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When Judges Behave Badly

Relying on recusal motions, as the third branch does, is no way to protect judicial integrity.

By Douglas T. Kendall

Responding to congressional criticism this spring, Chief Justice William Rehnquist established a panel to evaluate the judiciary's implementation of the Conduct and Disability Act of 1980, which permits any person to file an ethics complaint against a federal judge. The six-member panel, headed by Justice Stephen Breyer, expects to spend about two years on this task. That should give panel members plenty of time to step back and take a broader look at how judicial ethics are enforced, especially the respective roles that ethics complaints and recusal motions play.

A recusal motion—a formal request by a party that a judge step down from a particular case—is the dominant way in which the judiciary now addresses ethics concerns. This is a conscious choice by the bench. Indeed, otherwise valid ethics complaints against federal judges are regularly dismissed if the conduct in question could give rise to a recusal motion.

In the case of the Supreme Court itself, the reliance on recusal motions is more than a choice. Neither the Conduct and Disability Act nor the ethics code for federal judges applies to the nine justices. Thus, the only way of formally raising ethical concerns against a justice—who, say, went duck hunting with a top government official then litigating a key case before the Court—is to file a recusal motion.

But this dependence on recusal motions as the favored solution is not good—for justice or for the judiciary.

JUDGE, JUDGE THYSELF

Insoluble problems undercut the use of recusal motions to enforce judicial ethics. Even where faced with plainly unethical conduct, a party to a case may not file a recusal motion for a plethora of reasons. In some cases, the unethical conduct will not be discovered until after a case is settled or reversed on appeal, leaving the harmed party with no incentive to seek redress. In innumerable other cases, litigators may decide that the clear risk of angering a judge outweighs the potential benefit of a successful recusal motion.

Which leads us to the second problem: Recusal motions are decided by the very judge whose conduct is alleged to be unethical. For lower court judges, decisions on recusal are then reviewed on appeal only for "abuse of discretion"—a highly deferential standard that rarely results in reversal. For the nine justices, there is no review whatsoever. As the negative editorial reaction to Justice Antonin Scalia's decision not to recuse from Vice President Dick Cheney's energy task force case illustrated, such self-policing does not always inspire a lot of public confidence.

In theory, increased reliance on the Conduct and Disability Act would solve these problems. The act allows "any person" to file an ethics complaint against a judge for conduct "prejudicial to the effective and expeditious administration of the business of the courts." Where prejudicial behavior is found, the statute authorizes the judicial council of each circuit—a special committee of judges assigned to address such complaints—to take any "such action as is appropriate to assure the effective and expeditious administration of the business of the courts."

In practice, the Conduct and Disability Act has been an abject failure. Most important, these petitions almost never result in action to address the alleged misconduct. Between September 2002 and September 2003, 682 complaints were resolved by the judiciary. Only one of those cases resulted in any action by a judicial council against a judge. In the last five years, 3,673 complaints were closed by the judiciary with action against a judge in only six cases. No wonder Rep. F. James Sensenbrenner Jr. (R-Wis.), chairman of the House Judiciary Committee, warned the Judicial Conference in March that he would have to assess "whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue."

TAKE SOME ACTION

The problem appears to be that the judiciary views the Conduct and Disability Act as a method of punishing judges,

rather than as a vehicle for policing judicial conduct. Judges are loath to punish other judges, particularly for violating broadly worded ethical standards like the prohibition against conduct that creates the "appearance of impropriety."

But the Conduct and Disability Act, in fact, speaks of taking "action," not punishing individuals. And there are a wide variety of actions that judicial councils could take, short of censuring or reprimanding a judge, that would prevent future conduct that undermines public confidence in the third branch.

For example, the organization I direct, Community Rights Counsel (CRC), recently filed Conduct and Disability Act petitions against four federal judges who sit on the board of directors of the Foundation for Research on Economics and the Environment (FREE). This organization takes money from corporations and foundations with an interest in federal court litigation and uses those funds to host lavish seminars for federal judges, among others. Noted ethics expert Stephen Gillers, vice dean of New York University School of Law, told *The Washington Post* in March that sitting on FREE's board "compromises the public's view of the impartiality of panels on which [the judge] sits in every case of interest to FREE's members."

Nonetheless, CRC's petitions are not asking for actual discipline against any of these judges. Rather, we are asking that they resign from FREE's board or, if they refuse, for their respective judicial councils to declare that their continued membership violates the Conduct and Disability Act. By the same token, if the act applied to the Supreme Court, a similar petition might be brought seeking to require Justice Ruth Bader Ginsburg to end her affiliation with a lecture series at Legal Momentum, which regularly litigates before the Court.

NOTHING DONE

CRC has filed only one other ethics petition against a judge, and it provides another good example of how the system has broken down. In August 2003, we filed an ethics petition against U.S. District Judge Clarence Brimmer of Wyoming. On July 14, 2003, in *Wyoming v. U.S. Department of Agriculture,* Judge Brimmer invalidated nationwide the Roadless Area Conservation Policy and thereby opened up 58.5 million acres of public lands—containing an estimated 10 trillion cubic feet of natural gas and 500 million to 1.2 billion barrels of oil—to oil and gas exploration. As it happens, Brimmer owns stock or royalty interests in 15 oil and gas companies. These assets, worth between $265,000 and $810,000, represent approximately half his net worth.

Among other things, CRC asked the Judicial Council of the U.S. Court of Appeals for the 10th Circuit to bar Judge Brimmer from hearing cases involving the interests of the oil and gas industry until he divests himself of his financial interests in these companies. The judicial council dismissed this petition without considering the merits, finding that it was "related to a case" and thus more properly the subject of a recusal motion.

If history holds, a similar fate awaits CRC's four pending petitions against the judges who sit on FREE's board, and what *The New York Times* in May called a "festering scandal" will continue to fester. But if just one of these judicial councils demands a judge's resignation, it will immediately send a message around the country that judges should think hard before affiliating themselves with organizations that are trying to advance their legal interests through the courts.

More important, these judicial councils have the opportunity to show Justice Breyer and the other members of the ethics panel how the judiciary can best respond to Rep. Sensenbrenner's concerns. By taking "action" to address valid ethical concerns across the board, rather than simply punishing the very worst judicial offenders, the judiciary can use the Conduct and Disability Act to restore public trust in the judicial branch.

Douglas T. Kendall is executive director of D.C.-based Community Rights Counsel, a nonprofit, public interest law firm that assists state and local governments in defending land use, environmental, public health, and other community protections (www.communityrights.org).