OpEdNews

Original Content at http://www.opednews.com/articles/opedne_carl_ber_080404_law_day_2008.htm

April 5, 2008

Law Day 2008

By Carl Bernofsky

"We all have a stake in the rule of law and we can all do our part to strengthen it," advises William Neukom, President, American Bar Association, in the opening pages of *Law Day 2008*, a catalog of ideas and paraphernalia designed by the ABA to help us celebrate Law Day on May 1st.

First proclaimed in 1958 by President Dwight D. Eisenhower, this year's Law Day marks the 50th anniversary of a "day of national dedication to the principle of government under law." In selecting May 1st as Law Day, skeptics point out, Eisenhower was responding to the desire of the ABA and many in government to weaken the traditional association of May 1st ("May Day") as a day to commemorate the endeavors of trade unions and the labor movement in this country.

Neukom's statement challenges us to reexamine the current state of the judiciary and determine what we, as citizens, can do to improve it. Because the federal judiciary is endowed with great powers, it is fitting to use the occasion of Law Day to review the checks and balances that exist to deal with the abuse of those powers.

Judicial Conduct and Disability

If you have been treated unfairly by a federal judge and can show that he or she had a conflict of interest, exhibited prejudice, had been influenced by a bribe, disregarded the law, or had ignored, misrepresented or altered material evidence to your detriment, then the good news is that you are free to file a complaint of judicial misconduct against that judge. The bad news is that under rules established unilaterally by the judicial bureaucracy, your complaint is likely to go nowhere.

On March 11, 2008 the Judicial Conference of the United States adopted a new set of rules for processing misconduct complaints against federal judges. The Judicial Conference, headed by Chief Justice John Roberts, is the policy-making arm of the federal judiciary, and its rules governing federal judicial discipline have attracted much criticism from citizen watchdog groups.

Presently, the doctrine of judicial immunity, which gives broad protection to judges for their judicial activities, is supported by two pillars that judges have erected for themselves. The first is exemplified by the 1978 Supreme Court ruling in *Stump v. Sparkman:* "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." That ruling insures that judges cannot be sued for errors committed while on the bench.

The second pillar is the set of rules implemented by the Judicial Conference

pursuant to the Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 351-364), which regulates federal judicial discipline and complaints filed by litigants against federal judges. These rules generally provide judges with the means to dismiss complaints against them.

The public has been very vocal in its dissatisfaction with the way judges have dealt with complaints against their colleagues, and in 2004 - responding to similar concerns raised by Congress - the late Chief Justice William Rehnquist appointed a committee of judges, led by Justice Stephen Breyer, to gather data on how complaints against judges are handled and to offer recommendations.

The Breyer Committee Report, completed in September, 2006, concluded that very little needed to be changed in the way that federal judges police themselves, and in July, 2007 Breyer's Committee on Judicial Conduct and Disability released its "Draft Rules Governing Judicial Conduct and Disability Proceedings" for public comment. These draft rules, now adopted, have become the subject of heated controversy.

According to data compiled by Dr. Richard Cordero from figures published by the Administrative Office of the U.S. Courts, of the reported 7,462 judicial misconduct complaints filed during the 10-year period of 1997-2006, nearly 99.9 percent were dismissed with little or no explanation, regardless of merit. Confidentiality rules have prevented the public and members of Congress from inspecting these complaints.

The new Rules Governing Judicial Conduct and Disability Proceedings, adopted at the March 11, 2008 meeting of the Committee on Judicial Conduct and Disability, chaired by Judge Ralph K. Winter of the 2nd Circuit Court of Appeals in Brooklyn, New York, will now render meaningless any complaint alleging that important evidence was ignored or misrepresented, or that a judicial outcome was invalid because of bias or conflict of interest. Such allegations would automatically be considered "merits-related" and dismissed without further investigation.

The Center for Judicial Accountability, a New York based nonprofit organization that advocates for effective and meaningful judicial selection and discipline, attempted to dissuade the Judicial Conference from adopting rules that provide for such automatic dismissals, claiming that existing law does not require the automatic exclusion of "merits-related" complaints. CJA's recommendations, which were made directly to Chief Justice Roberts, had little effect, however, and the new rules are scheduled to take effect 30 days from March 11th.

Separation of Powers

There is an inherent conflict of interest when judges both police themselves and dictate the rules that govern how they can be disciplined, and this can lead to abuses of judicial authority. Incidents of such abuse have spawned a nationwide, grass-roots movement calling for the creation of an alternative disciplinary mechanism, outside the federal judiciary, to review judicial misconduct.

Public disquietude over the performance of judicial self-discipline has attracted the attention of lawmakers whose revived concern in the subject has the potential to trigger a separation of powers conflict between the judicial and legislative branches of government, and lead to congressional hearings.

In 2006, Representative F. James Sensenbrenner, Jr. (R-Wis.), then House

Judiciary Committee Chairman, and Senator Charles Grassley (R-Iowa), a Member of the Senate Judiciary Committee, introduced legislation that would establish an independent Inspector General for the Judicial Branch. Although these bills, reintroduced in 2007 and strongly opposed by the ABA, were never brought to a vote, the concept of an extrajudicial disciplinary mechanism which they raised has generated a great deal of interest among legislators.

The U.S. Constitution clearly gives Congress the power to regulate the functioning of the courts and define what constitutes "good behaviour" of judges. Article III, Section 1, which created the Supreme Court, also endowed Congress with the power to "ordain and establish" all lower courts. It states:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

Implied in the constitutional establishment of the courts is the establishment of the rules and regulations that define their structure and operation. The question now is whether Congress will be able to wrest from the judiciary the power it gradually usurped for policing itself as Congress trustingly looked on. Once a critical mass of disaffected citizens applies sufficient pressure upon its representatives, Congress may suddenly recognize that it not only has the constitutional authority, but also a mandate from the people to restructure one of its own creations that has become so corrupted by self-serving regulation and provincialism that it has lost sight of its purpose to serve the public.

Judicial Question for Presidential Candidates

Sources

"Law Day Planning Guide"
American Bar Association
http://www.abanet.org/publiced/lawday/2008/Full_catalog.pdf

Center for Judicial Accountability Inc.
http://www.judgewatch.org

Dr. Richard Cordero, Esq.
http://www.Judicial-Discipline-Reform.org

"Draft Rules Governing Judicial Conduct and Disability Proceedings"
Committee on Judicial Conduct and Disability of the Judicial Conference
of the United States
http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html

"Stump v. Sparkman," Wikipedia,
http://en.wikipedia.org/wiki/Stump_v._Sparkman

"Sensenbrenner, Grassley Introduce Legislation Establishing an Inspector General for the Judicial Branch" [News Advisory, April 27, 2006].
http://judiciary.house.gov/media/pdfs/judgeIGintro42706.pdf

"A Firm Stand: ABA Opposes Bills to Create Inspector General for Federal Courts"
http://www.abajournal.com/magazine/a_firm_stand

HALT – Help Abolish Legal Tyranny
http://www.halt.org/jip/pdf/Comments_on_Judicial_Conduct_and_Disability.pdf

Authors Website: http://www.tulanelink.com

Authors Bio: Carl Bernofsky, Ph.D., is a former professor of biochemistry at Tulane University and Mayo Graduate School of Medicine. He is the author or co-author of numerous scientific publications and was the recipient of major awards from national granting agencies. A resident of New Orleans for 30 years, he relocated to Shreveport, Louisiana after Hurricane Katrina struck in August, 2005. For many years, he has been an advocate for judicial ethics reform and is working toward a legislative amendment that would require the recusal of adjunct faculty judges from cases that involve the universities that employ them. See: http://www.ipetitions.com/campaigns/tulanelink.

Back