

COBB, Chief Justice (dissenting to the April 1, 2010, order amending the Rules of Procedure of the Judicial Inquiry Commission).

As Chief Justice of the Alabama Supreme Court, I am responsible for the operation of the entire unified judicial system. It is an enormous responsibility, but one that is extremely gratifying, particularly because of the outstanding judges in this State. They are men and women of exceptional ability who live their lives in an exemplary fashion. Our judges make life and death decisions in their courtrooms; they are the guardians of the rule of law. Their independence and impartiality is crucial to the operation of our judicial system. "An independent and honorable judiciary is indispensable to justice in our society." Canon 1, Canons of Judicial Ethics. Former United States Supreme Court Justice Thurgood Marshall put it another way:

"We must never forget that the only real source of power we as judges can tap is the respect of the people."

Judges Must Strive for Neutrality, Chicago Tribune, Aug. 15, 1981, at 7.

The overwhelming majority of judges conduct themselves in a manner that is beyond reproach. Unfortunately, as there is in every human institution, there is in the judiciary a small minority of judges who, on occasion, cannot or will not follow

the Canons of Judicial Ethics<sup>1</sup> and who fail to exercise the high level of professional integrity the citizens expect and require. When judicial misconduct occurs, it is the responsibility of the Judicial Inquiry Commission ("the JIC") to receive or to initiate complaints against judges and to investigate those complaints to determine which are meritorious. Meritorious complaints are then addressed in the Court of the Judiciary. After all, if the "principles which govern the conduct of members of the judiciary," Preamble, Canons of Judicial Ethics, have no means of enforcement, those

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<sup>1</sup>The Preamble to Alabama's Canons of Judicial Ethics states:

"The first Code of Legal Ethics in the United States was formulated and adopted by the Alabama State Bar Association in 1887. This first Code was adopted with only minor changes by Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri between 1887 and 1906, and finally by the American Bar Association in 1908. Recognizing Alabama's leadership in the field of professional ethics and mindful that the character and conduct of a judge should never be objects of indifference and that declared ethical standards tend to become habits of life, the Supreme Court of Alabama deems it desirable to formulate and establish those principles which govern the conduct of members of the judiciary. The Supreme Court of Alabama accordingly adopts the following Canons, as a code for judges and a declaration of that which the people of the State of Alabama have a right to expect of them."

principles have no real meaning. After the adoption of Alabama's Rules of Procedure of the Judicial Inquiry Commission in 1975 and the Rules of Procedure for the Alabama Court of the Judiciary in 1974 and until October 2001, Alabama was a national model of a proper system of judicial oversight and discipline.

However, in October 2001, without notice to or opportunity to be heard from the Court's own Standing Committee for Rules of Conduct and Canons of Judicial Ethics, or from the Alabama State Bar, or from the State judiciary, or from the public, the Court enacted substantial changes to the Rules of Procedure for both the JIC and the Court of the Judiciary. Those changes significantly impaired the public's interest in having a strong oversight of judicial conduct and took this State's procedures governing judicial discipline out of the mainstream of American law. See J. Douglas McElvy, "The Current Status of Judicial Accountability," The Alabama Lawyer 426 (Nov. 2008). Since that time, and in spite of calls for reform from then Attorney General Bill Pryor<sup>2</sup> and numerous other members of the bench and bar, the Court has

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<sup>2</sup>Now a federal judge serving on the United States Court of Appeals for the Eleventh Circuit, William H. Pryor was the forty-fifth attorney general of Alabama, serving in that position from 1997 to 2004.

failed to act to correct its error. In point of fact, empirical data from the JIC indicates that the effect of the October 2001 changes was to decrease the average number of complaints filed per year from 233 to 155, to decrease the number of investigations per year from 50 to 30, and to decrease the number of valid complaints per year from 15 to 7.

Now, more than nine years later, after immense pressure from the bench and bar, the Court perpetuates the disservice it did to the people of this State in October 2001. In the changes the Court adopts today, which some would describe as cosmetic,<sup>3</sup> the Court has failed to rectify the unusual and unconstitutional modifications made to the JIC's procedural rules. Although some improvement in overseeing judicial misconduct may result from these changes, the Court has failed

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<sup>3</sup>The possible exception to this description would be some of the modifications to Rule 6. Rule 6.B. has been amended to expand from 60 to 70 days the time in which the JIC must complete its preliminary investigation of a complaint. Rule 6.C. has been amended to expand from 21 days to 84 days the time requiring service of the contents of the complaint and any supporting material on the judge under investigation, but it also requires the JIC to inform the judge "of those aspects of the complaint that it then considers worthy of some investigation." Rule 6.E. has also been amended to provide that the notification may be delayed where the JIC has reason to believe that the judge under investigation is likely to destroy evidence material to the investigation or is mentally or emotionally unstable, or where notification might jeopardize an ongoing criminal investigation.

to remedy the two most important issues: the requirement that copies of the verified complaint initiating the proceedings be sent to the judge who is to be investigated, and the requirement that everything uncovered during the investigation be disclosed to the judge under investigation -- requirements that exist in no other state's procedures for investigating judicial misconduct. Even as revised today, the Rules of Procedure of the Judicial Inquiry Commission require the JIC to furnish the judge under investigation with "copies of the complaint and all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint" during the investigation. Rule 6.C.

These Rules of Procedure of the Judicial Inquiry Commission engender a fear of retribution, in that they still require the JIC to provide the judge under investigation, a powerful public official, the opportunity to interfere with the investigation into his or her wrongdoing or unethical conduct. Few successful investigations can be conducted in this manner. Further, individuals who have knowledge of judicial wrongdoing must understand that they will be fully identified to the wrongdoer in the event that they file a complaint. The person who files a meritorious complaint will know that the judge is capable of wrongdoing and is in a

uniquely powerful position to retaliate against the complainant -- as when the complainant is a citizen within the judge's jurisdiction or a lawyer who might practice law before that judge. It is hard to imagine any circumstance that could better operate to prevent the filing of valid complaints.

Moreover, the disclosure requirements in the rules fly in the face of the constitutional provisions governing the JIC:

"The [JIC] shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state. The [JIC] shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the [JIC] decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties. All proceedings of the [JIC] shall be confidential except the filing of a complaint with the Court of the Judiciary. The [JIC] shall prosecute the complaints."

Ala. Const. 1901, Art. VI, § 156(b) (emphasis added). The disclosure of the fact that a complaint has been filed with the Court of the Judiciary does not envision that the contents of the complaint filed with the JIC or the JIC's subsequent investigation may be disclosed to the judge under investigation or that the identity of the complainant can be, or should be, disclosed. By its plain language, Art. VI, § 156(b), permits disclosure only of the complaint filed with

the Court of the Judiciary -- with respect to the JIC, "all proceedings ... shall be confidential ...." In our caselaw addressing statutory construction this Court has often said that the plain language of a constitutional provision is dispositive of its meaning.

"In construing a constitutional provision, the courts have no right to broaden the meaning of words used and, likewise, have no right to restrict the meaning of those words." This Court is "not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution." City of Birmingham v. City of Vestavia Hills, 654 So. 2d 532, 538 (Ala. 1995) (quoting McGee v. Borom, 341 So. 2d 141, 143 (Ala.1976))."

City of Bessemer v. McClain, 957 So. 2d 1061, 1092 (Ala. 2006) (opinion on second application for rehearing). Here, the Court has employed its rule-making power to trump the plain language of the Alabama Constitution without the benefit of argument, analysis, or review.

At present, I believe that Alabama may be unique in the nation in hampering the investigation of judicial misconduct with such disclosure requirements, particularly in the face of the requirements of our Constitution. See, e.g., Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 834 (1978) ("At the present time it appears that 47 States, the District of Columbia, and Puerto Rico, have established by constitution, statute, or court rule, some type of judicial inquiry and

disciplinary procedures. All of these jurisdictions, with the apparent exception of Puerto Rico, provide for the confidentiality of judicial disciplinary proceedings, although in most the guarantee of confidentiality extends only to the point when a formal complaint is filed with the State Supreme Court or equivalent body." (footnotes omitted)). See also Annot., "Confidentiality of proceedings or reports of judicial inquiry board or commission," 5 A.L.R. 4th 730 (1981 & 2009 Cum. Supp.)

In addition to the pernicious effect on the investigation of judicial misconduct, the lack of any requirement of confidentiality in the rules also raises valid concerns about the normal administration of justice. Absent any requirement of confidentiality, unscrupulous litigants have the opportunity to file and publish complaints for the purpose of creating the appearance of bias on the part of a judge and possibly requiring the judge's recusal.

The Court's failure to cure these problems is particularly troubling in light of the depth of material and study that has been presented to it. Eventually, possibly in response to the cumulative effects of Attorney General Pryor's earlier well reasoned arguments and the ongoing commentary from bench and bar since the publication of McKelvey's



article, supra, the Court acquiesced to the offer by the American Bar Association's president Tommy Wells to conduct an independent review of our present system for investigating judicial misconduct and requested the assistance of the American Bar Association's Standing Committee on Professional Discipline,<sup>4</sup> a neutral body of lawyers and judges who are well known for their expertise in the field of professional discipline. That committee studied our present system, studied the procedural rules of the JIC and the Court of the Judiciary, and interviewed over 40 individuals closely involved in the process of judicial discipline. In March

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<sup>4</sup>David S. Baker, chair, American Bar Association ("ABA") Standing Committee on Professional Discipline, Atlanta, Georgia (formerly a partner in Powell Goldstein, LLP, in Atlanta, Georgia, and formerly chair of the ABA General Practice Section); John S. Gleason, Denver, Colorado (Regulation Counsel, Colorado Supreme Court, where he directs the office responsible for the regulation of Colorado attorneys and magistrates); Hon. Barbara K. Howe, Towson, Maryland (former associate judge of the Circuit Court for Baltimore, Maryland, former director of the Attorney Grievance Commission of Maryland, now serving in "senior status" for Maryland Courts); Arnold R. Rosenfield, Boston, Massachusetts (presently Of Counsel to K&L Gates LLP, formerly Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Supreme Judicial Court in Massachusetts); Mary M. Devlin, Chicago, Illinois (Regulation Counsel, American Bar Association Center for Professional Responsibility and author of numerous articles on lawyer discipline and professional responsibility); and Ellyn S. Rosen, reporter, Chicago, Illinois (Associate Regulation Counsel at the ABA Center for Professional Responsibility and counsel to the ABA Standing Committee on Professional Discipline).

2009, the Committee issued a report entitled "Alabama: Report on the Judicial Discipline System" ("the report"). The committee determined that

"the requirements set forth in these Rules conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the [JIC] to effectively conduct a proper investigation."

(Emphasis added.) I could not agree more.

The committee makes the following recommendations in the report:

"Recommendation 1: The Court Should Amend Rules 5, 6, 7, and 9 of the Rules of Procedure of the Judicial Inquiry Commission to Ease Barriers to Investigations.

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"A. The Requirement that Complaints Be Verified Should Be Eliminated.

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"B. The Court Should Eliminate the Requirement That the Commission Provide a Judge With the Complaint and Accompanying Material Within Twenty-One Days<sup>5</sup> After Filing.

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<sup>5</sup>The amendment to Rule 6.C. adopted today extends the 21-day requirement to 84 days.

"C. The Court Should Eliminate the Requirement that the Commission Meet Within 60 Days<sup>6</sup> to Vote By a Majority of All Members to Authorize an Investigation.

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"D. The Court Should Eliminate Other Disclosure Requirements in Rules 6 and 9.

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"E. Judges Should be Required to Cooperate With the Commission.

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"F. The Court Should Amend Rule 5 of the Rules of Procedure of the Judicial Inquiry Commission to Allow Cooperation With Law Enforcement and Other Agencies When Necessary.

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"Recommendation 2: The Court Should Vacate Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission Regarding Certain Communications between Commission Members and Judges.

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"Recommendation 3: The Court Should Adopt a Records Retention Rule for the Judicial Inquiry Commission.

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"Recommendation 8: the Use of Assistant Attorneys General to Investigate and Prosecute Complaints Should be Eliminated.

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<sup>6</sup>The amendment to Rule 6.B. adopted today extends this requirement to 70 days.

"Recommendation 9: Term Limits for Judicial Inquiry Commission Members Should be adopted.

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"Recommendation 10: Automatic Disqualification With Pay May Not Be Necessary In All Cases.

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"Recommendation 11: The Court Should Adopt a Rule Providing for Private Admonitions and Expand Rule 16 Permitting Deferred Discipline Agreements.

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"Recommendation 12: The Court Should Adopt a Rule Providing for Discipline on Consent.

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"Recommendation 13: All Members of the Judicial Inquiry Commission Should Receive Mandatory and Continual Training.

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"Recommendation 14: The Judicial Inquiry Commission Should Increase Public Outreach."

These well reasoned recommendations are in the best interest of the people of Alabama and the judiciary that serves those people. Each recommendation is followed in the report by a thoughtful explanation of the rationale supporting the recommendation. Each recommendation is in accord with the practice in this State before October 2001 and in the vast majority of American jurisdictions at the present time. I am not aware of any comparable study or writing that purports to

rebut any of the committee's recommendations. These recommendations are supported by the Alabama Judicial Study Commission, the Alabama Circuit Judges Association, the Alabama District Judges Association, the Alabama Bar Association, and the Chief Justice's Commission on Professionalism. Accordingly, I attach the report in its entirety to this dissent for further reference.

The Alabama Bar Association requested a public hearing before the Court prior to any action on these rules. The Court refused. Why? The bench and bar asked the Court to follow the above recommendations. In large part, certainly in the essential part, the Court refused. Why? Why would the highest court in Alabama make it more difficult to discipline an unethical judge? How this Court's action -- or inaction -- today might serve to engender the "respect of the people" that is so necessary for its existence, I cannot imagine. I therefore dissent.