Statement of the Honorable J. Clifford Wallace
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U.S. Court of Appeals for the Ninth Circuit & Member of the Judicial Council
on Behalf of the Judicial Council of the Ninth Circuit
November 4, 2014

This written statement incorporates the comments I made, on behalf of the Judicial Council of the Ninth Circuit, on October 30, 2014 to the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States concerning proposed amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

I. Decentralized Power for Judicial Conduct Proceedings

The issue of judicial misconduct complaints and how they should be addressed is not new, and many of us have dealt with the issue for decades. However, because of the recent major shift of process and procedures, our Judicial Council believes proposed changes can better be addressed if they are put in their historical context.

The need for a local decentralized review structure of judicial conduct was described by Chief Justice Charles Evans Hughes in 1938. He saw the need for "greater attention to local authority and local responsibility..." resulting in "a decentralization and distribution of authority which I think will greatly promote efficiency and will put the responsibility immediately and directly where it belongs with respect to the administration of justice in the respective circuits."[1]

Following Chief Justice Hughes' preference, Congress established the Judicial Councils of the Circuits. Congress provided the Judicial Councils with power to enter administrative orders. That administrative power from the legislature is direct and significant for purposes of this hearing. It empowers the Judicial Councils to enter all orders for administration of the business of the courts.[2] This power was not granted to the Judicial Conference of the United

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[1] *Federal Judicial Center, Debates on the Federal Judiciary: A Documentary History, Volume II: 1875-1939*, p. 150 (2013).

[2] 28 U.S.C. § 332(d)(1).

States, nor to the circuit or district courts.

For over seventy years, the basic framework which governs judicial discipline gives the Judicial Councils exclusive power to enter orders dealing with discipline short of impeachment.[3]

The Supreme Court has also weighed in on the virtues of decentralization of the judicial administrative structure. The Supreme Court has made clear that the "policy conclusions of the Judicial Conference are not binding on the lower courts, and are instead "entitled to respectful consideration." *Perry v. Hollingsworth*, 558 U.S. 183, 193 (2010), *citing In re Sony BMG Music Entertainment*, 564 F. 3d 1, 6 (CA1 2009). Associate Justice Stephen Breyer, who was a former Chief Circuit Judge and chaired the Committee responsible for the 2006 Breyer Committee Report, stated in his dissenting opinion in *Perry*:

> "For the past 80 years, local judicial administration has been left to the exclusive province of the Circuit Judicial Councils, and this Court lacks their institutional experience. *See generally P. Fish, The Politics of Federal Judicial Administration* 152-153 (1973) (From their creation, "[t]he councils constituted . . . a mechanism through which there could be a concentration of responsibility in the various Circuits-immediate responsibility for the work of the courts, with power and authority . . . to insure competence in th[eir] work . . ."). For that reason it is inappropriate as well as unnecessary for this Court to intervene in the procedural aspects of local judicial administration. Perhaps that is why I have not been able to find any other case in which this Court has previously done so, through emergency relief or otherwise. *Cf. Bank of Nova Scotia v. United States*, 487 U. S. 250, 264 (1988) (SCALIA, J., concurring) ("I do not see the basis for any direct authority to supervise lower courts" (*citing Frazier v. Heebe*, 482 U. S. 641, 651-652 (1987) (Rehnquist, C. J., dissenting)). Nor am I aware of any instance in which this Court has preemptively sought to micromanage district court proceedings as it does today.

Id. at 203-204.

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[3] 28 U.S.C. § 354.

The history of local control of judicial administration provides a powerful precedent for decentralized power.

II. Tracing the Evolution from Judicial Council Power to JCUS Power

It appears to the Judicial Council of the Ninth Circuit that in the last decade this decentralized power of the Judicial Councils seems to have diminished, and the JCUS, with this Committee, has evolved from an advisory role into a policing role. Tracing this evolution shows the following:

1975: The Nunn Bill

The first challenge to this delegated power occurred in 1975 when Senator Sam Nunn of Georgia introduced a bill that would create a mechanism, to be housed in Washington, D.C., which could remove judges without impeachment. The proposal was approved in principle by the JCUS although it is doubtful it had any great support from the judges. Chief Justice Burger said to me the concern was that Congress might do more to erode the power of the federal judiciary. The real debate was whether the Judicial Councils could perform judicial correction short of impeachment or whether a specific amendment was needed.

1980: Judicial Conduct and Disability Act

Eventually it was deemed prudent by most to amend the current judicial council authority so more judges would support it. Three judges, Judge James R. Browning, then Chief Judge of the Ninth Circuit, Judge Elmo B. Hunter, then Chair of the JCUS Court Administration Committee, and I drafted the amendment which was subsequently introduced and adopted in 1980, and became the Judicial Conduct and Disability Act which continues to govern all misconduct proceedings.[4]

The Judicial Conduct and Disability Act further clarified the existing power of the Judicial Councils as having the authority to censor federal judges, only if a judge's conduct interfered with the business of the courts. This accomplished two things. First, it identified the conduct to be considered by the power already delegated to the Judicial Councils. Second, it limited the misconduct program to acts which interfered with the business of the courts. The personal life of the judge

[4] 28 U.S.C. § 351 *et seq.*

was to remain private - unless it interfered with the business of the court.

1993: National Commission

The first review of how well the Circuit Councils were applying the statute occurred about 13 years after its adoption with an investigating commission chaired by former Representative Robert Kastenmeier. Mr. Kastenmeier chaired the House Judiciary Committee, which authored the statute and its subsequent review. Thus, these findings are significant.

The National Commission found that the "system of formal and informal approaches to problems of misconduct and disability ... is working reasonably well." (*Report of the National Commission on Judicial Discipline & Removal* (1993) at p. 123) The Commission wrote that it was not aware of any other system that would strike as well the balance between judicial independence and accountability. (*Id.*) The Commission further stated that "... information, education, and dialogue are integral to the creation and nurture of a culture that encourages meritorious complaints of misconduct or disability while disposing with dispatch of those that do not belong in the system." (*Id.* at p. 124.)

2004-2006: Breyer Committee Report

A decade later, some national legislators questioned our system, primarily because of a few high profile challenges claiming judicial misconduct. In 2006, the committee appointed to study the matter released its report, which has become known as "The Breyer Committee Report." *See Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 146 (2006) ("Breyer Committee Report"). The Breyer Committee found: "no serious problem with the judiciary's handling of the vast bulk of complaints under the Act. The federal judiciary handles more than 2 million cases annually and the handling of only 2% to 3% of those is problematic. We find this last number reflective of the difficulties of creating an error-free system." (Breyer Committee Report at p.5)

As stated by Russell Wheeler, who was substantially involved in the Breyer Committee investigation: By way of summary, as the findings and conclusions of the Breyer Committee demonstrate, the Judicial Councils are doing "a very good job of administering the Act." (Wheeler Statement the House Committee on the Judiciary Subcommittee Hearings, April 25, 2013, p. 3) Mr. Wheeler further opined that "despite occasional problematic dispositions, proper administration of the Act is by and large engrained in the culture of federal judicial administration."

(*Id.*).

The Breyer Committee found only 5 out of 17 "high-visibility" complaints terminated were "problematic"- not "wrong" - just problematic, that is: the Chief Judge and the Judicial Council may have been mistaken in these cases.

So what is the problem and how should it be fixed? The Breyer Committee made suggestions it believed would reduce the difficulty with this small percentage of high-visibility complaints. The Breyer Committee recommended that your committee should:

(1) Develop an in-court orientation program for new chief judges and an on-line Compendium of precedents to aid those implementing the Act.
(2) Consider periodic monitoring of the Act's administration.
(3) Clarify the JCUS' authority to review decisions of its Review Committee.

It seems to our Judicial Council that the obvious answer was not redesigning the judicial correction process, but decreasing the number of problematic high profile cases by implementing specific continuous training for the Chief Circuit judges. We were advised that initial training occurred and we have seen little evidence of any matters that have been improperly handled.

In spite of this, new rules were adopted to solve what both the National Commission and Breyer Committee Report indicated was not a significant problem.

III. Recommendations

In some areas, the Rules for Judicial-Conduct and Judicial-Disability Proceedings and this Committee already have gone too far. For example, through rule-making, the committee has tried to broaden the statutory term "business of the courts" to a foreign meaning by rules. For example, consider section 3, the definition section. Rule 3(h)(2) defines "cognizable misconduct," but extends it beyond interference with the business of the courts by citing ethical aspirations, as if they were a necessary part of the wording of the statute "business of the courts." It then identifies the ambiguous term "lowering confidence in the courts" as a part of the defined statutory term.

I realize that Judge Scirica and I have a friendly disagreement on this issue, as I have read some of his judicial misconduct opinions from when he was a Chief Judge. But we agree that the Judicial Conduct and Disability Act has standards for discipline that are significantly lower than, and conceptually different from, the ideals embodied in the Canons. *See In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. Jud. Council 1995) (The Canons cannot be the standard for judicial discipline. The Canons are aspirational goals, voluntarily adopted by the judiciary itself, "designed to provide guidance to judges and nominees for judicial office." Commentary to Canon 1.); *see also In re Complaint of Judicial Misconduct*, 575 F.3d 279, 292 (3rd Cir. Judicial Council 2009) (The Code of Conduct "is in many potential applications aspirational rather than a set of disciplinary rules.").

Further, the JCUS has adopted an "oversight" role that has become too tenacious. Since 2008, the rules have required Circuit Councils to send documents to the JCUS Committee for monitoring, and possibly for the "compendium" although one has not yet issued. See Judicial-Conduct Rules 11(g)(1) and (g)(2), 17, 18(c)(3), 19(a) and (c), and Rule 20(f). Rather than reviewing over a thousand circuit orders each year, the Ninth Circuit recommends that the focus should be on training for new chief circuit judges and completing the compendium. This training could focus on problematic issues that arise during the complaint review process. We also suggest that consideration be given to adding this topic as a recurring agenda item at the bi-annual chief circuit judges' meetings for the chiefs to discuss the more difficult misconduct complaints and share insights.

Now for specific recommendations about the proposed 2014 amendments:

Rule 24: "Orders to be Made Public Even if Vacated or Modified"

Proposed Rule 24 provides that "[W]hen final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including orders vacated or modified, must be made public ...". This "even if vacated or modified" language is peppered throughout the proposed rules. The proposed amendment further provides "[U]nless it has issued a final decision on the merits, a judicial council may, at any time after the appointment of a special committee, conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary." The proposed amendments seem to create a possible work-around at Rule 20(b)(3) for situations in which a judge may resign or retire during a

misconduct proceeding but only when a judicial council has not already issued its order, hence defeating the intended goal of transparency of the process.

Proposed Rule 24 is is obviously directed to a fairly unique situation that arose in this circuit. We believe the rule goes too far and deprives the Circuit Council of ensuring accuracy in the orders it issues. For example, an affected judge or complainant might ask for reconsideration of an order because it contains a critical factual error or inadvertently discloses confidential information. The Council ought to be able to have the opportunity to correct the error or redact the confidential information before the document is released to the public. This situation arises so infrequently that it does not deserve a special rule. The national committee ruling in this matter already serves as precedent for those unique situations should it arise again. We do not need a rule that could cause needless collateral damage.

Rule 3: "Cognizable Misconduct"

The proposed amendments add two new types of cognizable misconduct: (1) retaliating against complainants, witnesses, or others for their participation in this complaint process (found at Rule 3(h)(1)(G)), and (2) refusing, without good cause shown, to cooperate in the investigation of a complaint (found at Rule 3(h)(1)(H)). The Ninth Circuit agrees with Third Circuit Chief Judge McKee's concerns, addressed in his June 23, 2014 Memorandum to your committee, that the refusal to cooperate provision was more prosecutorial in nature, setting up a "punitive procedure" that could result in a finding of misconduct for failure to cooperate even where the complaint had not merit. This amendment also raises Fifth Amendment concerns.

Rule 20(e): "Disqualification of Chief Judges"

Proposed Rule 20(b)(1)(D)(vii) allows a judicial council to find that a circuit chief judge or district chief judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with 28 U.S.C. § 45(d) or § 136(e). Proposed Rule 25(e) disqualifies any subject judge in a case where a special committee is appointed from the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. As other circuits have expressed, the Ninth Circuit too is concerned about the incongruity in allowing a judge to continue to handle and decide court cases but not perform administrative duties. It is

questionable whether this proposed rule could be reconciled with the statutory responsibilities and powers given the chief judge. We also suggest that the word "temporary" in this context is illusory in that most special committees take a year or more to complete their business. Removing a chief judge from his administrative duties could put the administrative staff and the court in disarray. We urge the committee to reconsider the need for such a rule.

IV. Conclusion

This committee has a challenging task. Forces push you in various directions and many will seem to have value. While these comments may have been direct, we assure you that the Judicial Council of the Ninth Circuit is a team player. We appreciate the opportunity to provide you our comments.