

SMITH, Justice (concurring specially to the April 1, 2010, order amending the Rules of Procedure of the Judicial Inquiry Commission).

I concur in the Court's adoption of amendments to the Rules of Procedure of the Judicial Inquiry Commission ("the JIC Rules"). I write specially to express my reasons for doing so and to address certain points the Chief Justice raises in her dissenting opinion to the order adopting the amendments.

I share the Chief Justice's admiration of the judiciary, and I agree that the vast majority of judges in Alabama conduct themselves in a manner that is beyond reproach. I acknowledge that there is a small minority of judges who fail to exhibit the high level of professional integrity the office demands and the public rightfully expects. I disagree, however, that the changes to the JIC Rules this Court has adopted are "cosmetic" or "perpetuate[] [a] disservice ... to the people of this State."

Before adopting the current amendments to the JIC Rules, this Court received and reviewed an abundance of information, including materials detailing the considerations presented to this Court before the 2001 amendments to the JIC Rules, a report issued in March 2009 by the American Bar Association Standing Committee on Professional Discipline ("the March 2009

ABA report"), and the August 2009 report of the Judicial Discipline Subcommittee for the Alabama Judicial Study Commission. Additionally, this Court met with the consultation team of the American Bar Association Standing Committee on Professional Discipline and with the executive director of the Judicial Inquiry Commission. This Court requested, received, and reviewed statistical information from the Judicial Inquiry Commission ("the JIC") and spent numerous hours in conference discussing the submitted information. The Court also reviewed correspondence from the Chief Justice's Commission on Professionalism and the Alabama Board of Bar Commissioners.

This Court adopted the present amendments after more than a year of deliberation and consideration of the above materials and information. Although it is not typical that special writings accompany an order amending Court rules, it is the internal practice of the Court that if there is an indication in the case-management system of the Court that a special writing by one or more Justices may be forthcoming, the order is not released to the public until all writings are completed and have been circulated to the other Justices. There were such indications in the system as to these

amendments. Nonetheless, last week I learned that the order amending the JIC Rules--and the Chief Justice's writing dissenting from the order--had been released to the public on April 1, 2010, without prior notice to the other members of the Court that the JIC Rules would be released without the indicated writings of other Justices. Thus, this writing is being issued at the earliest possible date following the release to the public of the order amending the JIC Rules and the Chief Justice's dissent.

As described in some detail below, the March 2009 ABA report made numerous recommendations, some of which were recommended by the Judicial Discipline Subcommittee and adopted by this Court and some of which were adopted by this Court without a recommendation from the Judicial Discipline Subcommittee. This Court ultimately decided not to incorporate in the present version of the JIC Rules all the recommendations in the March 2009 ABA report.

The last significant substantive revisions to the JIC Rules before the April 1, 2010, amendments were in October 2001.<sup>1</sup> The Chief Justice's dissenting opinion states that the

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<sup>1</sup>The JIC Rules were last amended effective February 1, 2009. Those amendments changed the number of days for various actions relating to investigations in Rule 6 and added Rule

2001 "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." In support of that position, the Chief Justice cites, among other things,

"empirical data from the JIC indicat[ing] 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."

(Emphasis original.) The Chief Justice's use of "empirical data," however, does not provide a complete context.

The 2001 revisions to the JIC Rules were made against a backdrop of an unusual surge in the number of complaints filed with the JIC in 1999, 2000, and 2001 based on allegations categorized as "election misconduct" or "recusal."<sup>2</sup> Since the

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16, "Deferral of Impairment Cases," and Rule 17, "Informal Communications with Judge." The other changes to the JIC Rules in 2009 were technical.

<sup>2</sup>These statistics are from materials the JIC provided to this Court. The statistics indicated the number of complaints filed with the JIC and the number of resulting investigations for the years 1989 through 2009.

The JIC publishes an annual report detailing matters such as the number of complaints filed, the number of investigations conducted or commenced, and the number of complaints disposed and the reasons for disposition, such as "no jurisdiction," "no reasonable basis to charge," "no ethical violation," or "insufficient evidence or factual

adoption of the 2001 amendments, the number of complaints involving allegations in those two categories has significantly decreased.

In 1998, for example, there were 4 allegations in the "recusal" category, but in the years 1999, 2000, and 2001, there were 26, 30, and 19 such allegations, respectively. From 2002 through 2008, however, there was one allegation categorized as a "recusal" matter. Additionally, no complaint alleging "election misconduct" was filed with the JIC in 1998, yet in 1999, 2000, and 2001, there were 14, 20, and 5 allegations, respectively, of "election misconduct." From 2002 through 2008, the JIC received three allegations of "election misconduct."

The surge in allegations categorized as "election misconduct" and "recusal" in 1998 through 2001 correlates with a notable increase in the total number of complaints filed with the JIC beginning in 1994. In the 5-year period from 1989 through 1993, a total of 738 complaints were filed with the JIC, an average of 148 per year. In that same period, the JIC conducted 100 investigations, an average of 20 per year.

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allegations." See, e.g., State of Alabama Judicial Inquiry Commission, Annual Report 15-20, 27-29 (2005).

In 1994, however, the number of complaints increased to 218, 39 of which resulted in investigations. In the 8 years from 1994 until 2001, there were 1,867 complaints and 399 investigations, an annual average of 233 complaints and 50 investigations. In the 8 years following the 2001 amendments to the JIC Rules, however, there were 1,237 complaints and 240 investigations, an average of 155 complaints and 30 investigations per year.

Although the annual average number of complaints and investigations in the years 2002 through 2009 (155 complaints and 30 investigations) was significantly less than the annual average in the years 1994 through 2001 (233 complaints and 50 investigations), the annual average number of complaints and investigations in the years 2002 through 2009 was actually higher than the annual average in the 5-year period 1989 through 1993 (148 complaints and 20 investigations). Thus, after the 2001 revisions to the JIC Rules, the average number of complaints and investigations per year more closely resembled the pre-1994 numbers.

As has been discussed elsewhere, the 1990s and 2000s saw significant change in the political affiliation of judges in

Alabama.<sup>3</sup> See, e.g., Kristen LeBlond, *Bad Faith in Alabama's Civil Justice System: "Tort Hell" or Reformed Jurisdiction?*, 14 Conn. Ins. L.J. 149, 156-57 (2007); Michael DeBow, *The Road Back from "Tort Hell": The Alabama Supreme Court, 1994-2004*, 1-3 (The Federalist Society, Oct. 15, 2004).<sup>4</sup> In 1994, there were two very contentious campaigns for seats on this Court, one of which involved a lengthy court battle before it was finally resolved, and the election cycles of 1996, 1998, and 2000 involved heavily contested campaigns for seats on this Court as well as on courts throughout Alabama. See DeBow, supra, at 2.

It is not my purpose here to editorialize on those campaigns or the results. I note only that the years 1994 through 2001 were a time of substantial change in the degree of involvement in judicial campaigns and that that change correlated with a substantial increase in the number of JIC complaints and investigations. Certainly correlation is not

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<sup>3</sup>In 1994, each of the members of the Supreme Court was a Democrat; by 2005, however, the Court was entirely Republican. Kristen LeBlond, *Bad Faith in Alabama's Civil Justice System: "Tort Hell" or Reformed Jurisdiction?*, 14 Conn. Ins. L.J. 149, 156-57 (2007).

<sup>4</sup>On the date this special writing was issued, a copy of this article could be found at [http://www.fed-soc.org/publications/pubID.92/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.92/pub_detail.asp)

always indicative of causation. However, I do think the above correlation is relevant, if for no other reason than to show that the changes to the JIC Rules in 2001 criticized by the Chief Justice did not occur in a vacuum. Rather, the 2001 changes were a response to perceived abuses and, like the recent changes to the JIC Rules adopted by the Court, occurred in the unique context of this State.

The Chief Justice's dissent characterizes the present version of the JIC Rules as being "out of the mainstream of American law." The Chief Justice criticizes the Court for

"fail[ing] 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."

(Emphasis original.) However, the Chief Justice, in suggesting that "some would describe" the changes to the JIC Rules as "cosmetic," minimizes the effect of the present changes to the rules. In particular, the modifications to Rule 6.E provide significant exceptions to the requirement of disclosure of the complaint and the investigatory materials to the judge being investigated. Under Rule 6.E, the disclosure requirements of which the Chief Justice complains "may be



delayed" if the JIC "has reason to believe" that one of the following circumstances exists:

1. Disclosure of the information "is likely to result in the secreting, altering, or destroying of evidence material to the complaint";
2. "[T]he judge is mentally or emotionally unstable and ... likely to act in a manner dangerous to himself or herself or to others"; or
3. Disclosure of the information "could jeopardize [a] criminal investigation."

Additionally, Rule 6.B as amended provides for a summary dismissal of nonmeritorious complaints upon preliminary review without notification to the judge being investigated.<sup>5</sup> In my

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<sup>5</sup>Under the JIC Rules before the adoption of the present amendments, there was no summary-dismissal provision; instead, judges received a copy of every complaint filed against them. That provision, according to the March 2009 ABA report, was not consistent with the practice in a majority of other states. The summary-dismissal provision in the current version of Rule 6.B is consistent with the following from recommendation 1.B of the March 2009 ABA report:

"In Alabama, as in most states, approximately 90% of complaints against judges are dismissed outright or after minimal investigation. An impact of the 2001 amendments is that Alabama judges receive notice of every complaint filed against them, including those that are facially frivolous. In the Discipline Committee's experience, most judges do not want to receive notice of these complaints, and they do not need to be notified of matters that do not allege violations of the Alabama Canons of Judicial Ethics. In addition to the unnecessary anxiety suffered by a judge every time he or she receives a letter from a judicial conduct organization, these

opinion, the exceptions in Rule 6.E and the summary-dismissal provision in Rule 6.B sufficiently address the "two most important issues" described by the Chief Justice and adequately protect "the public's interest in having a strong oversight of judicial conduct."<sup>6</sup>

In addition, the Chief Justice's criticism of the present changes to the JIC Rules overlooks the constitutional uniqueness of the JIC and its relationship to Alabama's

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are not official complaints. Providing information on non-meritorious complaints to the judge means that judges who seek other positions may have to report these matters to potential future employers. Rule 17(A) of the ABA Model Rules for Judicial Disciplinary Enforcement provides that '[i]f the information would not constitute misconduct or incapacity if it was true, disciplinary counsel shall dismiss the complaint...' The Commentary explains that 'it is not necessary to notify a judge of a complaint that is dismissed after screening on the ground that it does not state facts constituting misconduct.' Thus, judges who have been the subject of non-meritorious 'complaints' do not have to report that they have been recipients of complaints. A judge should be able to truthfully state that no official complaints have been filed against him or her on disclosure forms when non-meritorious matters have been screened out."

<sup>6</sup>Additionally, in my opinion, the concerns expressed by then Attorney General Bill Pryor in his 2001 filing with this Court on behalf of the JIC are addressed adequately by these modifications, as well as by other changes to Rule 6, such as the modification to Rule 6.C, which expands from 21 to 84 days the time in which the contents of the complaint and any supporting material must be served on the judge under investigation.

constitutionally adopted method of selecting judges. For more than 150 years, Alabama's constitution has required that judges be selected by popular elections. See Howard P. Walthall, Sr., A Doubtful Mind: Understanding Alabama's State Constitution, 35 Cumb. L. Rev. 7, 35 (2005).<sup>7</sup> Alabama's method of selecting judges has not been without its share of criticism, particularly as judicial elections in Alabama, especially at the appellate level, have become increasingly contentious and extremely expensive.<sup>8</sup> Some in the legal

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<sup>7</sup>In 1849-50, the electorate approved, and the legislature ratified, constitutional amendments to provide for the election of county and circuit judges. Id. The Alabama Constitution of 1868 instituted elections as the means of selecting Supreme Court Justices. Id. at 45.

Professor Walthall argues that "[p]opular election of judges was consistent with the Jacksonian ethos of faith in the people, but the proposal also reflected dissatisfaction with the Legislature's performance of the judicial selection role, marked by electioneering by candidates for judicial office." Id. at 35 (footnote omitted). He notes the defeat in 1861 of a constitutional provision to allow the Governor to appoint judges with the advice and consent of the Senate. Id. at 38.

<sup>8</sup>For example, a 2007 editorial in The Alabama Lawyer by the then president of the Alabama State Bar, Fournier J. "Boots" Gale III, states:

"During the decade ending with the 2004 elections, Alabama was first in money spent for supreme court elections. In those ten years, candidates for the Alabama Supreme Court spent \$41 million. Texas came in a distant second at \$17.5 million. With the November elections now behind us,

community have expressed opposition to elections--and partisan elections in particular--as the means of selecting judges.<sup>9</sup> Nevertheless, the people of this State have chosen popular elections as the constitutional standard for selecting judges.

Like the Alabama State Bar ("the ASB"), see supra note 9, the American Bar Association ("the ABA") has long advocated

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the campaign financing numbers are in for the 2006 judicial races--and they are astounding. In our supreme court races alone, a total of \$11.5 million was raised, which again ranks Alabama number one for the most expensive judicial races in the United States. A total of \$10.6 million was spent by the candidates, of which more than half was spent by the candidates for chief justice. The day after the elections The Birmingham News reported that the Alabama chief justice race was the most expensive in the nation ...."

Fournier J. "Boots" Gale III, Alabama: Ground Zero, 68 Ala. Lawyer 8 (2007).

<sup>9</sup>See, e.g., Gale, supra note 8, at 8:

"For the last three years the [Alabama State Bar] has promoted the merit selection of appellate judges .... We are continuing this effort. ...

"The way we currently elect appellate judges in Alabama is bad for the judiciary and the citizens of Alabama. It is also harmful to our profession--it tends to divide our bar into camps and that is unacceptable. Our courts should be a place where neutrality and impartiality are valued above all, not extraneous matters such as partisan politics. Unfortunately, this is what we face under our current system. Alabama is one of only seven remaining states to hold partisan elections of appellate court judges."

"merit selection" of judges in lieu of judicial elections.<sup>10</sup> See, e.g., American Bar Association Coalition for Justice, Judicial Selection: The Process of Choosing Judges 4 (June 2008) ("The American Bar Association first addressed this issue in 1937, when its House of Delegates adopted a policy in favor of 'merit selection' of judges. That position has been reaffirmed by the ABA in many ways during the succeeding sixty years."). The March 2009 ABA report was "designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in judicial regulation and the ABA Model Rules for Judicial Disciplinary Enforcement." ABA Standing Committee on Professional Discipline, Alabama Report on the Judicial Discipline System 8 (March 2009). Given the ABA's longstanding preference for "merit selection" of judges, the ABA Model Rules for Judicial Disciplinary Enforcement ("the Model Rules") envision a means of judicial disciplinary enforcement that is more appropriate for a "merit selection" system of choosing judges--i.e., the initial appointment of judges who are later subject to retention elections. Thus,

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<sup>10</sup>"Merit selection" is not without its critics, however. See, e.g., Michael DeBow et al., The Case for Partisan Judicial Elections, 33 U. Tol. L. Rev. 393 (2002).

given the differences in the merit-selection system favored by the ABA and the election system adopted by the people of Alabama, the means of judicial disciplinary enforcement in the Model Rules are, in some cases, a poor fit for the constitutional system adopted by the people of Alabama.

For example, the Model Rules include a structural separation of the investigation function from the prosecution function. The Model Rules create "two panels, an investigative panel of three members and a hearing panel of nine members." American Bar Association Center for Professional Responsibility, Preface, Model Rules for Judicial Disciplinary Enforcement 3 (1994).<sup>11</sup> Under Alabama's system,

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<sup>11</sup>The Model Rules offer the following explanation for its separation of the investigation and prosecution functions:

"One of the most consistent complaints the Joint Subcommittee heard from judges and their counsel was the perceived unfairness of a system that combines all functions--investigation, prosecution, hearing and decision making--in a single process. The process has survived due process challenges because in this type of system the highest court has the ultimate authority to review de novo and impose sanctions. The primary reason voiced in favor of this type of system is cost efficiency. The primary criticism is that once a commission is exposed to all the investigative information and determines probable cause to file formal charges, it is nearly impossible for the same commission to be a neutral adjudicative body. Although commissions and executive directors express their assurance that it

the JIC is analogous to the "investigative panel" and the Court of the Judiciary ("the COJ") is analogous to the "hearing panel" under the Model Rules. However, as to the investigative panel, the Model Rules provide for a separate "disciplinary counsel" charged with the task of conducting preliminary investigations and making recommendations to the investigative panel. See Rule 4, Model Rules for Judicial Disciplinary Enforcement. Disciplinary counsel may not conduct a "full investigation" unless the investigative panel has authorized disciplinary counsel to do so. Similarly, disciplinary counsel may not prosecute a complaint unless the investigative panel authorizes the prosecution. The investigative panel thereby acts as an internal check on the

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is fair, the appearance of fairness is not met. The Joint Subcommittee engaged in extensive deliberations in formulating its recommendation to separate the investigative and prosecutorial functions from the hearing, fact-finding and decision-making functions.

". . . .

"Rule 3 provides that each panel should be composed of an equal number of judges, lawyers and members of the public. The membership on the panels rotates with the restriction that no member shall sit on both the hearing and investigative panel for the same case."

Id. at 3-4.

investigatory actions of disciplinary counsel.<sup>12</sup> The Alabama Constitution, however, provides no corresponding structural separation of the investigation and prosecution functions of the JIC. See Art. VI, § 156(b), Ala. Const. 1901 (Off. Recomp.) ("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 prosecute the complaints.").

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<sup>12</sup>Rule 4 of the Model Rules states the following with respect to the role of disciplinary counsel:

"Disciplinary counsel shall have the authority and duty to:

"(1) ... conduct preliminary investigations, recommend to an investigative panel of the commission and upon authorization conduct full investigations, ... [and] prosecute formal charges ...."

Rule 3.E.(3) states that

"[a]n investigative panel shall have the duty and authority to:

"(a) review the recommendations of disciplinary counsel after preliminary investigation and either authorize a full investigation or dismiss the complaint; and

"(b) review the recommendations of disciplinary counsel after full investigation and approve, disapprove or modify the recommendations ...."



One reason this difference between the discipline system proposed by the Model Rules and the judicial disciplinary system established in the Alabama Constitution is significant is that once the JIC files a complaint against a judge with the COJ, § 159 of the Alabama Constitution requires automatic suspension of the judge while the complaint is pending. Although I share the Chief Justice's concern that a judge who is notified of charges against him or her may try to "interfere with the investigation into his or her wrongdoing or unethical conduct," that concern has to be balanced against the potential for abuse of the complaint-filing and investigatory process, particularly in light of the automatic-suspension requirement of § 159--a requirement that cannot be changed except by constitutional amendment. In my opinion, the current revisions to Rule 6, including the above-described safeguards to prevent undue interference with an investigation, strike that appropriate balance.<sup>13</sup> Again, those safeguards operate if the JIC "has reason to believe" that (1)

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<sup>13</sup>Additionally, the difference in the number of complaints filed with the JIC and the number of investigations conducted is indicative of the fact that many nonmeritorious complaints are filed with the JIC. In fact, the March 2009 ABA report recognized that many nonmeritorious complaints are filed and recommended a summary-dismissal process. See supra note 5.

disclosure will likely result in interference with obtaining evidence material to the complaint; (2) "the judge is mentally or emotionally unstable and ... likely to act in a manner dangerous to himself or herself or to others"; or (3) disclosure of the information "could jeopardize [a] criminal investigation."

Another significant difference between the disciplinary system proposed by the Model Rules and Alabama's judicial disciplinary system is that the members of the JIC are not subject to term limits. In fact, recommendation 9 of the March 2009 ABA report is that term limits should be adopted for members of the JIC. That recommendation states, in relevant part:

"The team was advised that a number of Commission members have served in excess of four years, some in excess of eight. While this commitment to public service is admirable, terms of membership on the Commission should be long enough to promote consistency, but short enough to ensure the system benefits from new perspectives. New members need to be and can be educated about the process and what is expected of them. The Discipline Committee is aware that a constitutional amendment to accomplish the establishment of term limits may be required."

As the March 2009 ABA report recognizes, despite the desirability of term limits, there appears to be no constitutional authority for this Court to use its rule-making

authority to impose term limits on members of the JIC. Cf. Rule 2, Model Rules for Judicial Disciplinary Enforcement (providing for term limits for members of the "Commission on Judicial Conduct"). Thus, there is the potential for the JIC membership to remain intact longer than is advisable under the Model Rules.

Ultimately, I think it is important to note that nothing in the March 2009 ABA report or in any of the materials this Court considered indicates that the JIC has been unable to successfully investigate and prosecute a judge who should have been disciplined.

The Alabama Constitution places the responsibility with this Court to "adopt rules governing the procedures of the [JIC]." Art. VI, § 156(c), Ala. Const. 1901 (Off. Recomp.). Thus, this Court is charged with adopting rules of procedure for the JIC that strike a balance between protecting the constitutional right of the people to have their elected judges serve freely and independently, on the one hand, and protecting the constitutional right of the people to hold judges accountable through the JIC and the COJ, on the other. I think the current version of the JIC Rules, although surely not perfect, more appropriately strike that balance than would

the revisions advocated by the Chief Justice in her dissenting opinion. I therefore believe the Chief Justice's criticism of the JIC Rules and of this Court for adopting the present amendments is ill-founded.

Stuart and Bolin, JJ., concur.