

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-08-90106, 03-09-90009

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: May 28, 2009)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, AMBROSE, BROWN, BARTLE, KANE, and SLEET, *Members of the Judicial Council*.

SCIRICA, *Chief Judge*.

A Complaint of judicial misconduct was filed under 28 U.S.C. § 351 against the Subject Judge (Subject Judge I) and two other judges of the United States Court of Appeals for the Ninth Circuit (Subject Judge II and Subject Judge III).

The Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364, and the *Rules for Judicial-Conduct and Judicial-Disability Proceedings* govern this proceeding. Unless otherwise specified, all Rules cited in this Memorandum Opinion are the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

I.

A.

This Complaint came before the Judicial Council of the Third Circuit because it is

related to a prior complaint that was transferred to the Judicial Council of the Third Circuit from the Judicial Council of the Ninth Circuit. On June 12, 2008, Subject Judge I issued a request that the Judicial Council of the Ninth Circuit initiate proceedings under Rule 26 with regard to allegations contained in a June 11, 2008, *Los Angeles Times* article. In an order dated June 16, 2008, pursuant to 28 U.S.C. § 351(b) and Rule 5, the Judicial Council of the Ninth Circuit construed Subject Judge I's June 12 request as the identification of a judicial misconduct complaint against Subject Judge I, and stated that the "identified complaint" of misconduct against Subject Judge I "is based on allegations in [the] June 11, 2008, *Los Angeles Times* article."¹

The Judicial Council of the Ninth Circuit requested that the Chief Justice of the United States transfer the identified complaint to the judicial council of another circuit pursuant to Rule 26. The order of the Judicial Council of the Ninth Circuit stated, "Any pending complaints, or new complaints that may be filed, relating to this matter are included in this request for transfer." On June 16, 2008, the Chief Justice granted the request and selected the Judicial Council of the Third Circuit "to accept the transfer and to exercise the powers of a judicial council with respect to the identified complaint and any pending or new complaints relating to the same subject matter." *See* Rule 26.

¹ The June 16, 2008, order of the Judicial Council of the Ninth Circuit cited as the basis for the identified complaint the article entitled "9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website," which appeared on the *Los Angeles Times* website on June 11, 2008. An expanded and revised version of the article appeared, under a different headline, in the *Los Angeles Times* print edition on June 12, 2008.

Following the transfer of the identified complaint to the Judicial Council of the Third Circuit, the Honorable Anthony J. Scirica, Chief Judge of the United States Court of Appeals for the Third Circuit and Chair of the Judicial Council of the Third Circuit, entered an order appointing a Special Committee to investigate the identified complaint. *See* 28 U.S.C. § 353(a)(1); Rule 11(f). The members of the Special Committee were: Chief Judge Scirica, presiding; Marjorie O. Rendell, Circuit Judge, United States Court of Appeals for the Third Circuit; Walter K. Stapleton, Senior Circuit Judge, United States Court of Appeals for the Third Circuit; Garrett E. Brown, Jr., Chief Judge, United States District Court for the District of New Jersey; and Harvey Bartle III, Chief Judge, United States District Court for the Eastern District of Pennsylvania.

The primary focus of the June 11, 2008, article was the *Los Angeles Times*'s assertion that Subject Judge I “maintained a publicly accessible website featuring sexually explicit photos and videos.” The article also reported that “[s]everal year[s] ago,” Subject Judge I was involved in an effort to remove from Ninth Circuit computers what the *Los Angeles Times* described as “filters . . . that denied access to pornography and other materials.”

B.

This Complaint was received by the Clerk of the Third Circuit on November 24, 2008. Complainant, a former Director of the Administrative Office of the United States Courts, contends that in 2001 Subject Judge I, Subject Judge II, and Subject Judge III

violated various laws and failed to follow the Code of Conduct for United States Judges.² The crux of the Complaint was a widely publicized dispute in 2001 concerning the Administrative Office’s policy utilizing electronic “sensors” to track Internet use on computers within the judiciary — apparently in order to detect access to music and video files and other Internet materials — and the reactions of the Judicial Council of the Ninth Circuit and certain judges. These judges believed the Administrative Office’s monitoring of Internet use, whatever its intended purpose, posed serious problems for judges and judiciary employees, including possibly compromising the confidentiality of work product and official correspondence. Also implicated in the debate were the respective institutional roles and divisions of responsibility and authority, mandated by statute and informed by practice, of the principal governing and administrative bodies of the federal judiciary: the Judicial Conference of the United States, the judicial councils of the federal circuits, and the Administrative Office of the United States Courts. These bodies overlap to an extent in their responsibility and authority for court administration. In 2001, that

² The Complaint suggests that the Judicial Council of the Third Circuit should seek to discipline the person who held the position of Circuit Executive of the United States Court of Appeals for the Ninth Circuit in 2001 during the time of the alleged events at issue. Because that person was not in 2001 and is not now a federal judge, the Judicial Council lacks jurisdiction to consider any complaint against the Circuit Executive. *See* 28 U.S.C. § 351(a) (authorizing the filing of a complaint against “a judge”); Rule 4 (“A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.”).

overlap gave rise to some tension with respect to the Internet monitoring policy.

The Complaint alleges that in the spring of 2001, Subject Judge I, with the prior authorization of the Judicial Council of the Ninth Circuit, disabled electronic sensors put in place by the Administrative Office — the computer software tools that detected certain communications between computers and the Internet in the Eighth, Ninth, and Tenth Circuits — thereby allegedly damaging the computer “security system for Judges all over the country.” Subject Judge II (then-Chief Judge) and Subject Judge III allegedly served as “co-conspirators with” Subject Judge I, by: (1) approving and assisting in Subject Judge I’s efforts to disable the sensors, (2) “cover[ing] up” Subject Judge I’s alleged conduct with respect to the sensors, and (3) failing to “carry out their legal duty to file a misconduct complaint against and discipline” Subject Judge I for the alleged conduct with respect to the sensors. Complainant contends Subject Judge I wanted to disable the sensors to make it “impossible to detect the downloading of illegal pornography and illegal music by Federal Judges and Court staff,” and discounts the concerns, expressed by some judges at the time, about confidentiality and privacy. Complainant also disputes certain characterizations of the Internet monitoring policy offered in media reports and by Subject Judge I in 2001.

The dispute between Complainant and Subject Judge I with respect to these issues dates to 2001, when the two engaged in a public exchange of various charges — reaching the pages of *The Wall Street Journal* and *The New York Times*. For example, Subject

Judge I authored an opinion column published in *The Wall Street Journal*, on September 4, 2001, entitled “Privacy on Trial,” which criticized the Administrative Office’s Internet monitoring policy and identified Complainant as its chief proponent. On September 9, 2001, *The New York Times* published an article reporting various charges Complainant had leveled against Subject Judge I and other judges who opposed the Internet monitoring policy.

C.

Pursuant to Rule 11(f), and consistent with the instructions contained in the Chief Justice’s letter transferring the prior complaint against Subject Judge I, Chief Judge Scirica entered orders referring this Complaint to the Special Committee previously assigned to investigate the prior complaint.³ Pursuant to its authority under Rule 13(c), the Special Committee engaged the following counsel to assist the Committee: Robert C. Heim of Dechert LLP and J. Gordon Cooney, Jr., of Morgan, Lewis & Bockius LLP. Subject Judge I is represented by counsel. On April 29, 2009, the Special Committee filed its Report with the Judicial Council.⁴

“[A] complaint against a judge of a United States court of appeals . . . must be

³ Pursuant to Rule 11(g)(1), Chief Judge Scirica notified Subject Judge I, Complainant, and the Judicial Conference Committee on Judicial Conduct and Disability of the referral of the Complaint to the Special Committee.

⁴ Subject Judge I was notified of the filing of the Special Committee’s Report and received a copy of the Report. *See* Rule 15(b). Complainant was notified of the filing of the Special Committee’s Report. *See* Rule 16(a).

filed with the circuit clerk in the jurisdiction in which the subject judge holds office.” Rule 7(a)(1). Here, however, the Complaint is related to the prior complaint against Subject Judge I pending before this Judicial Council. As described above, the prior complaint was identified by Subject Judge I and, upon request by the Judicial Council of the Ninth Circuit, was transferred by the Chief Justice of the United States to the Judicial Council of the Third Circuit. *See* Rule 26. The Chief Justice authorized the Judicial Council of the Third Circuit “to exercise the powers of a judicial council with respect to the identified complaint and any pending or new complaints relating to the same subject matter.”

Because the instant Complaint relates to certain of the same subject matter as the prior identified complaint, the Judicial Council of the Third Circuit has jurisdiction. The identified complaint was based on allegations in a June 11, 2008, newspaper article that included a statement that Subject Judge I, “after learning that appeals court administrators had placed filters on computers[,] . . . led a successful effort to have the filters removed.” The instant Complaint relates to the removal of the “filters” — a term used in the newspaper article to refer to the sensors at issue. Although the 2001 dispute is not the focus of the newspaper article, the subject of the 2001 dispute is contained within the June 11, 2008, article. Complainant is one of the “appeals court administrators” described in the article as having “placed filters on computers.” Under the Chief Justice’s authorization, we find the Complaint is properly before the Judicial Council of the Third

Circuit as a “new complaint[] relating to the same subject matter.”

II.

The Complaint seeks to reopen a matter addressed and completely resolved in 2001 by the Judicial Conference of the United States. No further review is warranted. Reopening this matter would disregard the finality of the resolution in 2001, and any new inquiry would not only be improper but also would be prejudiced by the unexplained and unreasonable delay in the filing of the Complaint. Accordingly, we will dismiss the Complaint.

A.

Review of the Matter by the Judicial Conference of the United States in 2001

The Judicial Conference of the United States is the national policymaking body for the administration of the federal courts. Among its other responsibilities, the Judicial Conference has final review authority over matters of judicial conduct and disability, *see* 28 U.S.C. §§ 331 & 357, and it supervises the director of the Administrative Office of the United States Courts, *see* 28 U.S.C. § 604.

1.

The Events of 2001 as Explained in the *Report of the Proceedings of the Judicial Conference of the United States, September/October 2001*

The *Report of the Proceedings of the Judicial Conference of the United States, September/October 2001*, is a public document containing the official minutes of Judicial

Conference action. *See Report of the Proceedings of the Judicial Conference of the United States, September/October 2001, available at <http://www.uscourts.gov/judconf/sept01proc.pdf>.* The *Report* provides the following background for the events at issue in this Complaint:

In September 1997, the Judicial Conference approved a judiciary-wide policy aimed at protecting the security of the judiciary's electronic systems and information, requiring that, for computers connected to the judiciary's data communications network, access to the Internet would be provided only through national gateway connections approved by the Administrative Office pursuant to procedures adopted by the Automation and Technology Committee. It also urged all courts to adopt their own policies establishing local responsibility for managing employee access to the Internet and providing guidance on appropriate Internet use. In December 2000, concerned with the explosive growth in Internet usage within the judiciary, the Committee asked the Administrative Office to conduct an analysis of such use. The analysis revealed that a significant factor contributing to the growth of Internet traffic in the courts appeared to be related to personal, rather than business usage.

Informed of the Automation and Technology Committee's efforts, of the AO's analysis, and of subsequent steps taken to advise chief judges of potentially inappropriate Internet use, the Executive Committee, in March 2001, asked the Committee on Automation and Technology to develop a comprehensive plan for improving information technology security in the judiciary. The Executive Committee later expanded its request, urging the Automation Committee, on an expedited basis, to develop policies and procedures to protect the confidentiality of electronic judiciary communications and work product, including appropriate controls on monitoring.

Id. at 43 (citations omitted).

The *Report* includes the following account of the series of events discussed in the Complaint:

In March 2001, the Executive Committee was advised that, consistent with Judicial Conference policy, the Administrative Office was confidentially informing chief judges of potentially inappropriate use of the Internet by court personnel, so that the chief judge could take action, if appropriate. The Committee supported these actions, and asked the Committee on Automation and Technology to develop a comprehensive plan for improving information technology security in the judiciary. In late May, upon hearing of objections by certain judges to the judiciary's Internet access policy as managed by the AO, the Executive Committee urged the Committee on Automation and Technology, on an expedited basis, to develop policies and procedures to protect the confidentiality of electronic judicial communications and work product, including appropriate controls on monitoring.

The Executive Committee subsequently learned that the Ninth Circuit Judicial Council had directed the disconnection of intrusion detection software installed at the Ninth Circuit Internet gateway (which also serves the Eighth and Tenth Circuits). This software made possible, among other things, the identification of high-volume music and movie files. Concerned that the security of judiciary data in these circuits was jeopardized, the Committee determined to ask that the Ninth Circuit Council reactivate the intrusion detection software immediately, and agreed that if this was done, the identification of high-volume files (to which the Ninth Circuit Council had objected) would cease in all three judiciary gateways, pending the previously requested development of policies and procedures by the Automation and Technology Committee. The Ninth Circuit Council agreed.

In June, and again in August 2001, the Executive Committee was informed by the Chair of the Automation and Technology Committee of the latter committee's efforts to develop procedures on appropriate Internet use and the management of such use and on recommendations to be presented to the Conference for actions to be taken pending further development. In August 2001, the Executive Committee, with the concurrence of the Automation and Technology Committee, agreed to release to the public prior to the Conference session the latter committee's addendum to its report, which deals with this matter.

Id. at 39–40 (citations omitted).

2.

Consideration and Resolution of the Internet Security and Monitoring Issues
by the Judicial Conference of the United States in 2001

The events and surrounding matters at issue in the Complaint received extensive review by the Executive Committee of the Judicial Conference of the United States, the Judicial Conference Committee on Automation and Technology,⁵ and the Judicial Conference Committee on the Administrative Office. Significantly, in 2001, the full Judicial Conference of the United States, by formal action, addressed and resolved these issues by voting to adopt specific recommendations relating to the issues raised in the Complaint.

The Report of the Proceedings of the Judicial Conference of the United States, September/October 2001, recites that the Judicial Conference Committee on the Administrative Office “devoted considerable attention to the AO’s role and actions in managing the security and performance of the judiciary’s data communications network, including its procedures for notifying chief judges about possible inappropriate Internet use, which were consistent with established protocols. The Committee was briefed on current issues respecting the managing of judiciary Internet usage; it met in executive session and reviewed and approved the actions of the Administrative Office in that regard.” *Id.* at 41–42. The Judicial Conference Committee on Automation and

⁵ This committee is now known as the Committee on Information Technology.

Technology “developed a number of recommendations regarding operations of the national communications infrastructure, appropriate use of judiciary information technology resources, noticing of judiciary employees, and protection of the judiciary’s communications infrastructure.” *Id.* at 43.

The *Report of the Proceedings of the Judicial Conference of the United States, September/October 2001*, further recites that the Judicial Conference of the United States approved and voted to adopt the following recommendations of the Judicial Conference Committee on Automation and Technology, all specifically addressing the matters raised in the Complaint:

That the Judicial Conference —

- Pending the completion of a review of the system architecture in 2002 that will be completed under the Committee’s direction, with a view toward possible decentralization of Internet access to individual courts in a manner consistent with the security of the entire judiciary network, agree to reaffirm (a) that computers connected to the data communications network (DCN) shall access the Internet only through national gateways; and (b) that operations and security at those gateways are under the administrative, managerial, and logistical control of the Administrative Office, subject to the direction of the Conference or, where appropriate, Conference committees;
- Agree to adopt immediately, on an interim basis, the model use policy developed by the federal Chief Information Officers Council (except for Section F, “Privacy Expectations,” which the Committee determined to reconsider), as ultimately revised by the Committee or its Subcommittee on IT Architecture and Infrastructure to tailor it to the judiciary, as a national minimum standard defining appropriate Internet use, subject to the right of each court unit to impose or maintain more restrictive policies. Further agree that in carrying out

routine administrative, operational, and maintenance responsibilities, should instances of possibly inappropriate use of government resources come to the attention of the management of a court unit or the Administrative Office, established Judicial Conference notification policy will be followed;

- Reaffirm that individual courts have responsibility to enforce appropriate Internet use policies and direct the Administrative Office, as part of its regular audit process, to examine and comment upon the adequacy of the courts' enforcement methods;
- Agree to recommit to the Committee on Automation and Technology a recommendation on providing notice to judiciary employees of Internet use policies, in light of developments in technology and recent concerns raised on privacy; and
- Having discerned no material business use for Gnutella, Napster, Glacier, and Quake, all of which raise immediate and continuing security vulnerabilities, agree to (a) direct the Administrative Office to take appropriate steps to block such traffic involving computers connected to the DCN; and (b) delegate to the Committee the authority to block other tunneling protocols that may cause security breaches.

Id. at 44.

To summarize, a policy disagreement and misunderstandings concerning the nature, scope, and extent of the Administrative Office's monitoring policy with respect to Internet use escalated into a public dispute, reflecting some of the institutional tensions between the regional and national authorities responsible for court administration. The Judicial Conference of the United States reached a proper and final resolution in 2001 by adopting policies that addressed and resolved the arguments and objectives of the interested parties.

3.

Executive Committee Chair's Reaffirmation in 2008 That the Matters Raised
in the Complaint Were Resolved Completely and Concluded in 2001

Reiterating this thorough consideration and resolution, Chief Judge Thomas F. Hogan, then-Chair of the Executive Committee of the Judicial Conference of the United States, released the following statement on February 12, 2008:

Seven years ago, there was an issue involving the detection of increased bandwidth use on computers in the Judiciary, the Judiciary's monitoring of such use, and the need to maintain security within the Judiciary's electronic communications and work product. The matter was thoroughly reviewed and resolved completely at that time by the Executive Committee of the Judicial Conference of the United States. The Judicial Conference of the United States adopted a national policy on internet use which was coordinated with its already-existing use of filters and controls over access to music and movies on computers within the Judiciary, much like those utilized in many other public and private organizations. The matter was properly concluded seven years ago, there was no finding of judicial misconduct, and the Executive Committee finds no reason to revisit today those decisions.

B.

Dismissal of the Complaint

1.

The Complaint Is Dismissed Because the Judicial Conference of the United States
Resolved the Issues in 2001

The Complaint will be dismissed with respect to the actions of Subject Judge I and the Judicial Council of the Ninth Circuit in 2001, which were widely reported and

thoroughly examined at the time. The matter was resolved in 2001 through formal action and a vote by the full Judicial Conference of the United States. The Judicial Conference found no reason to inquire further into the events of 2001 that preceded its official action, nor did it make any finding of judicial misconduct. Chief Judge Hogan, then-Chair of the Executive Committee of the Judicial Conference of the United States, reaffirmed this conclusion in 2008. The Complaint seeks to reopen this final resolution and will be dismissed. *See* 28 U.S.C. § 354(a)(1)(B); Rule 20(b)(1)(A)(iv).

2.

The Complaint Is Dismissed for Unreasonable Delay

The disposition above suffices to warrant dismissal of the Complaint as to the 2001 dispute. We note in addition, however, that considerable time has passed since the events at issue. Any investigation today would not only disregard the finality of the resolution in 2001, but also would be prejudiced by the change of circumstances resulting from, and complications caused by, the passage of time. Under Rule 9, although a “complaint may be filed or identified at any time,” “[i]f the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed.” Dismissal is “appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.” Commentary on Rule 11. “[A] complaint may be dismissed, for reasons analogous to laches, if the delay in filing the complaint would prejudice the ability of the

judicial council to give fair consideration to the matter.” *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, Commentary on Rule 1(d) (2000).⁶ See also *id.* Rule 1(d) (“A complaint may be filed at any time. However, complaints should be filed promptly.”).

The analogy to the equitable doctrine of laches is apt. Laches shares a conceptual basis with statutes of limitations, which “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979). The doctrine of laches

was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society.

Brown v. County of Buena Vista, 95 U.S. 157, 161 (1877).

The rule of laches properly applies to proceedings under the Judicial Conduct and Disability Act. Judicial misconduct proceedings are in part administrative and in part inquisitorial. Ultimately they require a resolution. Because “lapse of time necessarily obscures the truth,” *Stearns v. Page*, 48 U.S. 819, 829 (1849), the consequences of unreasonable delay in initiating a proceeding are felt acutely not only by persons against

⁶ Rule 9 is adapted from, among other sources, the *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*. See Commentary on Rule 9.

whom stale allegations are leveled, but equally by the body charged with finding and evaluating the facts. Accordingly, the laches doctrine arises from the responsibility of all fact-finding bodies to “arrive at accurate conclusions as to the truth,” *Henson v. United States*, 27 Fed. Cl. 581, 591 (1993). See *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1360 (Fed. Cir. 2008) (recognizing that unreasonable delay may “undermin[e] the court’s ability to judge the facts” (quoting *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992))). In providing that a complaint must be dismissed when unreasonable delay frustrates a fair and accurate investigation, Rule 9 recognizes and protects the Judicial Council’s function — to obtain the truth before contemplating judicial discipline. This procedure comports fully with the Judicial Conduct and Disability Act. Section 358(c) of the Act provides that no misconduct rule promulgated by a judicial council or the Judicial Conference “may limit the period of time within which a person may file a complaint.” 28 U.S.C. § 358(c). While this provision may bar the enactment of categorical rules, it leaves intact the Judicial Council’s power to dismiss an untimely complaint when unreasonable delay will prejudice a fair and accurate investigation of a particular matter. As the Report of the House Committee on the Judiciary explained, the provision in 28 U.S.C. § 358(c) narrow[s] the rule-making power of the circuit councils so that a council cannot create a statute of limitations. Statutes of limitations, which are substantive in nature and not procedural, are for the Congress to make and not for the rulemakers. However, dismissal — on a case-by-case basis — may be appropriate, considering the individual equities involved.

H.R. Rep. No. 101-512 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6879, 6894; *see Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, Commentary on Rule 1(d) (2000) (dismissal for unreasonable delay on a case-by-case basis is consistent with the Judicial Conduct and Disability Act); *see also Hayward v. Nat'l Bank*, 96 U.S. 611, 618 (1877) (explaining that in applying the laches rule “the delay which will defeat a recovery must depend on the particular circumstances of each case”).

As noted, the Judicial Conference of the United States resolved the disputed issues in 2001. Complainant waited seven years to file a complaint.⁷ Complainant has brought nothing to our attention that would have precluded Complainant from filing this Complaint soon after Subject Judge I allegedly engaged in the actions at issue. Nor is there any indication that any information in the Complaint was not available to Complainant at the time of the alleged events. *Cf. Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993) (“When applying the equitable doctrine of laches in order to bar a claim, the period of delay is measured from

⁷ Although the rule of laches generally operates without regard to any statute of limitations applicable at law, “courts frequently refuse relief where it appears that the complainant . . . permitted the lapse of a period comparable to the one appearing in the statute of limitations.” 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 419a, at 173 (5th ed. 1941). We note that a five-year statute of limitations applies to the criminal statutes cited in the Complaint. *See* 18 U.S.C. § 3282. By way of further reference, in California the statute of limitations for civil claims for trespass and for fraud is three years; for libel and for slander, one year. *See* Cal. Civ. Proc. Code § 338(b) (trespass); § 338(d) (fraud); § 340(c) (libel and slander).

when the claimant had actual notice of the claim or would have reasonably been expected to inquire about the subject matter.”).

The Complaint includes numerous allegations regarding the statements, actions, and intent of alleged witnesses to the 2001 events who are now deceased, including the former Chief Justice of the United States and the following judges: the former Chair of the Committee on Automation and Technology of the Judicial Conference of the United States, the former Chair of the Executive Committee of the Judicial Conference of the United States, and a former member of the Executive Committee of the Judicial Conference of the United States. The unavailability of such witnesses, whose statements, actions, and intent are relevant to the Complaint, combined with other typical consequences of the passage of time, pose steep impediments to a fair and accurate investigation and prejudice Subject Judge I’s ability to rebut the allegations of the Complaint. Because the passage of time has made a fair and accurate investigation of the Complaint impractical, the Complaint will also be dismissed under Rule 9.⁸

⁸ The Complaint refers to the contents of several documents not attached as exhibits to the Complaint. The Complaint states that Complainant requested copies of these documents from the Administrative Office of the United States Courts, which declined to provide them to Complainant.

The Special Committee received from the Administrative Office and reviewed all available documents cited in the Complaint. Nothing in those documents contradicts the public record of the proceedings of the Judicial Conference of the United States. Nor does anything in those documents alter our conclusion that the Complaint seeks to reopen a matter finally resolved by the Judicial Conference in 2001.

III.

For the foregoing reasons, the Complaint will be dismissed under 28 U.S.C. § 354(a)(1)(B).⁹ *See* Rule 20(b)(1)(A)(iv) (Judicial Council may dismiss a complaint that is “not appropriate for consideration under” the Judicial Conduct and Disability Act); Rule 9 (mandating dismissal when “the passage of time has made an accurate and fair investigation of a complaint impractical”).¹⁰ An appropriate Order follows.

/s/ Anthony J. Scirica
Anthony J. Scirica, Chief Judge
United States Court of Appeals
for the Third Circuit

Dated: May 28, 2009

⁹ We note that the Complaint also includes allegations unrelated to the sensors dispute as “additional or possible misconduct” concerning Subject Judge I that “has been called to [Complainant’s] attention.” These allegations relate to conduct that occurred long ago — between 1985 and 2004 — and investigation of them would pose similar problems. There is no explanation why these allegations could not have been made earlier; their disposition should be no different from the disposition of those described above — dismissal for unreasonable delay.

¹⁰ On January 22, 2009, Complainant filed an “Amendment” to the Complaint, which included additional allegations against Subject Judge I. The Amendment to the Complaint is based on a newspaper article reporting that, for a period of some years ending in the summer of 2008, Subject Judge I used a university e-mail account periodically to send a group of friends and associates various jokes, some of which allegedly included tasteless material. Subject Judge I has acknowledged having maintained an e-mail “gag list” over a number of years and having sent some ribald jokes to the list, stated that any distribution of jokes via the gag list ceased in summer 2008, and apologized for any embarrassment to the federal judiciary that resulted from the distribution of jokes via the gag list. Under Rule 20(b)(1)(B), proceedings on the Amendment to the Complaint will be concluded on the basis of Subject Judge I’s corrective action.

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. Nos. 03-08-90106, 03-09-90009

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

O R D E R

(Filed: May 28, 2009)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, AMBROSE, BROWN, BARTLE, KANE, and SLEET, *Members of the Judicial Council*.

SCIRICA, *Chief Judge*.

After consideration of the Report and Recommendation of the Special Committee and the record and on the basis of the foregoing Memorandum Opinion entered on this date, it is ORDERED AND ADJUDGED that the Special Committee's Report and Recommendation is adopted and the Complaint, J.C. No. 03-08-90106, filed pursuant to 28 U.S.C. § 351, is hereby dismissed under 28 U.S.C. § 354(a)(1)(B) and Rules 9 and 20(b)(1)(A)(iv) of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, and the Amendment to the Complaint, J.C. No. 03-09-90009, filed pursuant to 28 U.S.C. § 351, is hereby concluded under Rule 20(b)(1)(B) of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Complainant and Respondent are notified that this Order constitutes the

final order of the Judicial Council under 28 U.S.C. § 354 and is conclusive and not subject to further review by the Judicial Council and is not judicially reviewable on appeal or otherwise except as provided by 28 U.S.C. § 357(a).

In accordance with 28 U.S.C. 357(a), “[a] complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.” The procedure for seeking review by the Judicial Conference Committee on Judicial Conduct and Disability is specified by Rules 21 and 22 of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. The full text of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings* is available from the Clerk’s Office of the Court of Appeals for the Third Circuit and on the Court of Appeals Internet site, www.ca3.uscourts.gov.

 /s/ Anthony J. Scirica
Anthony J. Scirica, Chief Judge
United States Court of Appeals
for the Third Circuit

Dated: May 28, 2009