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## *MADISON LECTURE*

### JUDICIAL GOVERNANCE AND JUDICIAL INDEPENDENCE

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*This Lecture examines judicial independence, judicial accountability, and judicial governance. I discuss the role the current system of judicial self-governance plays in ensuring both accountability and independence—two sides of the same coin. Yet, two recent legislative proposals threaten not only decisional independence but also the institutional independence of the judicial branch itself. The first calls for an inspector general for the federal judiciary and the second proposes to regulate Supreme Court recusals. This Lecture discusses how the inspector general and Supreme Court recusal bills would lead to significant changes in the way the judiciary functions, and concludes these changes would nonetheless be insignificant compared to the threat they pose to the decisional independence of the federal judiciary.*

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INTRODUCTION

“There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers.”

—James Madison, Federalist No. 47<sup>1</sup>

Judicial independence is at the core of the rule of law. For the federal judiciary it is, of course, set out and secured in the Constitution,<sup>2</sup> but it has also been protected over the last few centuries by formal structures and informal norms and customs.<sup>3</sup> And by establishing and bolstering the courts’ administrative and oversight capacities, Congress has fostered and validated the federal judiciary’s capacity for self-governance.<sup>4</sup>

For the past several years I have been involved in judicial self-governance as a former chief circuit judge, a member of the Judicial Conference of the United States, and most recently, as chair of the Judicial Conference Committee on Judicial Conduct and Disability. This is the committee that proposes and monitors procedural rules for conduct and disability of federal judges and helps to implement the Judicial Conduct and Disability Act of 1980.<sup>5</sup> For contentious cases,

<sup>1</sup> THE FEDERALIST NO. 47, at 102 (James Madison) (Michael A. Genovese ed., 2009) (quoting Montesquieu).

<sup>2</sup> See *infra* note 16 and accompanying text (discussing the protections of tenure and protected salary).

<sup>3</sup> See Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 160, 162–63 (Stephen B. Burbank & Barry Friedman eds., 2002) (identifying three sources of judicial independence: doctrinal independence, functional independence, and customary independence); see also Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 331 (2003) (stating that the judiciary is subject to executive and legislative controls in various manners that extended beyond constitutional provisions); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 157 (2003) [hereinafter *Judicial Independence*] (asserting that insight into the historical development of congressional customs is key to understanding judicial independence).

<sup>4</sup> See *infra* Part I.B (discussing Congress’s willingness to preserve judicial independence).

<sup>5</sup> See 28 U.S.C. §§ 351–364 (2012) (providing mechanisms for filing complaints against federal judges). See generally RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY

the Committee also acts as a court of review.<sup>6</sup> The Judicial Conduct and Disability Act delegates to the judiciary the authority to regulate judicial conduct that does not warrant impeachment, but that is “prejudicial to the effective and expeditious administration of the business of the courts.”<sup>7</sup> The definition of such conduct has been guided by the Code of Conduct for United States Judges (Code of Conduct)<sup>8</sup> and also by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules).<sup>9</sup>

This Lecture examines judicial independence, judicial accountability, and judicial governance. I discuss the role the current system of judicial self-governance plays in ensuring both accountability and independence—which are actually two sides of the same coin<sup>10</sup>—in Part I. Yet, two recent legislative proposals threaten not only decisional independence, but also the institutional independence of the judicial branch itself. The first calls for an inspector general for the federal judiciary<sup>11</sup> and the second proposes to regulate Supreme Court recusals.<sup>12</sup> These bills and their implications for judicial independence are discussed in Part II.

## I

### JUDICIAL INDEPENDENCE

Judicial independence is both structural and instrumental. It is a means to serve the objective of impartial decisionmaking; that is, decisionmaking independent of political influence and personal interest.<sup>13</sup> These concepts are enshrined in our modern understanding of the Constitution, but that understanding has developed over time and

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PROCEEDINGS (Judicial Conference of the U.S. 2008) [hereinafter JUDICIAL CONDUCT AND DISABILITY RULES], available at [http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf) (describing the standards and procedures for filing complaints against federal judges).

<sup>6</sup> See JUDICIAL CONDUCT AND DISABILITY RULES R. 21 & cmt.

<sup>7</sup> 28 U.S.C. § 351(a).

<sup>8</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/vol02a-ch02.pdf>.

<sup>9</sup> JUDICIAL CONDUCT AND DISABILITY RULES R. 3.

<sup>10</sup> Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999).

<sup>11</sup> This proposal has appeared in various iterations of the Judicial Transparency and Ethics Enhancement Act. *E.g.*, H.R. 5219, 109th Cong. § 2(a) (2006). For a list of other Senate and House bills, see *infra* note 76.

<sup>12</sup> The Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. § 3 (2011). As with the inspector general bill, some commentators support congressional regulation of Supreme Court recusals. *E.g.*, Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1547 (2012) (describing Congress’s attempts to address Supreme Court recusal as “popular and well-intentioned”).

<sup>13</sup> Burbank, *supra* note 3, at 332.

through interactions between Congress and the judiciary.<sup>14</sup> It is often helpful to think of judicial independence as having two dimensions: decisional independence and institutional independence.

### A. *Decisional and Institutional Independence*

Decisional independence is the ability of an individual judge to render a decision in the absence of political pressures and personal interests.<sup>15</sup> It is essential to our concept of procedural due process and is codified in the Constitution's insulation of judges from political pressures through life tenure and nondiminution of salary.<sup>16</sup> Deference to the judgment and rulings of the courts depends on public confidence that those decisions were based on the law and the facts. Even with its coercive powers, the judiciary for the most part relies on voluntary compliance with its directives.<sup>17</sup>

Institutional independence is the structural autonomy of the judicial branch as a coequal branch of government. Robust institutional independence is necessary to ensure decisional independence because external regulation of judges' conduct may chill the ability and willingness to reach just merits decisions.<sup>18</sup> At the same time, the relationship among the three branches has given rise to informal constitutional norms that inform our understanding of the separation of powers. Together with the Constitution's spare but powerful textual protections for judicial independence, these informal constitutional norms and customs have produced a structure of institutional independence to insulate judges from political pressures, while providing mechanisms for accountability.<sup>19</sup>

Although today it seems axiomatic that a judge could not be removed for rendering an unpopular or poorly reasoned decision, the

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<sup>14</sup> See, e.g., CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 25 (2008) (“[T]he perceived ‘problem,’ as articulated in the Declaration of Independence, was not judicial dependence per se but judicial dependence on the monarch.”); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations* 95 *GEO. L.J.* 909, 913 (2007) (noting that the relationship between the courts and other branches is mostly shaped by informal norms and customs).

<sup>15</sup> See Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835, 839 (1995).

<sup>16</sup> Specifically, Article III, Section 1 accomplishes this by requiring all federal judges hold office during good behavior and preventing their compensation from being decreased. U.S. CONST. art. III, § 1.

<sup>17</sup> See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW*, at xiii, 3–72 (2010) (describing the history of the Court's authority and explaining why public acceptance of Court decisions “is not automatic and cannot be taken for granted”).

<sup>18</sup> *Judicial Independence*, *supra* note 3, at 159, 162–63.

<sup>19</sup> *Id.* at 165–66.

Constitution does not define the “good behavior” upon which a judge’s life tenure depends. Without a textual definition provided in Article III, the Article II standard of “high crimes and misdemeanors”<sup>20</sup> (applicable to the President) has been applied to the judiciary.<sup>21</sup> Reserving impeachment for a judge’s conduct that was largely unrelated to decisional responsibilities, such as receiving a bribe, developed over time, beginning with the House’s vote in 1804 to impeach Supreme Court Justice Samuel Chase based on his rulings and in-court demeanor<sup>22</sup> and the Senate’s subsequent unwillingness to convict.<sup>23</sup> The Supreme Court has since confirmed that Article III judges are “appointed for life, subject only to removal by impeachment.”<sup>24</sup> And, in fact, no federal judge has ever been removed other than by impeachment.<sup>25</sup> This interpretation and practice protects judges from political pressures that might otherwise emanate from the legislature.<sup>26</sup>

Yet institutional independence is not absolute. The Constitution empowers Congress to create and regulate the lower federal courts.<sup>27</sup> In doing so, Congress has granted self-regulatory power to the judi-

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<sup>20</sup> U.S. CONST. art. II, § 4.

<sup>21</sup> See Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 MICH. L. REV. 765, 776–78 (1989) (noting that no judge has ever been removed except through the formal impeachment process).

<sup>22</sup> GEYH, *supra* note 14, at 134 (noting that the House accused the Justice based on faulty jury instructions, refusal to excuse an allegedly biased juror, exclusion of relevant testimony, a rude disposition to lawyers, and “indecent solicitude for the conviction of the accused”).

<sup>23</sup> *Id.* at 141–42 (discussing a wariness of establishing congressional review of judicial decisions by impeachment as a possible reason for the Senate’s exoneration of Justice Chase).

<sup>24</sup> *Toth v. Quarles*, 350 U.S. 11, 16 (1955). Of course this does not prevent federal judges from facing prosecution for conduct that violates criminal laws, either before or after impeachment proceedings. See U.S. CONST. art. I, § 3, cl. 7 (“[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”); *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 66 (D.C. Cir. 2001) (reviewing cases holding that judges could be prosecuted before impeachment). A judge convicted in a criminal case may also choose to resign or retire before the conclusion of any impeachment proceedings, as other judges have done in the past. See, e.g., ELIZABETH B. BAZAN & ANNA C. HENNING, CONGRESSIONAL RESEARCH SERVICE, 98-186, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 4 n.17 (2010) (describing the resignation of District Judge Robert F. Collins); Lise Olsen, *Embattled Kent Resigns, Effective Tuesday*, HOUSTON CHRONICLE (June 25, 2009), <http://www.chron.com/news/houston-texas/article/Embattled-Kent-resigns-effective-Tuesday-1731302.php>.

<sup>25</sup> Edwards, *supra* note 21, at 776.

<sup>26</sup> *Id.*

<sup>27</sup> U.S. CONST. art. III, § 1.

ciary itself, while retaining an oversight role.<sup>28</sup> This accommodation has preserved accountability in a way that insulates judges from political pressures and interference, but that also depends on a partnership between the branches in cultivating judicial self-governance.

### B. *Development of Judicial Self-Regulation*

The recent bills proposing an inspector general for the federal judiciary and seeking to regulate Supreme Court recusal are not the first instances where Congress has taken up the matter of judicial conduct. But in each prior episode, Congress has found that the solution lay within the judiciary, preserving judicial independence, and respecting the constitutional structure that separates the three branches of power.

#### 1. *A Brief History of Congress's Role in Shaping Judicial Accountability*

There have been several phases of congressional action in response to a perceived lack of judicial accountability. In 1891, decades of unease over perceived “judicial despotism”<sup>29</sup>—the concern, in particular, that there was no effective manner of reviewing arbitrary district court decisions—prompted Congress to establish courts of appeals to replace circuit-riding by the Supreme Court Justices.<sup>30</sup> In 1922, Congress centralized much judicial authority in a single governing body—the Conference of Senior Circuit Judges.<sup>31</sup> This body was chaired by the Chief Justice and comprised the nation’s chief circuit judges.<sup>32</sup> In 1934, Congress vested procedural rulemaking authority in the judiciary.<sup>33</sup> In 1939, Congress built on the creation of the Conference by establishing the circuit judicial councils and the

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<sup>28</sup> See ROBERT A. KATZMANN, *COURTS AND CONGRESS* 2–3 (1997) (“Congress creates judgeships; determines the structure, jurisdiction, procedures (both civil and criminal), and substantive law of the federal courts; passes laws affective such disparate areas as judicial discipline and sentencing policy; and sets appropriations and compensation.”); *Judicial Independence*, *supra* note 3, at 160 (noting that Congress decides when behavior is not good behavior, controls court-related funds other than judges’ salaries, and decides on the establishment and disestablishment of lower courts).

<sup>29</sup> GEYH, *supra* note 14, at 98.

<sup>30</sup> *Id.* Despite the logistical problems of the circuit-riding system—particularly as the United States expanded geographically—legislators commented that it was important for judicial accountability to bring the Justices to the people. *Id.* at 65.

<sup>31</sup> See GEYH, *supra* note 14, at 103–05 (discussing the congressional process and hearings).

<sup>32</sup> *Id.* at 103.

<sup>33</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)).

Administrative Office of the U.S. Courts.<sup>34</sup> This allowed Congress to place the administrative and budget functions that had previously been the responsibility of the Department of Justice under the Administrative Office.<sup>35</sup> In 1948, Congress refined the elements of court organization and governance, and renamed the Conference of Senior Circuit Judges as the Judicial Conference.<sup>36</sup> District judges were formally added to the Conference in 1957.<sup>37</sup>

It is notable that while Congress took these actions in response to concerns about judicial accountability, each action gave the judiciary the opportunity to strengthen its internal oversight, obviating the need for increased congressional oversight. Along with the circuit judicial councils, the Judicial Conference was created as a body capable of forging and implementing judicial conduct regulations. Institutionally, the foundations were in place to accommodate the Judicial Conduct and Disability Act of 1980.

By 1973, the Judicial Conference had adopted the Code of Judicial Conduct, which grew out of the American Bar Association's 1924 Canons of Judicial Ethics.<sup>38</sup> With the Judicial Conduct and Disability Act of 1980 (1980 Act), Congress redefined misconduct standards and created a formal mechanism to enforce these standards.<sup>39</sup>

The 1980 Act was a response, in part, to several bills introduced in the 1960s and 1970s to regulate judicial conduct short of impeachment proceedings. Senator Joseph Tydings's bill,<sup>40</sup> which followed a study of judicial reform, would have established a five-judge commission to investigate, try, and recommend removal of federal district and circuit judges for "[w]illful misconduct in office or willful and persistent failure to perform his official duties."<sup>41</sup> Several years later, Senator Sam Nunn proposed legislation to create a council authorized to receive all complaints about judicial conduct and recommend the

<sup>34</sup> Act of Aug. 7, 1939, Pub. L. No. 76-299, 53 Stat. 1223.

<sup>35</sup> Until the 1840s, the judiciary was administered by the Treasury Department, then the Interior Department, followed by the Justice Department in 1870. Bermant & Wheeler, *supra* note 15, at 854.

<sup>36</sup> Act of June 25, 1948, ch. 646, § 331, 62 Stat. 869, 902 (codified as amended at 28 U.S.C. § 331 (2012)); *see also* *Judicial Conference of the United States*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited Apr. 22, 2015).

<sup>37</sup> Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified as amended at 28 U.S.C. § 331 (2012)).

<sup>38</sup> Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 *YALE L. & POL'Y REV.* 33, 48 (2012).

<sup>39</sup> Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, sec. 3, 94 Stat. 2035, 2036-40 (1980) (codified as amended at 28 U.S.C. § 351-364 (2012)).

<sup>40</sup> Judicial Reform Act, S. 3055, 90th Cong. (1968).

<sup>41</sup> S. 3055 § 378(c).

removal of a judge from office.<sup>42</sup> The 1980 Act was drafted by the Judicial Conference as an alternative to other proposals and provided for conduct regulation through existing administrative functions within the judiciary.<sup>43</sup> In this way, it codified the judiciary's long-standing practice of regulating its own conduct and disability, but also was the product of cooperation between the legislative and judicial branches.<sup>44</sup>

The 1980 Act—which, like Senator Tydings's bill, applies to the lower federal judiciary and not to the Supreme Court—provided for consideration of judicial conduct complaints by the chief circuit judges, the existing circuit judicial councils, and the Judicial Conference.<sup>45</sup> It authorized the Judicial Conference and circuit judicial councils to promulgate rules of procedure to implement the Act and to appoint a standing committee to do so.<sup>46</sup> But instead of implementing mandatory rules of procedure, the Judicial Conference initially left the creation of procedural rules to the circuit judicial councils.<sup>47</sup>

In 1986, the Special Committee of the Conference of the Chief Judges created the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, but the circuit judicial councils were free to adopt their own procedures.<sup>48</sup> But without centralized coordination, there were inconsistencies among circuits. The circuits varied both in procedural rules and in interpretations of the 1980 Act's definition of actionable misconduct—“conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>49</sup> Over the ensuing years, issues of potential misconduct—including attendance at privately funded educational seminars<sup>50</sup>—reignited questions regarding judicial accountability and implementation of the 1980 Act. Following some high-profile instances that were the subject of public

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<sup>42</sup> Judicial Tenure Act, S. 1110, 94th Cong. (1976).

<sup>43</sup> Remus, *supra* note 38, at 52.

<sup>44</sup> Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 426 (2007) (“The 1980 Act was the product of compromise, and one element of the compromise was the assurance of continuing legislative oversight.”).

<sup>45</sup> Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, sec. 3, § 372(c)(3)–(8), 94 Stat. 2035, 2036–38 (1980) (codified as amended at 28 U.S.C. § 352–355 (2012)).

<sup>46</sup> *Id.* at sec. 3, § 372(c)(11), 94 Stat. at 2038–39 (codified at 28 U.S.C. § 358 (2012)).

<sup>47</sup> Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 289 (1982).

<sup>48</sup> Hellman, *supra* note 44, at 427; *see also* JUDICIAL CONDUCT AND DISABILITY RULES R. 1 cmt. (describing circuit judges as adopting the Illustrative Rules with some minor variations).

<sup>49</sup> Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, at sec. 3, § 372(c)(1), 94 Stat. at 2036 (codified as amended at 28 U.S.C. § 351(a) (2012)).

<sup>50</sup> Remus, *supra* note 38, at 58.

and congressional criticism, the Chair of the House Judiciary Committee announced in 2004 that Congress would begin investigating whether the judiciary was effectively regulating itself.<sup>51</sup>

Responding to this criticism, Chief Justice William Rehnquist appointed the Judicial Conduct and Disability Act Study Committee, chaired by Justice Stephen Breyer.<sup>52</sup> The Committee was asked “to examine the Act’s implementation, particularly in light of the recent criticism, and to report its findings and any recommendations.”<sup>53</sup> The Committee published its report in 2006, finding that with very few but high-profile exceptions, the 1980 Act was properly implemented by the chief circuit judges and the circuit judicial councils.<sup>54</sup> Nonetheless, it recommended that the Judicial Conference Committee on Judicial Conduct and Disability assume an advisory role over misconduct and disability matters and serve as a reviewing tribunal for complaints in contentious cases.<sup>55</sup> The Judicial Conference went further and, in 2008, adopted uniform mandatory rules of procedure to replace the different procedural rules employed in the various circuits.<sup>56</sup> The Judicial Conduct and Disability Committee is currently in the process of proposing revisions to those rules.<sup>57</sup>

## 2. *Features of Judicial Accountability Under the Existing Regime*

Under the 1980 Act and the Rules, the process begins with a complaint, which can be initiated by anyone.<sup>58</sup> A complaint can also be initiated by the chief circuit judge<sup>59</sup>—an important change with

<sup>51</sup> *Id.* at 61.

<sup>52</sup> JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, at i (2006), available at [http://www.fjc.gov/public/pdf.nsf/lookup/breyer06.pdf/\\$file/breyer06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/breyer06.pdf/$file/breyer06.pdf).

<sup>53</sup> *Id.* at 1.

<sup>54</sup> *Id.* at 107.

<sup>55</sup> *Id.* at 109.

<sup>56</sup> See Press Release, Judicial Conference of the United States, National Rules Adopted for Judicial Conduct and Disability Proceedings (Mar. 11, 2008), available at [http://www.uscourts.gov/News/NewsView/08-03-11/National\\_Rules\\_Adopted\\_for\\_Judicial\\_Conduct\\_and\\_Disability\\_Proceedings.aspx](http://www.uscourts.gov/News/NewsView/08-03-11/National_Rules_Adopted_for_Judicial_Conduct_and_Disability_Proceedings.aspx) (announcing the first set of nationally binding rules adopted by the Judicial Conference dealing with accusations of misconduct by federal judges); see also JUDICIAL CONDUCT AND DISABILITY RULES R. 1 cmt. (discussing the promulgation of uniform rules as a response to the Breyer Report).

<sup>57</sup> Draft amendments were released with an opportunity for public comment. JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, PROPOSED DRAFT (2014), available at <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/draft-amendments-rules-for-judicial-conduct.aspx>.

<sup>58</sup> 28 U.S.C. § 351(a) (2012) (providing that “[a]ny person” may file). A complainant need not be a litigant. It could be anyone responding to something read or seen in the media.

<sup>59</sup> 28 U.S.C. § 351(b).

ramifications for a chief judge's ability to act both formally and informally. The chief judge then makes an initial inquiry and determines whether the complaint should be dismissed or concluded on the grounds of voluntary corrective action or because of intervening events,<sup>60</sup> or whether it presents questions of fact that require further investigation.<sup>61</sup> If questions of fact remain, the chief circuit judge must appoint a special committee of judges to conduct an investigation.<sup>62</sup> The special committee then makes findings and recommendations to the circuit judicial council on disposition and any appropriate remedies or sanctions.<sup>63</sup> Remedies or sanctions may range from a reprimand or censure to a recommendation to Congress to consider impeachment.<sup>64</sup> A central purpose of the 1980 Act is to provide transparency, so every order resolving a complaint must be made public, and reprimands may be made public as well.<sup>65</sup>

The rules provide for review as of right.<sup>66</sup> Either the subject judge or the complainant may submit a petition for review to the circuit judicial council and, in some instances, to the Judicial Conduct and Disability Committee.<sup>67</sup> Discretionary review may also lie with the entire Judicial Conference.<sup>68</sup> The process is designed to be inquisitorial rather than adversarial.<sup>69</sup>

It has been my experience, in particular as seen in my tenure as Chief Judge of the Third Circuit, that several aspects of the current system contribute to its effectiveness. First, the chief circuit judge's role is essential to the system's efficacy, as the chief judge reviews all complaints. In the twelve-month period ending September 30, 2013, of 1167 resolved complaints, chief circuit judges dismissed 1147 as merits-related, lacking sufficient evidence, frivolous, or otherwise improper.<sup>70</sup> As noted, all matters determined to present factual issues are investigated by a special committee of judges who then makes a

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<sup>60</sup> 28 U.S.C. § 352(a)–(b); JUDICIAL CONDUCT AND DISABILITY RULES R. 11. Examples of “intervening events” include retirement or resignation by the judge in question. An example of “voluntary corrective action” is a judge resigning from a private club that the complainant alleges discriminates based on race.

<sup>61</sup> See 28 U.S.C. § 353(a) (requiring the chief judge to promptly establish a special committee to investigate questions of facts if the chief judge decides not to dismiss the complaint).

<sup>62</sup> 28 U.S.C. § 353(a)(1).

<sup>63</sup> 28 U.S.C. § 353(c); JUDICIAL CONDUCT AND DISABILITY RULES R. 17.

<sup>64</sup> 28 U.S.C. § 354(a)(2)–(3), (b); JUDICIAL CONDUCT AND DISABILITY RULES R. 20(b).

<sup>65</sup> 28 U.S.C. § 360(b); JUDICIAL CONDUCT AND DISABILITY RULES R. 19(f).

<sup>66</sup> 28 U.S.C. § 352(c); JUDICIAL CONDUCT AND DISABILITY RULES R. 18.

<sup>67</sup> 28 U.S.C. § 352(c); JUDICIAL CONDUCT AND DISABILITY RULES R. 18, 21.

<sup>68</sup> JUDICIAL CONDUCT AND DISABILITY RULES R. 21(a).

<sup>69</sup> JUDICIAL CONDUCT AND DISABILITY RULES R. 14 cmt.

<sup>70</sup> *Complaints Against Judges*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/complaints-against-judges.aspx> (last visited Apr. 3, 2015).

recommendation to the circuit judicial council.<sup>71</sup> The circuit judicial council then resolves the matter. Sometimes there is review by the Judicial Conduct and Disability Committee. Matters referred to a special committee of judges or a circuit judicial council typically take about a year to resolve.

Second, the authority of chief circuit judges to initiate investigations that was added to the statute in 1990 has served as a powerful tool to encourage judicial reception to chief judges' informal overtures—the “shotgun behind the door,” as one chief judge put it.<sup>72</sup> Before this addition, a chief judge asking about a judge's personal problem might have been told to “[m]ind your own business.”<sup>73</sup> Furthermore, the Judicial Conduct and Disability Committee is drafting a compendium of advisory opinions and key decisions interpreting the misconduct standards of the 1980 Act, the Code of Conduct, and procedural rules, to guide chief judges and circuit judicial councils in their implementation.

## II

### TWO BILLS TO ALTER THE BALANCE

Two recent legislative proposals could alter the balance of judicial accountability, challenge the federal judiciary's decisional and institutional independence, and upset our traditional notions of separation of powers. Each proposal is discussed in turn.

#### A. *Inspector General Bill*

The idea of an inspector general for the judiciary was first proposed in 1995 by Senator John McCain.<sup>74</sup> This bill was fairly narrow in scope; the inspector general's authority under the proposal was “limited strictly to the administrative functions performed by the [Administrative Office].”<sup>75</sup> Referred to the Senate Judiciary Committee, it received no further attention.

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<sup>71</sup> See *supra* notes 62–63 and accompanying text.

<sup>72</sup> Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PENN. L. REV. 243, 283 (1993) (internal quotation marks omitted).

<sup>73</sup> *Id.* (quoting Chief Judge Gobold) (internal quotations marks omitted).

<sup>74</sup> See Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 243 (1999) (supporting the creation of an inspector general office for federal courts).

<sup>75</sup> 141 CONG. REC. 35,326 (1995) (statement of Sen. McCain); see also Recommendation and Report, Am. Bar Ass'n House of Delegates (Aug. 7–8, 2006), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/threehundredeight.doc> (detailing ABA opposition to the judicial inspector general legislation).

The inspector general idea lay dormant until 2006. In that year, and in every congressional term since, members of Congress have introduced legislation to create an inspector general for the federal judiciary.<sup>76</sup> These more recent bills go much further than the McCain proposal, as the inspector general they contemplate would have powers to intrude upon the judicial branch and chambers of individual judges.<sup>77</sup> Some of the proposed duties of this inspector general are those one ordinarily associates with the position—investigating waste, fraud, and abuse, and conducting audits.<sup>78</sup> But significant to the purposes of this Lecture, the bills would also authorize the inspector general to investigate and resolve questions of judicial misconduct and disability.<sup>79</sup>

Though always entitled the “Judicial Transparency and Ethics Enhancement Act,” some of the contours of the legislation changed over the course of five congressional terms. But the central feature of the bill—the creation of an inspector general office with powers to investigate judicial misconduct and disability—has not.<sup>80</sup> All of the bills have given the inspector general significant investigatory power, including the power of contempt and the power to subpoena documents and witnesses, including judges.<sup>81</sup> The successive House bills have cabined the inspector general’s powers to the lower federal courts.<sup>82</sup> But not so with the Senate: All of the successive Senate versions have authorized the inspector general to investigate allegations of misconduct or disability in the Supreme Court as well.<sup>83</sup>

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<sup>76</sup> The Senate bills, in chronological order, are S. 2678, 109th Cong. (2006); S. 461, 110th Cong. (2007); S. 220, 111th Cong. (2009); S. 348, 112th Cong. (2011); and S. 575, 113th Cong. (2013). The House bills are H.R. 5219, 109th Cong. (2006); H.R. 785, 110th Cong. (2007); H.R. 486, 111th Cong. (2009); H.R. 727, 112th Cong. (2011); and H.R. 1203, 113th Cong. (2013).

<sup>77</sup> See, e.g., Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219 § 1023(1) (requiring the inspector general to “conduct investigations of matters pertaining to the Judicial Branch . . . that may require oversight or other action within the Judicial Branch or by Congress”); S. 2678 § 1023(1) (same).

<sup>78</sup> H.R. 1203 § 1023(2)–(3); S. 575 § 1023(3)–(4).

<sup>79</sup> H.R. 1203 § 1023(1); S. 575 § 1023(1)–(2).

<sup>80</sup> For the Senate bills, see sections 1023 and 1024 of S. 2678; S. 461; S. 220; S. 348; and S. 575. For the House bills, see sections 1023 and 1024 of H.R. 5219; H.R. 785; H.R. 486; H.R. 727; and H.R. 1203.

<sup>81</sup> For the Senate bills, see section 1024(3) of S. 2678; and section 1024(a)(3) of S. 461; S. 220; S. 348; and S. 575. For the House bills, see section 1024(3) of H.R. 5219; and section 1024(a)(3) of H.R. 785; H.R. 486; H.R. 727; and H.R. 1203.

<sup>82</sup> See section 1023 of H.R. 5219; H.R. 785; H.R. 486; H.R. 727; and H.R. 1203, which set out the inspector general’s duties and powers “[w]ith respect to the Judicial Branch, other than the United States Supreme Court.”

<sup>83</sup> See section 1023 of S. 2678; S. 461; S. 220; S. 348; and S. 575, which state “[w]ith respect to the Judicial Branch,” as well as section 1023(2) of S. 461; S. 220; S. 348, and S.

Initially, the House and Senate versions of the bill contemplated no limits on the inspector general's investigations, authorizing the inspector general to "conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings . . . that may require oversight or other action within the Judicial Branch or by Congress."<sup>84</sup> After hearings before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security in June 2006, however, the House and Senate bills went through changes that narrowed the inspector general's powers to some extent. The bills were amended to set four-year limits on the inspector general's term and to allow the Chief Justice to remove the inspector general so long as the Chief Justice gave reasons for his decision to Congress.<sup>85</sup> In addition, the inspector general was no longer charged with investigating all "matters pertaining to the Judicial Branch . . . that may require oversight," but instead targeted investigation of alleged judicial misconduct.<sup>86</sup> The inspector general's powers to commence investigations into judicial misconduct were also restricted, in part, to cases where a petition for review had been denied by the circuit judicial council.<sup>87</sup> It is worth noting, though, that in recent years, roughly fifty percent of all resolved complaints have been denied at this stage, totaling approximately five to six hundred complaints per year, so the restriction is not significant, nor would the restriction affect any contentious case.<sup>88</sup> The amended bills also restricted the inspector general's authority to investigate "any matter that is directly related to the merits of a decision or procedural ruling by any judge or court" or "punish or discipline any judge or court."<sup>89</sup>

At the hearings held before the House committee in June 2006, no federal judges were invited to testify.<sup>90</sup> Those who were invited to testify and were in favor of the bill expressed concerns about press reports of "ethics violations, conflicts of interest, and appearances of

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575, which explicitly state that the inspector general is authorized to investigate the Supreme Court.

<sup>84</sup> H.R. 5219 § 1023(1); S. 2678 § 1023(1).

<sup>85</sup> See *House Judiciary Committee Passes IG Bill*, UNITED STATES COURTS (Oct. 2006), [http://www.uscourts.gov/News/TheThirdBranch/06-10-01/House\\_Judiciary\\_Committee\\_Passes\\_IG\\_Bill.aspx](http://www.uscourts.gov/News/TheThirdBranch/06-10-01/House_Judiciary_Committee_Passes_IG_Bill.aspx) (discussing amendments to the 2006 bill).

<sup>86</sup> H.R. 5219 § 1023(1); S. 2678 § 1023(1).

<sup>87</sup> H.R. 785, 110th Cong. § 1024(b) (2007); S. 461 § 1024(b); *House Judiciary Committee Passes IG Bill*, *supra* note 85.

<sup>88</sup> *Complaints Against Judges*, *supra* note 70.

<sup>89</sup> H.R. 785 § 1024(c)(1)–(2); S. 461 § 1024(c)(1)–(2); *House Judiciary Committee Passes IG Bill*, *supra* note 85.

<sup>90</sup> MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY* 170–71, 175 (2009).

impropriety,” and questioned the judiciary’s ability to self-regulate.<sup>91</sup> In light of these issues, one supporter suggested that an inspector general would be a simple, commonsense control and check on impropriety.<sup>92</sup> Another emphasized that offices of inspector generals exist “throughout the executive branch” and in the House of Representatives<sup>93</sup> (although, it is worth noting, the House Inspector General is selected and appointed exclusively by the body it serves, and has only a narrow mandate that permits investigation of movement of funds, but not of legislators’ conduct or personal finances<sup>94</sup>). These speakers argued that the bill would strengthen judicial independence and give the public “greater faith” in the judiciary by enhancing the transparency of the judicial misconduct review process.<sup>95</sup>

The only witness opposed to the bill struck a different chord. He recalled previous periods of tension between Congress and the judiciary and acknowledged the trend in Congress, starting in the late nineteenth century, of increasing judicial accountability by “making [the judiciary] accountable to itself.”<sup>96</sup> The House bill, he said, marked a troubling shift “away from this century-long tradition” and toward a system that would give power to an inspector general and, in turn, to Congress.<sup>97</sup> The office of a judicial inspector general, he warned, could be misused to retaliate against judges who made unpopular decisions.<sup>98</sup> In addition, the comparison of the proposed inspector general to the offices of inspector general in executive agencies was flawed because the judiciary “lacks the power to push back if Congress erodes” its independence.<sup>99</sup> An inspector general in the executive branch would “straddle a barbed-wire fence” between the executive and legislative branches, which jockey for power, but no barbed-wire fence exists to protect the judiciary from congressional overreach.<sup>100</sup> In 2006, the House Committee on the Judiciary voted the bill out of committee, but no further action occurred.<sup>101</sup>

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<sup>91</sup> *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the H. Subcomm. on Crime, Terrorism & Homeland Sec.*, 109th Cong. 1 (2006).

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> See RULES OF THE HOUSE OF REPRESENTATIVES R. 2 (2015) (114th Cong.) available at <http://clerk.house.gov/legislative/house-rules.pdf> (outlining the appointment and duties of the Inspector General).

<sup>95</sup> *Judicial Transparency and Ethics Enhancement Act of 2006*, *supra* note 91, at 11.

<sup>96</sup> *Id.* at 46.

<sup>97</sup> *Id.* at 47.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 48.

<sup>100</sup> *Id.* at 47–48.

<sup>101</sup> *House Judiciary Committee Passes IG Bill*, *supra* note 85.

Neither the Senate nor the House of Representatives passed an inspector general bill, but they are reintroduced every session, and as recently as 2013, the House Judiciary Committee held hearings probing the viability of the current judicial conduct and disability system.<sup>102</sup> Each bill has authorized the inspector general to obtain information and assistance from any governmental agency, including all information kept by the Judicial Conference of the United States, the circuit judicial councils, and the Administrative Office of the United States Courts.<sup>103</sup> All bills permit the inspector general to subpoena documents and testimony of witnesses, which includes judges, and have those who fail to comply held in contempt.<sup>104</sup> The bills contemplate the inspector general having ties to both the judicial and the legislative branches.<sup>105</sup> Appointment of the inspector general would be the responsibility of the Chief Justice of the United States, but only after consultation with the leadership of both houses of Congress.<sup>106</sup> If the Chief Justice decides to remove the inspector general from office, he must “communicate the reasons for any such removal to both Houses of Congress.”<sup>107</sup> The inspector general would be responsible for reporting to Congress and the Chief Justice annually on the office’s activities as well as making additional reports to them on matters that “may require” their action.<sup>108</sup> Though some amendments have somewhat constrained the inspector general’s powers, the primary feature—the creation of an office, with ties to Congress, with robust investigatory powers over the judiciary branch—has not

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<sup>102</sup> *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013).

<sup>103</sup> For the Senate bills, see section 1024(2) of S. 2678, 109th Cong. (2006); and section 1024(a)(2) of S. 461, 110th Cong. § 1024(a)(2) (2007); S. 220, 111th Cong. § 1024(a)(2) (2009); S. 348, 112th Cong. § 1024(a)(2) (2011); and S. 575, 113th Cong. § 1024(a)(2) (2013). For the House bills, see section 1024(2) of H.R. 5219, 109th Cong. (2006); and section 1024(a)(2) of H.R. 785, 110th Cong. (2007); H.R. 486, 111th Cong. (2009); H.R. 727, 112th Cong. (2011), and H.R. 1203, 113th Cong. (2013).

<sup>104</sup> For the Senate bills, see section 1024(3) of S. 2678; and section 1024(a)(3) of S. 461; S. 220; S. 348; and S. 575. For the House bills, see section 1024(3) of H.R. 5219; and section 1024(a)(3) of H.R. 785; H.R. 486; H.R. 727; and H.R. 1203.

<sup>105</sup> For the Senate bills, see, for example, sections 1022 and 1025(a) of S. 2678; and section 1022(a) and 1025(a) of S. 461; S. 220; S. 348; and S. 575. The bills provide that the inspector general would be appointed by the Chief Justice after consultation with Congress, and that the inspector general would submit annual reports to the Chief Justice and Congress. Similarly for the House bills, see, for example, sections 1022 and 1025(a) of H.R. 5219; and sections 1022(a) and 1025(a) of H.R. 785; H.R. 486; H.R. 727; and H.R. 1203.

<sup>106</sup> *E.g.*, H.R. 1203, 113th Cong. § 1022(a) (2013); S. 575, 113th Cong. § 1022(a) (2013).

<sup>107</sup> *E.g.*, H.R. 1203 § 1022(c); S. 575 § 1022(c).

<sup>108</sup> *E.g.*, H.R. 1203 § 1025(a)(1)–(2); S. 575 § 1025(a)(1)–(2).

changed.<sup>109</sup> Significantly, the Senate bill still applies to the Supreme Court.<sup>110</sup> And it is impossible to predict what future versions of the bill will provide.

There have been different versions of the inspector general bill, but all versions are problematic on several levels. First, the bill raises serious constitutional concerns. Historically, Congress has formally reviewed the conduct of individual judges only when considering impeachable offenses. But the inspector general bill is designed to reach conduct that does not rise to impeachment. When a political branch of government can direct or influence these investigations, judges are no longer insulated from encroachment, and the judiciary's ability to check the power exercised by the executive and legislative branches may be undermined. Even more consequential is the authority to investigate conduct and disability of the Supreme Court—a recalibration of the equilibrium set forth by the separation of powers.

Some have argued that life tenure and protection of salary should be sufficient to shield the judiciary from real coercion.<sup>111</sup> But threats to decisional independence, such as those posed by the inspector general regime, are different from critical comments about judicial decisionmaking and self-regulation. After all, “[d]ecisional independence is the sine qua non of the judicial independence.”<sup>112</sup> Any outside influence on the judicial conduct and disability process contains the seeds for improper pressure and persuasion.

Second, as a matter of administration, the proposed mandate of the inspector general would duplicate the existing judicial conduct and disability process in several ways. The inspector general's power to investigate conduct and disability overlaps with the authority given to chief circuit judges and the circuit judicial councils.<sup>113</sup> On contentious cases there also may be review by the Judicial Conduct and Disability Committee.<sup>114</sup> And although the proposed inspector general would

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<sup>109</sup> Compare S. 2678 § 1022 (providing only for the appointment of the inspector general “by the Chief Justice of the United States after consultation with the majority leader and minority leader of the Senate and the Speaker and minority leader of the House of Representatives”), with S. 575 § 1022 (maintaining the same appointment provisions while setting a four-year term and providing for removal by the Chief Justice).

<sup>110</sup> Compare H.R. 1203 § 1023 (providing that the inspector general's duties are “[w]ith respect to the Judicial Branch, other than the United States Supreme Court”), with S. 575 § 1023(2) (providing that the inspector general “shall . . . conduct investigations of alleged misconduct in the United States Supreme Court that may require oversight or other action within the judicial branch or by Congress”).

<sup>111</sup> *Judicial Transparency and Ethics Enhancement Act of 2006*, *supra* note 91, at 10.

<sup>112</sup> Bermant & Wheeler, *supra* note 15, at 860 (emphasis omitted).

<sup>113</sup> See *supra* note 62 and accompanying text.

<sup>114</sup> See *supra* notes 66–67 and accompanying text.

have both subpoena and contempt power over documents and witnesses, the chief circuit judges, the circuit judicial councils, and the Judicial Conduct and Disability Committee hold this power as well, and can order judges to testify under oath.<sup>115</sup>

In addition, the reporting function of the inspector general is already served by the Judicial Conduct and Disability Committee. The Committee undertakes an annual review of all the complaints in a manner similar to the Breyer Committee analysis. The Committee also provides reports to Congress upon request of the Judiciary Committees, recommends changes in regulations, and reports any conduct that requires action by Congress or the Judicial Conference.

The inspector general's authority to investigate fraud and abuse also overlaps with work done by the Administrative Office, which contracts for outside audits conducted by independent accounting firms under generally accepted auditing standards.<sup>116</sup> Over one hundred such audits were conducted in fiscal year 2014.<sup>117</sup> In addition, a separate committee, the Committee on Audits and Administrative Office Accountability, is charged with addressing waste, fraud, or abuse and creating mechanisms for reporting and investigation.<sup>118</sup>

But there is something more. In a quite different way, an inspector general would have a transformative effect on the judiciary itself. Understandably, self-regulation of public servants draws skepticism, but it is imperative for the judiciary that it retains the proper measure of decisional independence. As noted, judicial independence and accountability are two sides of the same coin. And self-regulation fixes accountability in a way that regulation by another agency would not.

The process now in place requires discipline, rigor, and self-assessment, seen in the searching inquiry now undertaken by the chief

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<sup>115</sup> 28 U.S.C. § 356(a) (2012); JUDICIAL CONDUCT AND DISABILITY RULES R. 13(d).

<sup>116</sup> *Administrative Oversight and Accountability*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/administrative-oversight-accountability.aspx> (last visited Apr. 23, 2015) ("The [Administrative Office] oversees comprehensive audits of judiciary funds. Most audits are conducted by independent certified public accounting (CPA) firms.").

<sup>117</sup> See *Assuring Accountability*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2014/assuring-accountability.aspx> (last visited Apr. 23, 2015) ("Court audits are conducted on a four-year cycle for most courts, and on a 30-month cycle for larger courts. In fiscal year 2014, the [Administrative Office] issued final reports for 53 cyclical financial audits of the courts. Fifty-nine other financial audits were completed . . .").

<sup>118</sup> See *Oversight and Review at Core of Stewardship*, UNITED STATES COURTS (Apr. 2011), [http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Oversight\\_and\\_Review\\_at\\_Core\\_of\\_Stewardship.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Oversight_and_Review_at_Core_of_Stewardship.aspx) (providing an overview of the committee's work).

circuit judges and circuit judicial councils. The judges who make these decisions feel an acute responsibility for this essential and sensitive job: soundly exercising discretion on matters of personal and institutional importance. They balance the legitimate competing interests, but overall they must ensure and maintain public confidence in the integrity of a court's decisions, in the judiciary as an institution, and also in its principal actors—the judges themselves. The judges charged with this duty understand they act as stewards for an essential institution. Of course stewards have to be worthy of the task. This centrality of stewardship would be greatly diminished under an inspector general regime.

This stewardship is also exemplified by the manner that chief circuit judges and circuit judicial councils respond to allegations of conduct and disability even without adjudication. I am referring to those methods or norms that encourage proper behavior and regulate conduct and disability. Historically, the Chief Justice and other Justices took on the duty “of responding . . . to cases of individual judicial misconduct and disability. Senior Circuit Judges, later renamed Chief Circuit Judges did likewise, well before the judicial councils were created in 1939.”<sup>119</sup> Indeed, by virtue of their leadership role within a court, “the power to monitor judicial conduct may be inherent in the position of chief judge.”<sup>120</sup>

On misconduct matters, since 1990, each chief circuit judge has the authority to initiate a complaint against a fellow judge, *sua sponte*—that is, to “trigger the formal disciplinary process.”<sup>121</sup> Having this power means chief judges can take action in informal ways, with the threat of formal action looming. One of the advantages of informal resolution is that some problems can be confronted and corrected without compromising life tenure: “Informal action [can] embrace[ ] a broad range of approaches available to a chief judge . . . , ranging from the subtle to the blunt.”<sup>122</sup> These efforts are usually effective given the subject judges’ dedication to their work and to the judiciary as an institution. In certain instances, these efforts may result in retirement or resignation.

As for disability, the same considerations apply. Informal efforts to persuade disabled judges to seek help, retire, or resign have been quite successful. And the mere prospect of a circuit judicial council certifying a disability or suspending judicial duties, if ever ordered and

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<sup>119</sup> Geyh, *supra* note 72, at 279 (footnotes omitted).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 279 (citing 28 U.S.C. § 372(c) (Supp. IV 1992), currently codified at § 351(b)).

<sup>122</sup> *Id.* at 281.

issued, would reflect on the subject judge's mental capacity and constitute a vote of no confidence.

These informal interactions and their consequent relationships, so crucial in forming the character of the federal judiciary, a character that can reinforce an ethos of judicial independence and responsibility, could be lost or diminished under an inspector general regime.

### B. *Congressional Regulation of Supreme Court Recusal*

The inspector general bill is not the only recent congressional proposal that threatens to undermine the judiciary's independence. Another is found in the Supreme Court Transparency and Disclosure Act of 2011, a proposal that, if adopted, would regulate the recusal process for Supreme Court Justices.<sup>123</sup>

Current legislation addressing recusals states that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>124</sup> The statute goes on to enumerate several other categories of mandatory recusal, including having a financial stake in the case and the potential to be called as a witness.<sup>125</sup> Section 455 of that statute applies by its terms to all judges, including the Supreme Court Justices.<sup>126</sup> The Justices thus comply with its provisions, though they have never addressed the statute's constitutionality as applied to themselves.<sup>127</sup> The Justices also consult the Code of Conduct.<sup>128</sup>

Under the 1980 Act and the Rules, recusal is a merits decision,<sup>129</sup> and in the lower courts such decisions are appealable.<sup>130</sup> As a merits

<sup>123</sup> H.R. 862, 112th Cong. (2011).

<sup>124</sup> 28 U.S.C. § 455 (2012).

<sup>125</sup> 28 U.S.C. § 455(b)(4), (5)(iii)–(iv).

<sup>126</sup> See 28 U.S.C. § 455(a) (referring to “[a]ny justice, judge, or magistrate judge of the United States”).

<sup>127</sup> Chief Justice Roberts noted in his 2011 year-end report, “Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455.” 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8, available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>128</sup> 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 127, at 4 (“All Members of the [Supreme] Court do in fact consult the Code of Conduct in assessing their ethical obligations.”).

<sup>129</sup> See JUDICIAL CONDUCT AND DISABILITY RULES R. 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related.”); JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 9 (2006) (“[R]ecusal decisions are almost always merits-related and thus not covered by the Act.”).

<sup>130</sup> See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[It] deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”).

decision, recusal is not cognizable as misconduct under the Rules;<sup>131</sup> but some bases for recusal—bias or prejudice—are cognizable.<sup>132</sup> So some recusal decisions are unique in that they are also the potential subjects of misconduct complaints. Generally, recusal decisions are made by the individual judge or justice, *sua sponte* or upon motion.<sup>133</sup> Recusal is necessitated by an awareness that personal interest can interfere with neutral decisionmaking. This is an underlying principle of both section 455 and the Code of Conduct. Some may question the appropriateness of leaving the decision whether to recuse with the judge whose impartiality is being questioned. But judges understand and respect the importance of recusal decisions. And any conflict, relationship, or possible bias, or appearance of such, should necessitate recusal. At the same time, a judge's ability to put aside personal feelings and possible biases is essential to the judicial role.

Although a lower court judge's decision not to recuse is sometimes reviewable by a higher court, in the Supreme Court the decision is made by the individual Justice alone and is unreviewable. As Justice Robert Jackson wrote, "There is no authority . . . under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case."<sup>134</sup> Still, some commentators have argued for full Supreme Court review of a recusal decision.<sup>135</sup>

The proposed Supreme Court Transparency and Disclosure Act would formally apply the Code of Conduct adopted by the Judicial Conference to the Justices as well as to the lower judiciary and would require the Judicial Conference to establish procedures for receiving and reviewing complaints against the Justices, modeled after the current process in the lower courts.<sup>136</sup> Further, it would require the Justices to disclose their reasoning behind any recusal decision and require the Judicial Conference to establish a process of further review of a Justice's nonrecusal decision.<sup>137</sup>

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<sup>131</sup> See JUDICIAL CONDUCT AND DISABILITY RULES R. 3(h) (defining "[c]ognizable misconduct" to exclude "an allegation that is directly related to the merits of a decision or procedural ruling").

<sup>132</sup> See *id.*, at R. 3(h)(1) (defining "[c]ognizable misconduct" to include many prejudicial or biased actions).

<sup>133</sup> See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 601 (1987) ("[R]ecusal decisions are usually made in the first instance by the allegedly biased judge.").

<sup>134</sup> *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring on denial of petition for rehearing).

<sup>135</sup> See, e.g., Stempel, *supra* note 133, at 641.

<sup>136</sup> H.R. 862, 112th Cong. § 2 (2011).

<sup>137</sup> *Id.* § 3.

This review of a Justice's recusal decision would be unprecedented, and as Justice Jackson wrote in *Jewel Ridge*, would be without any recognized authority. Though the Constitution gives Congress the authority to create lower federal courts, it mandates "one Supreme court,"<sup>138</sup> and no explicit provision of the Constitution authorizes Congress to otherwise regulate the conduct of the Supreme Court. But there are other reasons, as well, to differentiate congressional regulation of Supreme Court recusal and regulation of recusal in the lower courts.

First, it is true that all other judges' recusal decisions (including those of state court judges) are reviewable by another court with final review in the Supreme Court.<sup>139</sup> But when dealing with recusal decisions by Supreme Court Justices, at some point no further review is possible, both as a practical matter and as "a consequence of the Constitution's command that there be only 'one supreme Court,'" as Chief Justice John Roberts has explained.<sup>140</sup> The finality of an individual Justice's recusal decision seems to be the norm in other common law countries. Like our Supreme Court, in both the High Court of Australia and the Supreme Court of Canada, recusal motions are directed to, and decided by, the subject justice.<sup>141</sup>

A second key difference is that the Supreme Court Justices arguably have a stronger duty to sit than other judges.<sup>142</sup> Unlike lower federal courts, where a judge can be substituted at nearly any time, another judge cannot substitute for a recusing Justice. Although some

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<sup>138</sup> U.S. CONST. art. III.

<sup>139</sup> See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009) (noting that, in certain cases, "the Constitution requires recusal").

<sup>140</sup> 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 127, at 8–9.

<sup>141</sup> R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1815, 1824 (2005). In some instances in common law countries, other judges or justices have reviewed the decision to recuse. *Id.* at 1818–27 (describing such instances in the British House of Lords, the High Court of Australia, and the Constitutional Court of South Africa). But because these were singular events in each country, it is far from clear that there is any regular practice of review. For instance, recusal motions to the High Court of Australia are decided by the subject judge; while the chief judge has the right to decide whether to accept a decision to recuse, it does not appear that the chief judge can require recusal when the subject judge decides it is not warranted. *Id.* at 1824. Similarly, the justices of the Supreme Court of Canada decide individually whether to recuse, although the Supreme Court of Canada has considered a recusal question before in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. See also Abimbola A. Olowofoyeku, *Regulating Supreme Court Recusals*, 2006 SING. J. LEGAL STUD. 60, 70–71 (discussing *Wewaykum Indian Band v. Canada*).

<sup>142</sup> See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8, at 604 (2d ed. 2007) (discussing federal judges' beliefs on their "duty to sit").

have suggested otherwise,<sup>143</sup> it is questionable whether the Constitution and current law allows for a retired Justice to temporarily sit on the Court to replace a recused Justice. When less than the full Court is present, there is a real possibility of a plurality or equally divided decision.<sup>144</sup> Accordingly, a Justice's vote to recuse may effectively be a vote on the merits, and any congressional regulation of the process of decision, or congressionally mandated full-court review of a recusal decision, also has the potential to impact the merits.

Several Justices of the Court have noted that the duty to sit is stronger on the Supreme Court in part because of the rule of necessity. In discussing this, Justice Stephen Breyer testified before the House Judiciary Committee: “[Y]ou . . . have a duty to sit . . . [b]ecause there is no one to replace me if I take myself out, and that could sometimes change the result.”<sup>145</sup> Chief Justice Roberts has said “each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.”<sup>146</sup> Still, the Justices do recuse themselves with some degree of regularity; from October Terms 2008 to 2012, Justices recused themselves fifty-five times, with the majority of those recusals coming from Justice Elena Kagan as a result of her work as Solicitor General.<sup>147</sup> What is clear is that the Supreme Court Justices carefully consider the decision to recuse by consulting the Code of Conduct, legal precedent, and scholarly works, as well as advice from colleagues, the Court's legal office, and the Judicial Conference Committee on the Codes of Conduct.

## CONCLUSION

The inspector general and Supreme Court recusal bills would lead to significant changes in the way the judiciary functions, but this change would be insignificant compared to the threat to the decisional independence of the federal judiciary. An inspector general with ties to a coordinate branch of government or congressional regulation of

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<sup>143</sup> See, e.g., Rebekah Saidman-Krauss, Comment, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN. ST. L. REV. 253 (2011) (arguing retired Justices should be able to sit in place of a recused Justice).

<sup>144</sup> See *Laird v. Tatum*, 409 U.S. 824, 838–39 (1972) (“[T]he disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court.”).

<sup>145</sup> *Financial Services and General Government Appropriations for 2012: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 112th Cong. 159 (2011) (statement of Justice Stephen Breyer).

<sup>146</sup> 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 127, at 9.

<sup>147</sup> See Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 493 (2014) (noting that Justice Kagan was responsible for thirty-five of those fifty-five recusals, thirty-three of which occurred during October Term 2010).

Supreme Court recusal would impact the constitutionally based separation of powers. Members of Congress and members of the judiciary share a common bond, as trustees of the long-term interests of an essential institution. For a very long time now, the coequal branches of the federal government have respected the other branch's decisional independence. This history is deeply rooted in the American political and constitutional tradition. Congress has honored this legacy by guarding judicial independence and self-governance. These long-standing principles of comity confirm that there is no need to create constitutional tension. The judiciary is faithfully discharging its duties of accountability.