicature Society appointed by the president.

in the system it put in place, or how pursuit of that goal might properly affect the interpretation and administration of the Act. Other criticisms, such as some relating to the confidentiality of the process and the timing and extent of public availability of decisions, are in tension if not direct conflict with provisions of the statute. Still others, such as criticism of the New Rules for failing to incorporate on a wholesale basis the standards of conduct prescribed in the Code of Conduct for United States Judges—as suggested by AJS and others—present a closer question. Having previously acknowledged that “disciplinary action is not appropriate for every violation of the Code,” we are mindful of the administrative (rather than disciplinary) focus of the governing standard, “conduct prejudicial to the effective and expeditious administration of the business of the courts.” We are also encouraged by both the greater determinacy of the New Rules and the Breyer Committee Report’s numerous references to the Code when explaining why conduct would (or might) violate that standard. Finally, we note that the judiciary’s efforts in this domain include revision of the Code (see <http://www.uscourts.gov/library/conduct.html>).

Second, taking into account the Act’s administrative focus and Congress’s preference for informal resolutions, we think that it is important not to underestimate either the extent of the reforms augured by the New Rules or the extent to which they will make it easier to hold the institution accountable if individual judges are permitted to escape accountability. The Breyer Committee Report noted examples of chief judges too quickly dismissing complaints as merits-related or unsupported. The New Rules counter that tendency by adopting many of the substantive standards for evaluating complaints used by the Breyer Committee and making them uniform throughout the circuits. The allocation of power between circuit councils and the Judicial Conference in the administration of the Act has

been a subject of legal and prudential controversy within the judiciary for more than 20 years. The councils did not lightly surrender their perceived prerogatives to operate a system of decentralized self-regulation. Rather than criticizing the New Rules for failing to go to the limit in centralizing power, we prefer to recognize the delicacy of the Conference’s legal position and to applaud the federal judiciary as a whole for sensitivity to the larger political context in which these questions have been raised.

Third, awareness of the larger political context also inclines us not to allow disappointment that a few suggested improvements were not made to overwhelm our enthusiasm for the New Rules. The federal judiciary was wise to take action in the face of criticisms of its implementation of the 1980 Act, however fecklessly some of the criticism may have been expressed. Purists may question whether some of the New Rules are within the statute’s grant of rule-making authority (or other grants of authority to the Judicial Conference). Realists will understand why the federal judiciary was not eager to seek statutory amendments. Those motivated by the public interest may not care how the changes were made, so long as they further the Act’s policies.

Having in general opted to emphasize the enormous potential for good in the New Rules, we end by noting one area in which the extent of additional progress they augur can be measured with assurance. Against the recommendation of AJS, the New Rules stop short of requiring that orders made public, including orders dismissing complaints, be placed on the court of appeal’s public website. Instead, they prescribe posting as an alternative to “placing them in a publicly accessible file in the office of the circuit clerk.” In an age of E-Government, we find it hard to regard this choice as other than an ill-advised concession to local sensibilities, one that could prevent the public from being able to follow a circuit’s progress in implementing

the Act. At least three circuits have begun posting dismissal orders on their sites (redacted to eliminate the judge’s name and other identifying information as required by the confidentiality provisions of the Act). Reviewing the orders for the 7th, 9th, and 10th Circuits should demonstrate to all but the most cynical readers that, just as the federal judiciary has maintained, the reason almost all complaints are dismissed every year is that they equate an adverse decision with evidence of misconduct. A recent order by the Chief Judge of the 9th Circuit dismissing a complaint explains the problem:

Many disappointed litigants feel very strongly that the judge who ruled against them must be guilty of some sort of chicanery, but such a suspicion, standing alone, is an insufficient basis for a misconduct complaint. Rather, complainants must present objectively verifiable proof (for example, names of witnesses, recorded documents or transcripts) supporting any such allegation, which complainant has not done.

AJS trusts that other circuits will soon begin posting their orders online. Easily accessible dismissal orders will give the federal judiciary a way of demonstrating that the New Rules represent another step in a renewed and sustained commitment to implement, and to be seen to implement, the 1980 Act. ❖❖



Federal judicial misconduct and disability

Under the Judicial Conduct and Disability Act of 1980, as amended, any person may file a written complaint alleging that a federal judge has engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all duties of office by reason of mental or physical disability” with the clerk of the court of appeals, who trans-

continued on page 313

.....

Federal, continued from page 269

mits the complaint to the chief judge of the circuit. The chief judge may also “identify a complaint” in a written order stating reasons. After reviewing a complaint (and perhaps engaging in an appropriately limited inquiry), the chief judge either dismisses the complaint or appoints a special committee.

Most complaints are dismissed. The most frequent statutory ground for dismissal is that a complaint is “directly related to the merits of a decision or procedural ruling.” A chief judge may also dismiss a com-

plaint if it alleges conduct or disability that is not covered by the Act, lacks sufficient evidence to raise an inference that misconduct has occurred, or contains allegations that are incapable of being established through investigation; or if a limited inquiry demonstrates that the allegations lack any factual foundation or are conclusively refuted by objective evidence. A chief judge may conclude the proceeding if appropriate corrective action has been taken or intervening events make action no longer necessary. A complainant or judge aggrieved by a final order of the chief judge may petition the cir-

cuit judicial council for review .

If a complaint is not dismissed, a special committee is appointed to investigate the allegations and file a written report with the circuit judicial council. The judicial council may dismiss the complaint, certify the disability of a judge, request that a judge voluntarily retire, order that, temporarily for a time certain, no further cases be assigned to a judge, privately censure or reprimand the judge, publicly censure or reprimand the judge, or order other appropriate action. The complainant or the judge may petition the United States Judicial Confer-

ence for review of any action taken by a circuit judicial council. A judge cannot be removed under the Act, although the Judicial Conference can refer a complaint to the House of Representatives for consideration of impeachment.

In 1986, a special committee of the chief judges of the courts of appeals formulated Illustrative Rules Governing Complaints of Judicial Conduct and Disability, which were revised in 2000. Most circuit councils adopted the Illustrative Rules verbatim or with slight modifications.

Based on the 2006 report of the Judicial Conduct and Disability Act Study Committee (known as the Breyer Committee for its chair, Justice Stephen Breyer), the 2008 Rules for Judicial Conduct and Disability Proceedings adopted by the Judicial Conference replace the Illustrative Rules, providing mandatory, nationally uniform rules and superseding any conflicting judicial council rules although "councils may promulgate additional rules . . . as long as those rules do not conflict." The new Rules adopt many of the standards for evaluating complaints used by the Breyer Committee, including extensive discussion of statutory terms such as "corrective action," "related to the merits," and "conduct prejudicial

to the effective and expeditious administration of the business of the courts."

The new rules clarify under what circumstances a chief judge should exercise the statutory authority to "identify a complaint" and start an inquiry without waiting for a complaint to be filed. In addition, a new rule fills "a jurisdictional gap" by permitting the Judicial Conference Committee on Judicial Conduct and Disability to review dismissal of a complaint if "one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed" although review is allowed only of the decision not to appoint a special committee. There is also a new rule that implements the Breyer Committee's recommendation that some complaint proceedings should be transferred to a judicial council in a different circuit selected by the Chief Justice, for example, "where the issues are highly visible and a local disposition may weaken public confidence in the process."

The text of the Act, the Breyer Committee Report, the new Rules, and related materials are posted on the website of the Administrative Office of the Courts at <http://www.uscourts.gov/library/conduct.html>. ☞



Deanell Reece Tacha
United States Circuit Judge
Tenth Circuit Court
of Appeals

Congratulations to the
Honorable
Deanell Reece Tacha
recipient of the Twenty-Sixth
Annual Edward J. Devitt
Distinguished Service
to Justice Award

Devitt Award Committee
2700 University Ave., Des Moines, IA 50311