

ATITUDINI

Judicial Transparency, Judicial Ethics and a Judicial Solution: An Inspector General for the Courts

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Rezumat:

Criticile aduse sistemului judiciar sunt adesea văzute ca un atac asupra independenței acestuia. Totuși, nu trebuie ignorate problemele reale semnalate și faptul că un sistem de autocontrol este ineficient. În acest context, un organism cu atribuții generale de control cum este cel al Inspectorului General ar contribui atât la creșterea independenței justiției, cât și la creșterea încrederii în sistem.



Abstract:

While the vast majority of judges uphold the highest ethical standards, some do not. Even more important, the procedure to investigate and discipline problem-judges is flawed. As Judge Winter has acknowledged, the status quo is not a confidence builder. The most direct and effective way to restore public confidence in the judiciary is to create an Inspector General. Instead of judges policing themselves, the independence of the Inspector General allows for careful screening of potential ethical violations. This solution is something that both the public and the judiciary should welcome.

Keywords: judicial system, magistracy, independence, public trust, justice, judges, reform, Inspector General, disciplinary proceedings, ethics, separation of powers, checks and balances

I. Introduction

Our judiciary finds itself subject to much criticism of late.¹ The

federal judiciary, in particular, has problems because its lifetime tenure and

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¹ Consider, for example, the remarks of Michael S. Greco, the President of the American Bar Association in 2005. His address to the American Bar Association House of Delegates, on August 8, 2005, noted: The past year has witnessed the killing

of judges and their family members, the attempt to strip away the jurisdiction and discretion of our courts, the demand to impeach judges for doing what they are supposed to do – apply the law to the facts and decide cases fairly, and threats of budget cuts for the judiciary by those who disagree with court rulings.

Michael S. Greco, President, Am. Bar Ass'n, Address to the American Bar Association House of

salary protection² do not invite the robust discipline that is possible (although not always attained) in the state court system.³ Although these constitutional protections give federal judges unique and valued independence, the federal judiciary often acts very thin-skinned, objecting to vocal criticism with all the vigor that the ancient dinosaurs had wished they could muster when they saw a comet heading towards earth.

The most prominent of those who fear the loss of judicial independence is Justice Sandra Day O'Connor.⁴ Since her retirement, she has repeatedly warned that "the breadth of the unhappiness being currently expressed, not only by public officials, but in public opinion polls in the nation" against federal judges is "certainly cause for great concern."⁵ She expressed alarm that some of these vocal critics would "strong-arm" the judiciary into adopting their policies. "It takes a lot of degeneration before a country falls into *dictatorship*," she warned, "but we should avoid these ends by avoiding these beginnings."⁶ Unless we act now, Justice

O'Connor predicted, we risk nothing less than dictatorship.

She has repeated these concerns in various forums.⁷ After looking back on her lifetime of experience as a practicing lawyer, a state judge, and a Supreme Court Justice, she concludes that these criticisms of the judiciary are "the most serious attack" in her lifetime.⁸

Strong words indeed. Yet, well within Justice O'Connor's lifetime—she was born in 1930—there have been serious (and successful) attacks on judicial independence. By comparison, federal judges in contemporary times are living in an era of good feeling.

Consider the information that President Franklin D. Roosevelt told his Attorney General, Francis Biddle, to pass on to the Supreme Court in 1942. F.D.R. wanted the Justices to know that he was going through with the trial of the Nazi saboteurs no matter how the Supreme Court would rule in *Ex Parte Quirin*.⁹ "I want one thing clearly understood," said the author of the Court-Packing Plan of 1937 to Biddle, "I won't hand them over

Delegates, at 3–4 (Aug. 8, 2005), available at http://www.abanet.org/op/greco/speeches/hod_annual.pdf.

² See John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 2.8 (7th ed. 2004); 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 2.9 (4th ed. 2007).

³ Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems & Materials* 676–92 (10th ed. 2008).

⁴ She is hardly alone. For example, in 2005, the ABA President complained, "Our own courts are under unprecedented attack." Greco, *supra* note 1, at 3. "We ... must not allow our independent judiciary to become hostage to any interest group or ideology." *Id.* at 4. Yes, we surely should be concerned about judicial hostages, but where are they, and where are the ransom demands?

⁵ Sandra Day O'Connor, Remarks at Georgetown University Symposium: Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28–29, 2006), in *In-Depth: On*

the Importance of Having a Fair and Independent Judiciary, 38 THE THIRD BRANCH: Newsletter of the Federal Courts, Oct. 2006, at 1, available at <http://www.uscourts.gov/ttb/10-06/indepth/index.html>.

⁶ Nina Totenberg, *O'Connor Decries Republican Attacks on Courts*, Nat'l Pub. Radio, Mar. 10, 2006, <http://www.npr.org/templates/story/story.php?storyId=5255712> (referring to the danger that the "sometimes uncivil tone" of critics poses "a danger to the independence of the judiciary") (emphasis added).

⁷ *E.g.*, Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

⁸ Sandra Day O'Connor, Remarks at American Law Institute 83rd Annual Meeting (May 17, 2006), 83 A.L.I. PROC. 251 (2006).

⁹ *Ex Parte Quirin*, 317 U.S. 1 (1942). See generally Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1 (2006) (discussing history and impact of *Ex Parte Quirin*).

Judicial independence does not imply immunity from oversight or from criticism. Judges should respond to criticism by answering the critics, not criticizing them.

to any United States marshal armed with a writ of habeas corpus. Understand?”¹⁰ Biddle clearly understood. So did Chief Justice Stone, who said, “That would be a dreadful thing.”¹¹ Shortly thereafter, the Court decided unanimously against *Quirin et al.* Within days, the Government executed most of the Nazi saboteurs after a secret trial in the building that housed the F.B.I.¹²

Now, that was real interference with an independent judiciary. In contrast, today’s verbal criticism is child’s play. Any student of history knows that judges, even federal judges, have been under attack since the beginning—from efforts to impeach Chief Justice John Marshall to efforts to impeach Chief Justice Earl Warren.¹³ Judges seem to prefer to give criticism rather than receive it. And when it comes to verbal criticism, some of the

harshest critics of judges in contemporary times are other judges.¹⁴

Judges should not be so thin-skinned. Henry Louis Mencken, whom we remember as H.L. Mencken, defined a judge as simply “a law student who marks his own examination papers.”¹⁵ A federal judge once told me that upon assuming the federal bench, a judge tells three lies: (1) I am over-worked; (2) I am under-paid; and (3) I was a great trial lawyer. A federal judge is simply a lawyer who knows a Senator. Judges, just like the rest of us, put on their robes two legs at a time. As Professor John Nowak reminded me on at least one occasion, the state gives robes to judges so that they can look impressive, and God gives them hemorrhoids so that they can look concerned. The best judges are more humble and realize that if they are tin gods, it is only in a narrow world.¹⁶

More seriously, Judge William Pryor gives us a better perspective: I respectfully disagree with the conventional wisdom of the Bench and Bar. I submit that the independence of the federal judiciary today is as secure as ever. The current criticisms of the judiciary are relatively mild and, on balance, a benefit to the judiciary. I am sympathetic to a call for an increase in pay, as my spouse, a

¹⁰ Francis Biddle, In Brief Authority 331 (1962). This book is the second volume of his memoirs.

¹¹ David J. Danelski, *The Saboteurs’ Case*, 1 J. OF SUP. CT. HIST. 61, 65 (1996). This entire issue is devoted to “The Supreme Court and World War II.”

¹² *Id.*

¹³ Jonathan M. Schoenwald, *A Time for Choosing: The Rise of Modern American Conservatism* 87–91 (Oxford Univ. Press 2001).

¹⁴ *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 606 (2005) (O’Connor, J., dissenting) (“[T]he Court both pre-empted the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of inviting lower court reassessments of our Eighth Amendment precedents.”) (emphasis added); *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J.,

dissenting) (“Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”) (emphasis added); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (“Today’s decision, though dressed up as a legal opinion, is really no more than a disagreement with the community’s sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court.”) (emphasis added).

¹⁵ James E. Combs & Dan Nimmo, *The Comedy of Democracy* 162 (1996).

¹⁶ *See, e.g.*, Ronald D. Rotunda, *Remembering Judge Walter R. Mansfield*, 53 BROOK. L. REV. 271 (1987).

certified public accountant, frequently reminds me of the opportunity cost of public service, but to say that our current pay is a threat to our independence is an exaggeration.¹⁷

As Judge Pryor reminds us, hyperbolic reaction to modern day vocal criticism of judges is factually inaccurate. Moreover, it cheapens the sacrifices of those judges who suffered real threats.

Consider, for example, the courageous judges in the Deep South who integrated our schools during the civil rights struggle.¹⁸ They issued desegregation rulings in the face of repeated physical threats against them and their families.¹⁹ One such example is District Judge J. Skelly Wright, who later became a judge on the D.C. Circuit. Justice Ruth Bader Ginsburg later related a story that Judge Wright's secretary had told her:

In May 1960, Judge Wright issued the first order ever in Fifth Circuit territory setting a day certain for the beginning of grade school desegregation. His signature on that order and earlier rulings, all of them stridently opposed by strong

forces in this State and City, put his personal safety at risk. Opposition to the Judge's day-certain order, his secretary recalled, had reached fever-pitch. One evening, when Judge Wright and his wife were out, a caller from the White Citizens Council rang. (Though the phone number was unlisted, it was found out.) The Wrights' son, James, then age thirteen, answered. "Let me speak to that dirty nigger-loving Communist," the voice demanded. Son James replied: "He's not at home. May I take a message?" Sheltered by loving parents through all the vilification and ostracism the Wrights endured, their young son simply took it in stride, along with the cross burned on the lawn and the company of U.S. marshals around the clock.²⁰

To suggest that modern criticism is as serious as what Judge Wright experienced depreciates what he faced.

Judicial independence does not imply immunity from oversight or from criticism.²¹ As both Justice Breyer²² and Chief Justice Roberts have conceded, "in a limited number of high-profile cases, the judiciary needed to do a better job,"²³

¹⁷ William H. Pryor, Jr., *Not-So-Serious Threats To Judicial Independence*, 93 VA. L. REV. 1759, 1762–63 (2007). See also William H. Pryor, Jr., *Judicial Independence and the Lesson of History*, ALA. LAW., Sept. 2007, at 389; William H. Pryor, Jr., *Neither Force Nor Will, But Merely Judgment*, WALL ST. J., Oct. 4, 2006, at A14; Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, THE PROF. LAW., Fall 2000, at 1.

¹⁸ See Maximilian Amster, *Judge Pryor on Judicial Independence*, HARV. L. REC., Mar. 15, 2007, <http://media.www.hlrecord.org/media/storage/paper609/news/2007/03/15/News/Judge.Pryor.On.Judicial.Independence-2777228.shtml>

¹⁹ See J.W. Peltason, *Fifty-eight Lonely Men: Southern Federal Judges and*

School Desegregation 221–29 (1971). See e.g., Liva Baker, *The Second Battle of New Orleans: The Hundred-Year Struggle to Integrate the Schools* (1996); Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, JR. and The South's Fight Over Civil Rights* 185 (1993); Jack

Bass, *Unlikely Heroes* (1981); Frank Sikora, *The Judge: The Life & Opinions of Alabama's Frank M. Johnson, JR.* (1992).

²⁰ Ruth Bader Ginsburg, *Remarks at Judge Robert A. Ainsworth, Jr. Memorial Lecture at Loyola University New Orleans, School of Law: Four Louisiana Giants in the Law* (Feb. 4, 2002), http://www.supremecourtus.gov/publicinfo/speeches/sp_02-04-02.html.

²¹ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* § 10.1-1.2(b) (2008–2009).

²² *Judicial Conduct & Disability Act Study COMM., Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 5 (Sept. 2006), available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>.

²³ John G. Roberts, Jr., *Remarks at Georgetown University Law Center & American Law Institute Conference: Fair and Independent Courts: A Conference on the State of the Judiciary* (Sept. 28, 2006), <http://www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf>.

regarding ethics charges. The two Justices are right: judges should respond to criticism by answering the critics, not criticizing them. If the critics are mistaken, judges should explain why, by answering them thoughtfully, not by complaining and raising the red flag of judicial independence.

In fact, *federal judges*, of all people, should not fear criticism. As Professor Steve Lubet has reminded us, “Federal judges have more insulation than anyone in American political life. A judge with life tenure needs less protection, not more, than an ordinary citizen.”²⁴

The critics raise important questions that we should not sweep under the rug. The problem-judge is atypical, and, the problems are indeed limited. But the federal judiciary has failed us in several high-profile cases, and there is room for reform. I offer a modest reform that will help keep our judiciary independent (because no one favors a dependent judiciary) and will help keep our judiciary accountable (because no one favors a judiciary that is above the law).

II. The judicial plea for statutory changes

Sadly, there are plenty of recent examples of judicial misbehavior that deserve criticism. Nevada recently removed a state judge who engaged in bizarre action such as sleeping on the job, breaching security by hiring private

security guards, and inflicting her foul mouth and mercurial temperament on her staff.²⁵ She even made false statements to impede the Nevada Judicial Discipline Commission’s investigation. The Commission concluded, “The damage resulting from her antics and willful misconduct will be felt by the judicial system for a significant future period of time.”²⁶ Earlier, this same Commission removed another judge who admitted to sexual improprieties, including having sex in hotels with a staff member during working hours.²⁷

Recently, the class action specialist, Milberg LLP, has been back in the news. In 2008, this law firm settled a federal indictment charging it with a thirty-year kickback scheme.²⁸ As part of the agreement with federal prosecutors, it repudiated three of its partners, including Melvyn Weiss. They eventually all pled guilty. Later, we learned that the Milberg law firm agreed to pay Weiss a share of the law firm’s *future* lawsuit winnings.²⁹ One would think that would run afoul of ethics rules that prohibit sharing legal fees with one who is not a member of the firm, and a non-lawyer to boot—a category that now includes Mr. Weiss.³⁰ During the summer of 2008, New York Supreme Court Judge Herman Cahn approved this payment to Mr. Weiss, even though the judge acknowledged that the normal rule is that law firms may not share fees with

²⁴ Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, at B3.

²⁵ David Kihara, *Discipline Commission: Halverson Removed from Bench*, LAS VEGAS REV. J., Nov. 18, 2008, <http://www.lvrj.com/news/34633874.html>; Debra Cassens Weiss, *Discipline Body Removes Judge Halverson, Citing ‘Bizarre’ Staff Treatment*, ABA J. LAW NEWS NOW, Nov. 18, 2008, http://www.abajournal.com/news/discipline_body_removes_judge_halverson_citing_bizarre_staff_treatment.

²⁶ Weiss, *supra* note 25.

²⁷ Kihara, *supra* note 25.

²⁸ See Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?*, 11 BRIEFLY (Am. Enterprise Inst. for Pub. Pol’y Res., Wash. D.C.), May 2008.

²⁹ *Milberg’s New Hire: The Plaintiffs Firm Has an Eye for Talent*, WALL ST. J., Feb. 25, 2009, at A14, available at <http://online.wsj.com/article/SB123552900194266313.html> [hereinafter *Milberg’s New Hire*].

³⁰ See *Model Rules of Prof’l Conduct* R. 5.4(a) (2003); Rotunda & Dzienkowski, *supra* note 21, §§ 5.4-1, 5.4-2 & 5.4-3

non-lawyers such as Mr. Weiss, who had forfeited his right to practice law.³¹ In December of that year, the Milberg law firm announced that it had hired a new lawyer, Judge Herman Cahn—the same judge who had approved of the Milberg arrangement.³² Interesting.

Meanwhile, earlier this year, a Pennsylvania state judge, Mark A. Ciavarella Jr., pled guilty to taking part in a kickback scheme. A week after that, a Wilkes-Barre newspaper accused him of fixing an unrelated defamation case where he ordered the newspaper to pay \$3.5 million.³³ State prosecutors charged Ciavarella and another Pennsylvania judge with taking over \$2.6 million in kickbacks from 2003 to 2008 to send teenagers to two privately run youth detention centers. The ramifications of this ethical lapse are wide-ranging: the Pennsylvania Supreme Court will have to overturn up to 1,200 juvenile convictions because of this illegal kickback scheme.³⁴

The mind boggles when one considers these problem-judges. All of these examples, however, are state judges. The Constitution shields federal judges with

life-time tenure and salary protection. What can be done to limit the harm that federal problem-judges cause? The answer is that we should create an institutional check to deal with problem-judges. This would instill desperately needed confidence in the federal judiciary.

Let us focus on the federal judiciary. In February of 2009, Federal Judge Samuel Kent pled guilty to obstruction of justice on the eve of his criminal trial. Federal prosecutors had indicted him for allegedly sexually abusing two court employees and for failing to fully disclose the extent of the alleged abuse to a court panel charged with investigating the matter.³⁵ He pled guilty to obstruction under a plea agreement that called for the dismissal of the sexual-abuse charges. The court could have sentenced him to twenty years, but the prosecutors agreed to ask for no more than three years—still a hefty penalty for a man who must spend time behind bars with felons he may have sentenced there earlier.³⁶ After the House Judiciary Committee voted to impeach him, he resigned effective immediately.

³¹ . The discipline authorities disbarred Weiss after his conviction, which he described in court on the morning of his sentencing as a “fall from grace.” Tiffany Hsu, *Melvyn Weiss Sentenced for Class-Action Kickback Scheme*, L.A. TIMES, June 3, 2008, <http://articles.latimes.com/2008/jun/03/business/03-business-fi-weiss3>.

³² *Milberg’s New Hire*, *supra* note 29.

³³ Ian Urbina, *Suit Names 2 Judges Accused in a Kickback Case*, N.Y. TIMES, Feb. 13, 2009, at A13, available at <http://www.nytimes.com/2009/02/14/us/14judge.html?ref=us>; See also Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 12, 2009, at A22, available at <http://www.nytimes.com/2009/02/13/us/13judge.html?ref=us>; see also Peter Hall & Leo Strupczewski, *Judges to Serve More Than Seven Years in Prison After Pleading Guilty in Kickbacks Probe*, THE LEGAL INTELLIGENCER, Jan. 28, 2009, <http://www.law.com/jsp/article.jsp?id=1202427800493&rss=newswire>.

³⁴ The other judge was Michael Conahan. See *In Re Judge Mark A. Ciavarella, Jr.*, Judicial Administration Docket No. 1, 2009 Pa. LEXIS 240 (Pa. Feb. 13, 2009) (per curiam); *In re Ciavarella*, 2009 Pa. LEXIS 196 (Pa. Super. Ct. Jan. 28, 2009) (per curiam); see also *In re Judge Michael T. Conahan*, Judicial Administration Docket No. 1, 2009 Pa. LEXIS 187 (Pa. Sup. Ct. Jan. 28, 2009) (per curiam); John Sullivan, *Judge May Overturn Hundreds of Cases in Luzerne Scandal*, PHILADELPHIA INQUIRER, Mar. 27, 2009, at A1; Michael Rubinkam & Maryclaire Dale, *Pa. Judges Accused of Jailing Kids for Cash*, MOBILE PRESS-REGISTER, Feb. 12, 2009, at A6, available at 2009 WLNR 3021035.

³⁵ Nathan Koppel, *Federal Judge Pleads Guilty to Obstruction*, WALL ST. J., Feb. 24, 2009, at A2, available at <http://online.wsj.com/article/SB123540590474748727.html>.

Otherwise, he could have continued to collect his federal judicial salary.³⁷

Last fall, another federal judge, U.S. District Judge Edward W. Nottingham, chief of the federal court in Colorado, resigned, effective October 29, 2008.³⁸ He did not leave because of his health or a desire to return to the practice of law.³⁹ Instead, he faced multiple misconduct complaints.⁴⁰ The Tenth Circuit Chief Judge, Robert H. Henry, announced that, in response to multiple complaints and investigations, Judge Nottingham resigned immediately, both as Chief Judge of the District of Colorado and as a United States District Judge.⁴¹

A month before that, the Judicial Council of the Fifth Circuit suspended Federal District Judge G. Thomas Porteous Jr. of New Orleans for two years for failing to report gifts from lawyers who

appeared before him and for concealing debts while in personal bankruptcy.⁴² A Louisiana Congressman is urging the House to take quick action to impeach Porteous.⁴³

A criminal remedy sometimes can deal with severe incidents of judicial misconduct, but that is not always the resolution. Let me furnish a recent example that both makes the case for reform, and pleads for statutory changes. I refer to the *In re Opinion of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*.⁴⁴ The Opinion deals with Judge Manuel Real, but no one would know that by reading it. The judges were careful not to name him, even though Judge Real is no neophyte when it comes to media attention.

The majority opinion held that under the relevant federal statute,⁴⁵ it had no

³⁶ *Id.*

³⁷ Posting of Michael Winter to U.S.A. Today, <http://blogs.usatoday.com/ondeadline/2009/06/impeached-us-judge-in-texas-resigns.html> (June 25, 2009, 19:41 EST); see Lisa Olsen, *Impeached Kent Quits Judge's Salary Will Stop Tuesday*, HOUS. CHRON., June 26, 2009, at B1; Stewart M. Powell, *Jailed Kent Sees First Day as Judge Without a Salary*, HOUS. CHRON., July 1, 2009, at B1, available at <http://www.chron.com/disp/story.mpl/headline/metro/6507543.html>.

³⁸ Felisa Cardona, *Nottingham Resigns – Ongoing Misconduct Probe*, DENV. POST, Oct. 22, 2008, at A1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.S. Court of Appeals for the Tenth Circuit, COURT NEWS AND EVENTS, (Oct. 21, 2008), http://abajournal.com/uploads/10th_circuit_screen_shot.JPG; see e.g., Molly McDonough, *Qwest CEO Judge Nottingham Resigns Amid Misconduct Probe*, ABA J. LAW NEWS Now, Oct. 21, 2008, http://www.abajournal.com/weekly/qwest_judge_nottingham_resigns_amid_misconduct_probe; *Judge in Qwest CEO Insider Trading Case Resigns*, SEATTLE POST-INTELLIGENCER, Oct. 21, 2008, http://www.seattlepi.com/business/384302_qwest22.html. Sean Harrington, who heads a legal technology firm, had filed a complaint in January citing news reports that Nottingham allegedly viewed adult Web sites on his government

computer in his chambers. Harrington also alleged that Nottingham had testified in his own divorce case that he spent \$3,000 at a strip club. Sealed transcripts of the divorce case were first obtained in August 2007 by KUSA-TV. . . . Another complaint against Nottingham involved a September 2007 dispute between him and attorney Jeanne Elliott over a parking spot for the disabled. Nottingham had parked in the spot, and Elliott parked her wheelchair behind his vehicle and refused to get out of his way. Police issued Nottingham a \$100 ticket.

⁴² Nathan Koppel, *Federal Judge Suspended on Misconduct Charges*, WALL ST. J., Sept. 13, 2008, at A4, available at <http://online.wsj.com/article/SB122126308499630469.html?mod=relevancy>

⁴³ Bruce Alpert, *Scalise Urges Quick Action On Porteous Impeachment Probe*, THE TIMES-PICAYUNE, May 4, 2009, available at http://www.nola.com/politics/index.ssf/2009/05/scalise_urges_quick_action_on.html.

⁴⁴ *In re Opinion of the Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106 (U.S. Jud. Conf. 2006). Judge Dolores K. Sloviter, joined by Judges Pasco M. Bowman II and Barefoot Sanders, wrote the majority opinion. Judge Ralph K. Winter, Jr., joined by Judge Carolyn R. Dimmick, dissented

⁴⁵ 28 U.S.C. § 351 (2002).

jurisdiction to discipline Judge Real because the Chief Circuit Judge of the Ninth Circuit and the Judicial Council of the Ninth Circuit did not follow the *mandatory* statutory procedures. The majority said that the “chief judge may avoid review by the Judicial Conference (and by definition our committee) by the simple expedient of failing to appoint a special committee under § 353 and instead dismissing a complaint under § 352(b).”⁴⁶

The reasoning of the majority should be eyebrow-raising. Because the Ninth Circuit Council and the Chief Judge did not follow procedures that Congress mandated that they follow, they can prevent further judicial review! The majority interpreted the statute in a way that makes no sense. Why would Congress instruct the judges to follow various procedures and then provide that, if the judges ignore the statutory mandate, the judges avoid a reviewing court? We can understand that Congress might provide some sort of penalty when judges ignore its statute. But why would Congress provide that if judges refuse to comply with the discipline procedures governing judges, then the judges may create their own “get out of jail free” card?

It seems customary in these types of cases for the judges to blame the legislature for enacting a statute that is

difficult to comprehend after the judges’ creative interpretation. Hence, the majority of the members of this panel—Judges Dolores K. Sloviter, Pasco M. Bowman II, and Barefoot Sanders—*requested that Congress enact new legislation* to solve the problem that this majority had created.⁴⁷ However, we have no evidence that Judges Sloviter, Bowman, and Sanders actually ever sent their request to Congress, or asked the Administrative Office of the United States Courts to send their opinion to Congress.⁴⁸ The judges simply said Congress should do something about this problem—the problem that these judges had created—and then went about other business.

I propose to grant the majority’s wish. Congress *should* enact new legislation. Congress should create an Inspector General for the federal courts. Of course, the details of the statute should provide safeguards to preserve judicial independence. But Congress should do more than simply amend the particular statute to cure the strange interpretation of Judges Sloviter, Bowman, and Sanders. If that is all Congress did, it would not prevent Judges Sloviter, Bowman, and Sanders, or their compatriots, from engaging in more creative interpretation in the future. An Inspector General, among other duties, can advise

⁴⁶ *Opinion of the Judicial Conference Comm.*, 449 F.3d at 109. See 28 U.S.C. §§ 352, 353 (2002).

⁴⁷ *Opinion of the Judicial Conference Comm.*, 449 F.3d at 109 (“[W]e believe that *additional legislation* expanding the scope of the Conference’s (and, by delegation, this Committee’s) jurisdiction is necessary . . .”). See e.g., Pamela A. MacLean, *Panel Says Judge’s Ethics Case Not Handled Properly: 9th Circuit Chief Failed To Appoint A Committee*, 28 NAT’L L.J. 6 (2005) (“Alleged mishandling of a 2003 judicial misconduct complaint against veteran Los Angeles federal judge Manuel L. Real prompted the federal judicial discipline committee to suggest that Congress expand the

committee’s authority to review such complaints.”).

⁴⁸ The mission of the Administration of the U.S. Courts include the following: On behalf of the Judicial Conference, the agency transmits draft bills to Congress and arranges for members of Judicial Conference committees and other judges to testify as expert witnesses at congressional hearings. As legislation that impacts the courts is drafted by the House and Senate, the AO communicates the concerns, interests, and positions of the Judicial Conference and suggests changes or compromises. Three Branch Coordination, U.S. Courts, <http://www.uscourts.gov/ao/branchcoordination.htm> (last visited Oct. 20, 2009).

Congress when judges in other cases say that Congress needs to amend the statutes. The problem is the system and not the way Congress has drafted this particular statute.

Judge Sloviter's opinion is the most recent chapter in a dispute that started in 2003, when a lawyer filed a judicial misconduct complaint against Federal Judge Manuel Real. The complaint alleged that Judge Real had improperly seized a bankruptcy case from another judge in order to aid a woman whose probation he was overseeing. The federal judicial discipline committee ruled that it did not have the power to sanction Judge Real because the Chief Judge of the Ninth Circuit had improperly investigated the complaint.

Judge Real is no stranger to litigation where he is a party. An earlier case is *Standing Committee v. Yagman*.⁴⁹ The facts that led to the controversy began when Yagman, a lawyer, sought to disqualify Judge Manuel Real, who had the case assigned to him. The response of Judge Real was to seek discipline against the lawyer. The Ninth Circuit rejected the attempt to discipline Yagman.⁵⁰

In an even earlier case Judge Real had granted a directed verdict against Yagman's clients and then sanctioned Yagman personally for a quarter of a million dollars. The Ninth Circuit overturned Judge Real's sanctions and remanded the case for reassignment to

another judge.⁵¹ It concluded that Judge Real should not hear further matters involving this case in order "to preserve the appearance of justice."⁵²

Judge Real did not like that remand, so he challenged the Ninth Circuit's power to reassign the case. (I am not making this up. Judge Real just refused to obey the Ninth Circuit.) Yagman then petitioned for a writ of mandamus.⁵³ Of course, the Ninth Circuit, once again, imposed its earlier order. Still, this controversy did not end until the Supreme Court denied Judge Real's petition for certiorari.⁵⁴

In *Calderon v. IBEW Local 47*, the Ninth Circuit held that Judge Real abused his discretion in dismissing an action.⁵⁵ But this was no ordinary disagreement, where the appellate court simply made new law or had a different interpretation of that law than the trial judge. Instead, the Ninth Circuit said, in harsh tones:

The district judge's *unseemly haste* in dismissing this case, and his failure to heed the perfectly plausible (and meritorious) explanation proffered by plaintiff in his motion for reconsideration, has cost the parties significant money and delay in pursuing this wholly unnecessary appeal. *Justice suffers when judges act in such an arbitrary fashion. We apologize to the parties and admonish the district judge to exercise more care and patience in the future.*⁵⁶

Despite all of these actions, it was not until 2006 that Judge Manuel Real secured the attention of the Judicial

⁴⁹ *Standing Comm. v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (Kozinski, J.) (rejecting discipline imposed on lawyer for comments about a federal trial judge). This case arose when Judge Manuel Real was assigned a case and Yagman, a lawyer, sought to disqualify him. For further factual background regarding this case, see Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1.

⁵⁰ *Yagman*, 55 F.3d at 1445.

⁵¹ *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986).

⁵² *Id.* at 1188

⁵³ *Brown v. Baden*, 815 F.2d 575, 576 (9th Cir. 1987) (per curiam) ("We grant the writ of mandamus, thereby directing enforcement of our previous decision that Chief Judge Real be replaced by a judge randomly selected by the clerk of the district court.")

⁵⁴ *Real v. Yagman*, 484 U.S. 963 (1987).

⁵⁵ *Calderon v. IBEW Local 47*, 508 F.3d 883 (9th Cir. 2007) (per curiam).

⁵⁶ *Calderon*, 508 F.3d at 887 (emphasis added).

Conference Committee to Review Circuit Council Conduct and Disability Orders. More precisely, as far as we know, these earlier cases involving Judge Real's peculiar behavior did not go to the Judicial Conference Committee. I say, "as far as we know" because it does not seem to be the custom of the Judicial Conference Committee to name the judge being investigated. That is a courtesy that no lawyer has if the client sues him for malpractice, no matter how frivolous the claim.

Judge Ralph Winter's dissent, joined by Judge Carolyn Dimmick, warned that allowing judges to police themselves was not working. The intention is noble—self-policing helps support an independent judiciary—but the result is a system where the judiciary is sweeping problems under the rug. The conclusion of these judges is born of their experience. Their remarks are worth quoting at length:

The judicial misconduct procedure is a self-regulatory one. It is self-regulatory *at the request of the judiciary* in a legitimate effort to preserve judicial independence. A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complainants against judges will be disfavored. *The Committee's decision in this case can only fuel such suspicions.*⁵⁷

Later, they further emphasized:

The required statutory procedure was not followed. The complaint was

dismissed without any discussion by the Chief Circuit Judge or the Council majority of the facts *admitted by the District Judge* accused of an *improper ex parte* contact. The admitted facts would be regarded by some, if not most, professional observers as establishing just such a contact. The Committee rules that it has no power to review the Council's decision *because the statutory procedures were not followed* by the Chief Circuit Judge and Council. *The disposition of the present matter is therefore not a confidence builder.*⁵⁸

It is time for a change. When we use a system and it does not work, our response should not be to invoke a shibboleth or catchphrase like "judicial independence." Our response should be to create a system that will work.

Judge Manuel Real, as discussed above, has often been the subject of critical appellate rulings.⁵⁹ The particular case that led to this opinion arose when Judge Real decided that he would personally supervise the probation of one Deborah M. Canter. She had pled guilty in April 1999 to one count of loan fraud and three counts of making false statements. She was 42 years old at the time.⁶⁰ She was described as a "comely" and "an attractive female."⁶¹

Two months before she pled guilty, she had separated from her husband, Gary Canter, who moved out of the house, which they had rented. Deborah Canter

⁵⁷ *In re* Opinion of Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 117 (U.S. Jud. Conf. 2006) (Winter, J., dissenting) (emphasis added).

⁵⁸ *Id.* (emphasis added).

⁵⁹ *In re* Yagman, 796 F.2d 1165, 1188 (9th Cir.1986). Students study Judge Real's actions to learn how judges should not behave. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 144 (Foundation Press, 4th ed. 1987). See Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (reversing disciplinary

proceedings against lawyer who made statements criticizing Judge Real).

⁶⁰ Deborah Cantor's lawyer said that he had no evidence of any improper relationship between the judge and Ms. Canter, "but was 'suspicious' because Ms. Canter was a 'cute girl' who projected a 'waif' persona that was appealing. At the time he thought that perhaps [the judge] had become aware of her divorce and imminent eviction in the course of one of her probation visits." *In re* Complaint of Judicial Misconduct, 425 F.3d 1179, 1189 (9th Cir. Jud. Council 2005) (Kozinski, J., dissenting).

⁶¹ *In re* Complaint of Judicial Misconduct, 425 F.3d at 1180.

continued to live there. The owner of the house was a trust, which Gary's parents had established.⁶²

Deborah Canter continued to live in this house but stopped paying rent. It cost her less money that way. In October 1999, Alan Canter, the property's trustee, filed suit, seeking to evict her and collect back rent. Shortly before her eviction, she personally delivered a letter asking Judge Real "for his help in preventing her eviction." Deborah Canter told her lawyer's secretary that the letter (this *ex parte* contact with the judge) had "worked." Deborah Canter's own lawyer admitted that he was "shocked" because it was a "complete no-no going to a judge secretly without talking to the other side." Judge Real's actions allowed Deborah Canter to live rent-free for two years, costing the creditors over \$50,000.⁶³

Judge Real conceded that he met with Canter when the lawyers for the other party were *not* present.⁶⁴ He conceded that they talked about her case. Yet, he sought to justify his actions by claiming that he believed her legal representation was inadequate. One wonders why his purported rationale was at all relevant. He is a federal judge and is not supposed to practice law. He is not supposed to give her legal advice or represent her. Her eviction proceedings were in state court, not federal court. *Federal* bankruptcy courts do not have authority to determine

whether counsel is adequately representing parties in *state* court proceedings.

Yet even if one actually believed that federal judges could engage in *ex parte* communications and interfere with a state proceeding when this younger woman asked him to intervene, Judge Real never bothered to hold a hearing on this issue; he simply asserted his new power.

When the trustee filed motions to evict Cantor, Judge Real denied them. When asked why, Judge Real curtly responded, "Just because I said it."⁶⁵

Judges may not meet with litigants *ex parte* and then use their power in a federal case to help a litigant in a state case. Judge Real's orders lacked legal authority. Furthermore, he based his unlawful orders "on *ex parte* communications from the debtor for whose benefit those orders were entered."⁶⁶

Nonetheless, Judge Mary M. Schroeder, Chief Judge of the Ninth Circuit, summarily dismissed an ethics complaint against Judge Manuel Real. The Ninth Circuit's ten-member Judicial Council sent the matter back to her for further disposition. The judges said: "A judge may not use his authority in one case to help a party in an unrelated case."⁶⁷ That would seem to be a noncontroversial opinion, but Judge Schroeder would not embrace that view. On remand, Judge Schroeder again dismissed the complaint, apparently finding that there was nothing improper.⁶⁸

⁶² *Id.* at 1184.

⁶³ *E.g.*, *In re* Opinion of Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 110 (U.S. Jud. Conf. 2006) (Winter, J., dissenting); *In re Complaint of Judicial Misconduct*, 425 F.3d at 1190, 1195 (Kozinski, J., dissenting); Weinstein, *supra* note 24, at B3. See ROTUNDA & DZIENKOWSKI, *supra* note 21, § 10.2-2.9.

⁶⁴ See Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions*, 2001 U. ILL. L. REV. 611, 612 (2001) [hereinafter Rotunda, *Judicial Comments*].

⁶⁵ *In re Complaint of Judicial Misconduct*, 425 F.3d at 1184 (Kozinski, J., dissenting) (quoting from

the transcript).

⁶⁶ *Id.* at 1188. It is well established that judges may not exercise judicial power based on secret or *ex parte* communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir. 1987); see also Rotunda & Dzienkowski, *supra* note 21, §§ 10.2-2.9, 10.3-3.8 to 10.3-3.10; Morgan & Rotunda, *supra* note 3 at 682–90; Rotunda, *Judicial Comments*, *supra* note 64, at 611.

⁶⁷ *In re Complaint of Judicial Misconduct*, 425 F.3d at 1187 (Kozinski, J., dissenting) (quoting Judicial Council Order at 5–6 (Dec. 18, 2003)).

⁶⁸ *Id.* at 1180–81 (quoting Judicial Council Order at 5–6 (Dec. 18, 2003)).

When the matter finally reached the Judicial Council, it decided not to “upset that factual finding.”⁶⁹ However, Judge Schroeder was not supposed to make any factual findings. First, the Chief Judge did not conduct an evidentiary hearing. Second, under the federal statute⁷⁰ and court rules,⁷¹ her authority is limited to determining whether there is credible evidence of misconduct. She may dismiss the complaint only if credible evidence is entirely lacking. One wonders why judges would defer to another judge’s actions that neither the federal statute nor the court rule authorized. The judge conceded the fact of the *ex parte* contact, so no one could claim that there was no credible evidence of misconduct.

That should be another eyebrow-raiser: the appellate court deferred to the unlawful exercise of authority by Chief Judge Schroeder.

A panel of judges on the Ninth Circuit demanded that Judge Real acknowledge his misconduct but, nonetheless, ruled that “[w]e are satisfied that adequate corrective action has been taken such that there will be no re-occurrence of any conduct that could be characterized as inappropriate.”⁷² In one of the two dissents, Judge Kozinski complained:

Unfortunately, the majority’s exiguous order seems far more concerned with not

hurting the feelings of the judge in question. But our first duty as members of the Judicial Council is not to spare the feelings of judges accused of misconduct. It is to maintain public confidence in the judiciary by ensuring that substantial allegations of misconduct are dealt with forthrightly and appropriately. This the majority has failed to do.⁷³

The Judicial Conference of the United States referred the matter to a five-judge disciplinary committee, which concluded (three to two) that it could not act because Chief Judge Schroeder failed to convene a special committee.⁷⁴ Then, after creating the unusual interpretation that led to this result, it said that Congress should enact additional legislation to deal with this issue.⁷⁵

The two-person dissent explained that two facts were “indisputable”: First, the record would support a finding of misconduct in the form of an *ex parte* contact resulting in a judicial ruling. Second, the mandatory statutory procedures regarding judicial misconduct petitions were not followed by either the Chief Circuit Judge or the Judicial Council of the Ninth Circuit.⁷⁶

The majority of the judges was unwilling to act, and then said that the problem was not them but the statute. The dissenters were dismayed that there was

⁶⁹ *Id.* at 1181

⁷⁰ “The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” 28 U.S.C. § 352(a) (2002).

⁷¹ See Judicial Conference of the United States, Rules for Judicial Conduct and Judicial-Disability Proceedings R. 4, 10 (2008), available at [http://207.41.19.15/Web/OCeLibra.nsf/504ca249c786e20f85256284006da7ab/1900867f11b4c90d882563e70082e7a9/\\$FILE/rules_judicial_conduct.pdf](http://207.41.19.15/Web/OCeLibra.nsf/504ca249c786e20f85256284006da7ab/1900867f11b4c90d882563e70082e7a9/$FILE/rules_judicial_conduct.pdf).

⁷² *In re Complaint of Judicial Misconduct*, 425 F.3d at 1181–82. The panel of judges included Alarcón, Kozinski, Kleinfeld, McKeown and W. Fletcher, Circuit Judges, and Ezra, Levi, McNamee, Strand and Winmill, District Judges. *Id.* at 1180. No judge signed the “order,” which was the opinion

denying any remedy. Ezra, Chief District Judge, filed an opinion concurring in part and dissenting in part. *Id.* at 1182. Kozinski, Circuit Judge, filed a dissenting opinion. *Id.* at 1183. Winmill, District Judge, filed a dissenting opinion. *Id.* at 1202

⁷³ *Id.* at 1198 (Kozinski, J., dissenting).

⁷⁴ *In re Opinion of Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106, 109 (U.S. Jud. Conf. 2006).

⁷⁵ *Id.* “[W]e believe that additional legislation expanding the scope of the Conference’s (and, by delegation, this Committee’s) jurisdiction is necessary before we may review the Judicial Council’s order affirming the chief judge’s dismissal of the complaint.” *Id.*

⁷⁶ *Id.* at 109–10 (Winter, J., dissenting) (emphasis added).

no discipline of the judge. They were doubly dismayed that the court's "self-regulatory procedure" fueled suspicions that the judges will disfavor investigating their own. And so they concluded that the "*disposition of the present matter is therefore not a confidence builder.*"⁷⁷

Sadly, the dissenters are correct: "*disposition of the present matter is therefore not a confidence builder.*"⁷⁸ The majority is also correct that Congress must change the statute. The Inspector General legislation would be an appropriate response.

In the meantime, Judge Real's actions permitted Deborah M. Canter to live rent-free for three years, costing her creditors \$35,000 in rent and thousands of additional dollars in legal costs.⁷⁹

III. An inspector general for the courts

Justice O'Connor has argued that an Inspector General for the Courts is a "threat to judicial independence."⁸⁰ "Argued" may not be the appropriate word, for her opposition tends to be more vigorous than that: "This is pretty scary stuff."⁸¹

Yet, we should be asking why we have waited so long to propose an Inspector

General for the courts. An Inspector General already exists for a host of federal agencies. The Inspector General's activities include auditing, protecting whistle-blowers, and increasing the public's confidence that government officials spend federal money legally, use resources properly, and follow federal statutes. Search the U.S. statutes in Westlaw for "Inspector General" and you will find 667 documents. Search, instead, for "Inspector General" under the federal case law, and you will find 4,821 documents, as of November 9, 2009. The concept of "Inspector General" is well-known in the court system, but judges, oddly enough, are immune from it.

There is, for example, an Inspector General for Iraq Reconstruction.⁸² The Coalition Provisional Authority, the U.S. overseer of Iraq from June 2003 to June 2004, established a program review board, an independent judiciary, and inspectors general in each agency to fight corruption.⁸³ There is an Inspector General for the Pentagon. Like other inspectors general, he investigates complaints, clears people wrongly accused in the press, or reaffirms the wrongdoing in other cases.⁸⁴ There is an

⁷⁷ *Id.* at 117 (emphasis added).

⁷⁸ *Id.*

⁷⁹ Weinstein, *supra* note 24, at 3B. Legal fees brought the total loss to approximately \$50,000

⁸⁰ O'Connor, *supra* note 7, at A18.

⁸¹ Q & A with Sandra Day O'Connor, TIME, Sept. 28, 2006, available at <http://www.time.com/time/nation/article/0,8599,1540702,00.html>. There's a resolution pending to give grounds for impeachment if a judge cites a foreign judgment. *You see a proposal for an inspector general for judges.* You see a proposal on the ballot in November in North Dakota called Jail for Judges that would remove judicial independence and set up a mechanism to punish judges criminally and civilly for erroneous decisions. *This is pretty scary stuff.* *Id.* (emphasis added).

⁸² *Audit Hits Former U.S. Authority in Iraq*, WASH. TIMES, Jan. 31, 2005, available at <http://www.washingtontimes.com/news/2005/jan/30/>

20050130-094529-3103r/?feat=article_related_stories.

⁸³ *Id.*

⁸⁴ . Rowan Scarborough, *General Cleared in Church Speeches Case*, WASH. TIMES, Aug. 20, 2004, at A03, available at <http://www.washingtontimes.com/national/20040820-125028-3534r.htm>. The Pentagon inspector general did not substantiate complaints that Lt. Gen. William G. Boykin misused his Army uniform, violated travel regulations or used improper speech when he addressed 23 church groups on his views on faith and warfare. Investigators also found Gen. Boykin did not improperly accept speaking fees. . . . But the IG report did find that Gen. Boykin violated three rules: He should have gotten clearance from public affairs on the content of his speech; he should have told audiences that his remarks were his own views, and not the Pentagon's; and he should have filled out a form showing that one group reimbursed him \$260 for travel. *Id.*

Inspector General for the Department of Homeland Security, so that when issues surface regarding possible improper conduct, the Inspector General investigates. The “passenger on Northwest Flight 327 who blew the whistle on the incident, said she felt ‘vindicated and relieved’ after learning the investigation had been ongoing since July.”⁸⁵

The House of Representatives has created its own Inspector General.⁸⁶ The House Committee on Standards handles ethical complaints. When House Speaker Gingrich assumed that office, he ordered an audit by the House, which outside firms conducted.⁸⁷ One engages in such conduct not because he assumes that there is evil afoot, but because he wants

to assure everyone that things are fine. Outside auditors perform that function. Inspectors General do so as well.

The Inspector General’s home page advises that there are now sixty-nine statutory Inspectors General.⁸⁸ The duties of the Inspector General are, in general, to “report waste, fraud, or abuse” and to “report violations of civil rights or civil liberties.”⁸⁹

The purpose of an Inspector General for the Courts is not to harass judges but to build confidence in the general public that the judiciary is not above the law. This Inspector General should do things like:

(1) conduct investigations of matters relating to the Judicial Branch, including possible misconduct of judges and

⁸⁵ Audrey Hudson, *Passengers Describe Flight As a Terrorist Dry Run*, WASH. TIMES, Apr. 27, 2005, at A09, available at <http://www.washingtontimes.com/national/20050426-105951-8168r.htm>.

⁸⁶ Rules of the House of Representatives of the United States, Rule II(6), available at <http://clerk.house.gov/legislative/rules/rule2.html> (last visited Nov. 2, 2009) [hereinafter Rule II]. See also Office of Inspector General, <http://www.house.gov/IG> (last visited Aug. 29, 2009) (providing overview of Inspector General’s position). Rules of the House of Representatives, Rule II: Other Officers And Officials, Part 6: Office of Inspector General provides: (a) There is established an Office of Inspector General. (b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly. (c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only— (1) conduct periodic audits of the financial and administrative functions of the House and of joint entities; (2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions; (3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause; (4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration a report of each audit conducted

under this clause; and (5) report to the Committee on Standards of Official Conduct information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI. Rule II, *supra*.

⁸⁷ “Among the administrative, legislative, and procedural actions taken by Republicans during the 104th Congress were these: (1) passing the Congressional Accountability Act, which applied workplace safety and antidiscrimination laws to Congress; (2) hiring Price Waterhouse and Company, a nationally known accounting firm, to conduct an independent audit of House finances . . .” The Cannon Centenary Conference: The Changing Nature of Speakership, Chapter 2, H.R. Doc. No. 108-204, at 43 (2003), available at <http://www.gpoaccess.gov/serialset/cdocuments/hd108-204/text/chap2.html>.

⁸⁸ Council of Inspectors General on Integrity and Efficiency, <http://www.ignet.gov> (last visited Aug. 29 2009).

⁸⁹ U.S. Department of Justice: Office of Inspector General, <http://www.usdoj.gov/oig> (last visited Aug. 29, 2009) “The Office of the Inspector General (OIG) conducts independent investigations, audits, inspections, and special reviews of United States Department of Justice personnel and programs to detect and deter waste, fraud, abuse, and misconduct, and to promote integrity, economy, efficiency, and effectiveness in Department of Justice operations.” *Id.*

proceedings under Chapter 16 of Title 28, United States Code, that may require oversight or other action by Congress;

(2) conduct and supervise audits and investigations;

(3) prevent and detect waste, fraud, and abuse; and

(4) recommend changes in laws or regulations governing the Judicial Branch.

These purposes are salutary. No judge should fear them. An Inspector General would protect judges from frivolous or false charges. Indeed, one wonders why it has taken so long to create an Inspector General for the Courts. No organ of government should be above the law.

Some judges greet an Inspector General the way Dracula would greet garlic. The newspapers quote Justice Ruth Bader Ginsburg as saying that creating an Inspector General to monitor the ethical behavior of federal judges is comparable to the former Soviet Union and is “a really scary idea.”⁹⁰ She continued, “[t]he judiciary is under assault in a way that I haven’t seen before.”⁹¹ Recall that Justice O’Connor also used the same term “scary.”⁹²

However, the sky is not falling. If Congress were to enact such a law, it could work out the details to make sure that the Inspector General will not interfere with judicial independence. The Chief Justice could appoint this official in the Judicial Branch. When a judicial panel claims that there is a problem with the statute, the Inspector General could forward the proposal to Congress. Recall that the judges in the Manuel Real case

said that Congress could change the statute.⁹³ However, those judges never forwarded that recommendation to Congress. They never sent a copy of their opinion to the members of the House and Senate Judiciary Committee. They did not write their Congressmen asking for a change. Instead, they simply wrote an opinion that removed the threat of discipline from a problem-judge and then blamed Congress for the result.

An Inspector General would give people greater faith that, if there are problems, the Inspector General would deal with them and not sweep them under the rug. An Inspector General would be a confidencebuilder.

IV. Structural provisions in our constitution protect the independence of each branch of government

The Framers created structural protections in the Constitution to protect the independence of each branch, but they put no branch above the law. For example, in Congress, the Framers authorized each House to be the Judge of its Elections.⁹⁴ They also authorized each House to punish its Members for disorderly conduct, and (if there is a supermajority) to even expel a Member for disorderly conduct.⁹⁵ And, of course, the Constitution creates a special “Speech or Debate” privilege of each Member.⁹⁶

The Framers did not create a similar set of immunities for the Judges in Article III courts. The Framers did not make the judges the “judge” of their own

⁹⁰ Tony Mauro, *Justices Fight Back*, U.S.A. TODAY, June 20, 2006, at A13, available at http://blogs.usatoday.com/oped/2006/06/justices_fight_.html.

⁹¹ *E.g., id.*

⁹² Q & A with Sandra Day O’Connor, *supra* note 81.

⁹³ *In re* Opinion of Judicial Conference Comm.

to Review Circuit Council Conduct and Disability Orders 449 F.3d 106, 109 (U.S. Jud. Conf. 2006).

⁹⁴ U.S. CONST. art. I, § 5, cl. 1.

⁹⁵ *Id.* art. I, § 5, cl. 2.

⁹⁶ *Id.* art. I, § 6, cl. 1. “[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place.” See ROTUNDA & NOWAK, *supra* note 2, § 8.6-8.

appointments; the judges cannot “expel” a fellow judge; and, of course, there is no privilege analogous to the “Speech or Debate” privilege. Instead, Framers guaranteed judicial independence in a different way: the judges would have lifetime appointments and Congress could not reduce their salaries.⁹⁷

It never occurred to the Framers that the judges should be, for example, immune from audit. Similarly, it could never have occurred to the Framers that the independence of the judicial branch meant that judges are or should be immune from criticism. If that were true, law reviews would be out of business. We all have the free speech right to criticize judicial decisions, just as judges have the right to criticize each other (or Congress) in their speeches and judicial opinions.

Nor does independence mean that judges are above the law. An Inspector General would protect judges, by providing a ready answer to criticism that they are not following the law.⁹⁸ An Inspector General would also protect the judicial system by providing a better structure to deal with valid complaints.

If there were an Inspector General and a disgruntled litigant complained, judges would be able to respond that the Inspector General would investigate. That would be a real confidence builder. If the Inspector General investigated and found the complaints to be fruitless, the complainant should have more confidence in the result. The judges, not the Inspector General, will be the ones who impose any discipline, such as a public or private reprimand, so there is no loss of judicial independence.

But what if the complaint is valid? Then the judges would know that there is a problem that needs correcting, and that they cannot rely on the Chief Judge of the Ninth Circuit to prevent discipline by ignoring the rules. The proposed Inspector General would not have any authority or jurisdiction over the substance of a judge’s opinions. The proposed law would not interfere with judges’ independence to write their own opinions.

V. Inspector general: building confidence in the judiciary

The great majority of complaints against federal judges suffer the same fate as the complaint against Judge Real: they are dismissed. In fact, more than 99% of the complaints are dismissed.⁹⁹ This figure would likely not change much if the federal courts had an Inspector General because the very great majority of judges are honest and hardworking. But, a few complaints would be investigated and those investigations would increase confidence in the judiciary. Right now, the discipline process is conducted largely in secret.

Even when the process is public, it is not really public. In the situation involving Judge Real, only with a great deal of investigation can one know what is going on. *In re Opinion of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*¹⁰⁰ managed to talk about the case without ever mentioning the name of the judge who was the subject of the complaint!

In re Opinion also never identified the Circuit from which the case came. This case is really an appeal from the Ninth Circuit, but one would never know from

⁹⁷ U.S. CONST. art. III, § 1.

⁹⁸ See Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1340–41 (2006) (explaining that the “appearance of impropriety” standard is so vague that it does

not protect the judiciary but rather gives ammunition to those who wish to attack it).

⁹⁹ Weinstein, *supra* note 24, at B3.

¹⁰⁰ *In re Opinion of the Judicial Conference Comm. to Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106 (U.S. Jud. Conf. 2006).

reading the majority opinion or dissent. In fact, the court never gives the citation to *In re Complaint of Judicial Misconduct*.¹⁰¹ Go to Westlaw and look at the “full history” of this case. It has none. *In re Complaint* is a judicial orphan, an appeal with no prior or subsequent history. It just springs forth, like Pallas Athena from the head of Zeus. However, this case springing forth does not give birth to wisdom. One has to search and dig in the case of *In re Complaint* to find out what is going on. That is not a confidence builder. It appears as if the court was more interested in protecting the reputation of a judge even after the court conceded that the judge acted improperly.

The majority said that Congress should change the statute, but the majority never took any steps to inform Congress of its conclusion. An Inspector General could change that and periodically report to Congress if there are laws that need changing.

If the federal courts had an Inspector General, we would have more openness and people would be less likely to assume that judges are above the law. When the disciplinary process for judges is conducted in secret, we cannot be sure. An Inspector General would give us that assurance.

Right now, we do not have that needed confidence. Even federal judges do not have confidence in their own system. Consider, for example, the concerns of John Kane, a judge in the U.S. District Court for the District of Colorado. He sat

on the Tenth Circuit Judicial Council when the first complaint about a judge came up for consideration: A district judge was trying to coerce counsel into establishing a library on product liability cases in honor of himself.

It is worth quoting at length the experience and conclusions of Judge Kane. He voted for judicial discipline but the Judicial Council took no disciplinary action. The vote was three to three:

[A]nd so the Chief Judge voted against sustaining the complaint because it was the first such complaint and he thought a close vote was too slender a reed upon which to proceed. As we were leaving the meeting, one of the judges who had voted to dismiss collared me and said, ‘John, think about it. The next time it could be you or me. We’ve got to stick together.’¹⁰²

Kane added:

I’ve recently heard of a number of judges who ruled on cases involving companies in which they owned an interest, yet nothing was done about it. The point is that the current system is a ‘kiss your sister’ operation that hasn’t worked and won’t as long as judges are covering one another’s butts. The present system is ineffectual and I think that could be demonstrated by the very sorry record.¹⁰³

Even a U.S. Supreme Court Justice did not follow clear recusal rules on stock ownership until the press publicized her mistake.¹⁰⁴ The mistake, I am sure, was unintentional, but it took publicity to

¹⁰¹ *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (Jud. Council 9th Cir. 2005)

¹⁰² Ronald D. Rotunda, *The Courts Need This Watchdog*, WASH. POST, Dec. 21, 2006, at A29 (quoting Judge Kane).

¹⁰³ See *id.*

¹⁰⁴ Justice Ruth Bader Ginsberg, for example, failed to disqualify herself from more than twenty cases involving companies where her husband held stock, in violation of the federal statute. See 28 U.S.C. §455(b)(5) (1974). When the news media published this, her husband finally sold his stock so that she would not have to disqualify herself.

Robert D. Hershey, Jr., *The Husband Of a Justice Sells His Stock After Scrutiny*, N.Y. TIMES, July 11, 1997, at A1. See also Richard Carelli, *Ginsburg Took Part In Cases In Which Spouse Owned Stock*, MEMPHIS COM. APPEAL, July 11, 1997, at B7. Supreme Court Justice Ruth Bader Ginsburg may have violated a federal law 21 times since 1995 by participating in cases involving companies in which her husband owned stock. . . . Responding to queries by The Associated Press, Martin D. Ginsburg said he has ordered his broker to sell all his stock in the eight companies. *Id.*

correct it; the clarity of the rules was not enough. An Inspector General could change that by dealing with the justice directly.

Other judges may not favor these conclusions but they do not dispute the facts. Justice Stephen Breyer's Judicial Conduct and Disability Act Study Committee reported that the judiciary failed to conduct a proper investigation of judicial misconduct in five of seventeen "high visibility cases" between 2001 and 2005.¹⁰⁵ This error rate, the report admitted, is "far too high."¹⁰⁶ Yet, its proposed reforms were quite modest. For example, it recommended that the Judicial Conference should "clarify the Conference's authority to review decisions of its Review Committee."¹⁰⁷

An Inspector General for the Courts needs to do a lot more than merely clarify the Conference's authority. Recently, the Judicial Conference of the United States amended its Code of Conduct for United States Judges.¹⁰⁸ The revisions reflect, to some extent, the 2007 revisions of the ABA Model Rules of Judicial Conduct.¹⁰⁹ The popular press reports that the new Judicial Code "apparently expands significantly the definition of the 'appearance of impropriety.'"¹¹⁰ Not so.

The former U.S. Code of Conduct defined "appearance of impropriety" as follows:

The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.¹¹¹

But the new, improved version reads:

An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.¹¹²

So, instead of a reasonable perception that there is an impairment of a judge's "integrity, impartiality, and competence," the new test is that there is a reasonable perception that there is an impairment of a judge's "honesty, integrity, impartiality, temperament, or fitness to serve as a judge."

If anything, it appears that the new rules do not "expand significantly" the definition. In fact, the new rules seem slightly narrower than the one it replaced. The new version says that the reasonable person "would conclude" that the judge is impaired. The prior version says that a reasonable person would have "a perception that" the judge is impaired.

¹⁰⁵ *Judicial Conduct & Disability Act Study Comm., Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 5 (Sept. 2006), available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf> ("We consequently consider the mishandling of five such cases out of seventeen—an error rate of close to 30%—far too high.").

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 126.

¹⁰⁸ *Judicial Conference of the United States, The Code of Conduct for United States Judges* (Effective July 1, 2009), available at http://www.uscourts.gov/library/codeOfConduct/Revised_Code_Effective_July-01-09.pdf

[hereinafter CODE OF CONDUCT].

¹⁰⁹ Rotunda & Dzienkowski, *supra* note 21, §§ 10.0-1 to 10.4-4.5.

¹¹⁰ *E.g.*, Martha Neil, *Stricter Impropriety Standard is Adopted by Judicial Conference*, ABA J. LAW NEWS NOW, Mar. 17, 2009, available at http://www.abajournal.com/news/stricter_impropriety_standard_is_adopted_by_judicial_conference.

¹¹¹ *American Bar Association Standing Committee on Ethics and Professional Responsibility and Judicial Code Subcommittee, 1990 ABA Model Code of Judicial Conduct*, Canon 2A cmt. (1990), available at http://www.abanet.org/cpr/mcjc/canon_2.html.

¹¹² CODE OF CONDUCT, *supra* note 108, Canon 2A cmt

The new version adds a few words, which were already implied in the original litany of nouns listing judicial virtues. It is hard to think of what the first, rather vague, definition would prohibit or allow that the second, rather vague definition would not prohibit or not allow. Tinkering with “appearance of impropriety” will not do the job. We need to do more. Creating an Inspector General can do much more to build confidence.

VI. Conclusion

While the vast majority of judges uphold the highest ethical standards,

some do not. Even more important, the procedure to investigate and discipline problem-judges is flawed. As Judge Winter has acknowledged, the status quo is not a confidence builder.¹¹³ The most direct and effective way to restore public confidence in the judiciary is to create an Inspector General. Instead of judges policing themselves, the independence of the Inspector General allows for careful screening of potential ethical violations. This solution is something that both the public and the judiciary should welcome.

¹¹³ *In re* Opinion of Judicial Conference Comm. to Review Circuit Council Conduct and Disability

Orders, 449 F.3d 106, 117 (U.S. Jud. Conf. 2006) (Winter, J., dissenting).