

## **Secret Judicial Council Vote Rewrote Branch Governance Policy**

Is it possible that the Judicial Council and AOC could totally rewrite the Judicial Branch Governance Policies, and then somehow enact them in secret? Is it further possible that the AOC could subsequently totally rewrite the California Rules of Court pertaining to branch governance, including making an unprecedented grant of policy-making power to the AOC, and get those rules passed without any council discussion, and without the public and members of the judiciary being given any chance to comment prior to their enactment? This sounds simply preposterous, of course, but read on.

### **Branch Leaders Promise Openness, Transparency**

For years, critics of the Judicial Council and the Administrative Office of the Courts have decried the manner in which these organizations operate—largely in secret, shielded from the scrutiny of the public and the state’s judges, declaring themselves exempt from public meeting laws that bind others. The response to these complaints is always the same: “Our decision making is open, transparent, and fully accessible to all.”

The Chief Justice himself recently repeated his commitment to the transparency of Council operations, ironically in a letter to the Alliance of California Judges *denying* our request to open the Judicial Council “issues meetings” to the public.<sup>1</sup> In that letter, he explained that there was really no need for our presence at the meetings anyway, assuring us that:

“The Judicial Council does *all* (emphasis added) of its policy making at public business meetings held at least five times each year.” He went on at length to extol the “openness” of the Council’s processes. (Letter to ACJ from the Chief Justice Ronald George, 12/24/09)

Others in positions of power, notably the head of the AOC William Vickrey, and Justice Richard Huffman, a powerful 13 year council veteran, continually echo these sentiments.

Sadly, it appears that the critics had it right.

### **The Secret Governance Policy Changes**

While researching a matter involving the authority of the Judicial Council a few months ago I came upon a 12 page document titled “Judicial Council Governance Policies, June 2008”. It can be viewed at:

[www.courtinfo.ca.gov/rules/documents/pdfFiles/appendix\\_d.pdf](http://www.courtinfo.ca.gov/rules/documents/pdfFiles/appendix_d.pdf)

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<sup>1</sup> These private “issues meetings” are held the day before each public Judicial Council meetings.

The document apparently replaced the 1998 governance policies, which had been adopted then by public vote of the Council, as had the rules implementing those 1998 policies. It is not a trivial document. It is described as “the Council’s framework for how it engages in policymaking; how it is organized; what the roles and responsibilities are for its members, officers, and committees; what the council’s relationship is with the director of the AOC and the AOC, and the areas of accountability.”<sup>2</sup> In other words, it is the guts of the governance machine.

Other than a one-line reference in the 12/08 minutes, a search of all Council minutes in 2008 failed to turn up any mention of the new policies. The first substantive reference came in August, 2009, when, without public circulation or comment, a massive rewrite of page after page of the California Rules of Court Governance Rules (the so called Title Ten Rules) was enacted by the Council, without public vote, on the *consent agenda*. At that meeting the 6/08 policy was made an appendix to the rules. It was explained in a written report by Justice Huffman submitted to Council members on that date that the 6/08 policy had been adopted by the Council at an earlier time, and that the rules were necessary to bring things into conformity with the new reality. The report failed to explain how, when, and by what mechanism this adoption had taken place.

Startlingly, I also learned that the rules had never even been sent out for public comment, contrary to the usual practice, because of a written request by Justice Huffman’s Executive and Planning committee made to the Rules committee. In uncharacteristically confusing style, Justice Huffman wrote that to send the voluminous rules out for comment would “*invite comment on decisions that the council already has made, which would erroneously imply that council decisions about its internal operating procedures after having been made, are subject to public comment and revision.*” This argument failed to acknowledge that, at a minimum, the public, and judges, had an interest in insuring that the rules comported with the policies, even if the policy was somehow beyond reach, itself an unsupportable claim.

Nonetheless, the Rules committee acceded to the non-circulation request notwithstanding its apparent conflict with the 2007 published policy on the subject of rule circulation.<sup>3</sup>

The Council, too, was apparently unanimously convinced by this logic, and without objection, the rules were passed automatically without vote, without discussion, and without a public comment period. The rules are found at

<http://www.courtinfo.ca.gov/rules/amendments/august2009.pdf>.

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<sup>2</sup> 8/4/09 report from Executive and Planning Committee to Council

<sup>3</sup> Rules Committee may recommend non-circulation of proposed rules if they present merely a “noncontroversial or a non-substantive, technical change or correction. “How a Proposal Becomes a Rule”, Administrative Office of the Courts, September 2007.

The rules themselves are a bonanza of power for the AOC. Rule 10.2(b)(4) now allows policy making, a job the Council has always claimed for itself, to be delegated to the director of the AOC, currently Mr. William Vickrey. This change alone may have accounted for the secrecy involved in the drafting and promulgation of the rules. In summary, the rules seem to put the director at the center of the judicial universe.

### **Where Did the Policy Underlying the Rules Come From?**

Since this original mystery remained, I requested help from various AOC staffers. They tried their best to answer one simple (I thought) question for me: **When and how was the 6/08 Judicial Council Governance Policies revision adopted by the Council?** After exhaustive search efforts over several days, they gave up, confessing to shared confusion. Like me, the only mention they could find of the Council dealing with the matter was at the 8/09 meeting, a full 14 months after the supposed adoption by the Council of its governance policies.

Only after additional correspondence, which was widened to include the Chief Deputy Director of the AOC, did the answer finally come from a high ranking AOC lawyer. The policy was passed by an **“email vote of the Council which was concluded on 6/23/08”**. **This vote occurred between regularly scheduled Council meetings.** (The vote was, of course, 26-0.)<sup>4</sup> No press release occurred mentioning the governance change until August, 2009, 14 months later. Interestingly, the email that called for the vote was sent by a staffer and states that the vote is being called by Justice Huffman, chair of the E and P committee. The minutes of the E and P committee have been reviewed and are silent as to this referral.

### **Aren't There Rules Against This Sort of Stuff?**

How could the council act in secret on a matter of such gravity and complexity, and one so deserving of public scrutiny? Well, the rules in effect then, and now, suggest they couldn't. Per rule **10.5(h)**, the Council is only empowered to act *between* meetings on *“urgent matters if the Chief Justice or the Administrative Director approves.”* Each *“circulating order”* so adopted by the council *“must be included on the agenda for the next business meeting as an information item.”* Was this one? No.<sup>5</sup> There is no exception in the rules for governance policies.

### **Conclusion**

Certainly the judiciary must have the prerogative to handle certain matters

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<sup>4</sup> Unanimous votes are the norm, and debate is rarely robust. A records search revealed only 6 non-unanimous Council votes in the 13 years for which records are available online.

<sup>5</sup> The only circulating order posted at the next business meeting following June 23, 2008, dealt with conversion of S.J.O. positions to judgeships.

out of public view, but what was the reason here? What was the urgency prompting the secret vote? What evil was the Council trying to prevent by keeping their work hidden from their 1500 colleagues? The deliberative process at times requires secrecy, but should the decisions themselves also be made in secret, and then be *kept* secret? This is ludicrous, and a perversion of the process. Can it seriously be argued by our leadership that the over 1500 California trial judges and hundred or more Appellate Justices really had *no right whatsoever* to have input to our very governance policies? How can we tolerate a system wherein it takes near detective work, two months of inquiry, and a written opinion by an AOC lawyer to get answers to what should be simple questions? It seems that we may need more than legislation to cure our problems. Perhaps the initiative process should not be scrapped, as is apparently favored by the Chief Justice, at least until a few necessary changes to Article VI can be made, including the manner in which Council members are selected. It is time to discuss democratizing that process.<sup>6</sup>

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<sup>6</sup>All judges and justices on the Council are currently appointed to their positions by the Chief Justice. Any changes to this procedure requires a constitutional amendment.