Testimony of Charles G. Geyh on H.R. 5219—The "Judicial Transparency and Ethics Enforcement Act of 2006"

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My name is Charles G. Geyh. I am a Professor of Law at Indiana University at Bloomington, the author of *When Courts & Congress Collide: The Struggle for Control of America's Judicial System (University of Michigan Press 2006)*, and coauthor, (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the forthcoming fourth edition of *Judicial Conduct and Ethics (Lexis Law Publishing 2007).* I am currently co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and previously served as consultant to the National Commission on Judicial Discipline and Removal.

HR 5219—The Judicial Transparency and Ethics Enforcement Act of 2006—has a laudable goal: to make the federal judiciary better accountable for its budget and for the ethical transgressions of its judges. Pursuing that goal by creating an inspector general for the federal judiciary, however, is highly problematic for at least two reasons:

- First, inspector general investigations can and likely will be exploited to punish judges for their judicial decisions, statements of bill sponsors to the contrary notwithstanding, thereby jeopardizing core judicial independence norms that Congress has respected for well over a century.

• Second, inspectors general are commonplace within executive branch agencies, but the judiciary is not an agency—it is an independent branch of government. To the extent that inspectors general for executive branch agencies have performed with independence and integrity, it is for reasons that the judicial branch is ill-equipped to replicate, because the judiciary lacks the powers of the executive branch to thwart Congressional intrusions into its inspector general investigations.

Although I have serious reservations about HR 5219, the bill serves the salutary purpose of communicating an important message to the judiciary: that Congress is serious about the judiciary's ethical and fiscal responsibilities and that the judiciary should be equally so. Recent events reported in the press signal possible deficiencies in the judiciary's ethics rules and disciplinary framework. The preferred approach is to work cooperatively with the courts to address the concerns that animate HR 5219, rather than to impose a potentially problematic solution on an unwilling judiciary. Such a conversation should await the results of three ongoing projects within the judicial branch—Justice Stephen Breyer's Commission on the disciplinary process; the Judicial Branch Committee's study of privately funded seminars, and the Codes of Conduct Committee's review of recusal issues.—and take place in the shadow of this bill, giving Congress the leverage it needs to ensure meaningful reform.

Background

In the past few years, members of Congress have been highly critical of federal judges and their decisions, and have proposed a variety of reforms calculated to punish "judicial activists" and curb their excesses. Some have proposed to impeach offending judges.[1] Others have advocated defiance—one bill would deprive the executive branch of the resources to enforce judicial orders in specified cases.[2] One suggested that Congress disestablish uncooperative courts,[3] while another proposed to cut the judiciary's budget to "get their attention,"[4] and many have pressed for legislation to deprive the courts of jurisdiction to hear specific kinds of cases on politically sensitive subjects.[5]

This is not the first time that federal judges have weathered a sustained period of criticism.[6] The first occurred at the turn of the nineteenth century when Thomas Jefferson succeeded John Adams as president and the Jeffersonian Republican Congress dedicated itself to undoing damage they perceived the outgoing Federalists as causing the federal courts, by disestablishing judgeships and impeaching unpopular judges. A

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[1] Ralph Hallow, *Rpublicans out ti Impeach "Sctivist" Jurists*, WASHINGTON TIMES, March 12, 1997, at A1.
[2] Stephen Dinan, *House Targets Judiical 'Errors' With a New Strategy; Votes to Stop Enforcement of Rulings on Pledge, Posting*, WASHINGTON TIMES, July 29, 2003 at A1.
[3] Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of "Judicial Activism,"* BOSTON GLOBE, April 4, 2005.
[4] Ruth Marcis, *Booting the Bench*, WASHINGTON POST, April 11, 2005.
[5] Alexander Bolton, *Courts May Be Stripped on the Pledge*, THE HILL, September 16, 2004 at 1.
[6] For an elaboration upon these cycles of anti-court sentiment and the emergence of judicial independence norms, see CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 51-113 (2006).

generation later, President Andrew Jackson and his supporters in Congress locked horns with the Marshall Court over the supremacy of the Supreme Court's authority to impose its interpretation of the U.S. Constitution on the state and federal governments, and several states openly defied Court orders. Another generation after that, a radical Republican Congress squared off against the Supreme Court in the aftermath of the Civil War over a number of issues pivotal to the Reconstruction agenda, and stripped the Supreme Court of jurisdiction to hear a pending case. Roughly twenty-five years later, near the turn of the twentieth century, congressional populists and progressives advocated a variety of means to restrain the courts from invalidating legislative reforms at the state and federal levels. During the 1930s, an exasperated Franklin Roosevelt invited Congress to pack the Supreme Court with additional justices to thwart the Court's conservative majority that had struck down several New Deal programs. The passage of another generation saw members of the Warren Court targeted for impeachment, and bills introduced to curtail federal court jurisdiction, all or in part because of their liberal-leaning decisions in civil rights and civil liberties cases.

In the 19th Century, Congress sometimes made good on these cyclical threats to impeach errant judges, disestablish their courts, or strip them of jurisdiction. Gradually, however, Congress—and the people it represented—came to appreciate that such threats were antithetical to an emerging Constitutional culture that respected the role independent judges play in American government and that rejected draconian proposals to manipulate the decisions that judges make. Although angry members of Congress

have continued to make such proposals every generation or so, they are almost never implemented, as judicial independence norms have become more fully entrenched.

That these heavy-handed means of court control gradually fell into disuse is not to suggest that Congress became indifferent to judicial accountability. Rather, Congress ultimately decided that the best way to balance the needs of judicial independence and accountability was to delegate to the judiciary the authority it needed to be better accountable to itself.[7] And so, in 1891, Congress created the circuit courts of appeals for the express purpose of curbing district court despotism by means of appellate review. In 1922, it created the precursor to the Judicial Conference of the United States, thereby enabling the judiciary to govern itself as a branch; in 1934 it delegated to the courts the power to make their own procedural rules; in 1939, it created the Administrative Office of U.S. Courts, thereby rendering the judiciary accountable for its own budget; and in 1980, it established a system for regulating judicial misconduct in which judges were authorized to discipline their own.

HR 5219 Can and Likely Will be Exploited to Punish Judges for Their Judicial Decisions

At first blush, HR 5219 may look like another proposal in keeping with the modern trend toward equipping the judiciary with the tools it needs to make it better accountable to itself, by creating a Chief Justice-appointed inspector general "for the

[7] For a discussion of this century-long project to make the judiciary better accountable to itself, *see id.* at 92-110

judicial branch" who bill sponsors have taken pains to emphasize "will not have any authority or jurisdiction over the substance of a judge's decisions." A closer look, however, reveals that notwithstanding the best intentions of its drafters, this legislation could be employed by members of Congress to manipulate judges and their decision-making in patently unacceptable ways.

In evaluating the impact of proposed legislation on the courts, context matters. When President Franklin Roosevelt introduced his Court-packing plan in 1937, it was on the pretext that federal judges were elderly, had fallen behind in their work, and needed additional help. Superficially, then, his was an innocuous plan to improve the efficient operation of the courts. In context, however, this was an Administration furious with Supreme Court decisions invalidating New Deal legislation, and intent on finding a way to get around those decisions, and so—notwithstanding the President's explanation—the court-packing plan was generally understood as a direct assault on the judiciary's autonomy. Context matters with HR 5219 too. This is not a sympathetic Congress that is looking for ways to help the courts better administer themselves. This is an angry Congress that is dismayed with federal judges generally, with their autonomy, with the outcomes of cases that they have decided, and with the way they run their shop. When, in 2004, Chairman Sensenbrenner addressed the Judicial Conference on the relationship between Congress and the courts, he quite pointedly called attention to two recent disciplinary matters that in his view "raise[] profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself," adding that "If the Judiciary will not act, Congress will." The next year, when

Chairman Sensenbrenner first elaborated on his proposal to create an inspector general for the judiciary, it was in the context of a speech at Stanford in which he expressed his dismay for "judicial activism" but pronounced impeachment too "extreme" a remedy, before adding in the very next sentence that "[t]his does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct" and hailing judicial discipline as the appropriate solution. Perhaps Chairman Sensenbrenner did not mean to imply that judicial discipline was an appropriate remedy for "activist" decision-making, but in the larger context of an angry Congress looking for ways to diminish the courts' autonomy and control judges and their decisions, if HR 5219 can be construed to authorize investigations into judicial decision-making, odds are that some members of Congress will seek make it happen.

HR 5219 is indeed written broadly and ambiguously enough to authorize inquiries into judicial decision-making:

• Section 1023 authorizes the Inspector General to "conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings under chapter 16 of this title, that may require oversight or other action within the Judicial Branch or by Congress." It would certainly seem that a judge's decisions would fall within the ambit of "matters pertaining to the judicial branch," unless the "including" clause that follows is intended to limit applicable "matters" to those involving judicial misconduct or proceedings under Chapter 16. While the latter construction is possible, it is strained and odd-seeming, because it would mean that the

section conferred a sweeping investigatory mandate in one clause only to take it away in the next.

• Even if pertinent investigations were limited to questions of "misconduct in office by judges," a judicial decision in which a judge rendered a decision by allegedly disregarding his oath to follow the law and substituting his own personal or political predilections, might well qualify as a form of misconduct. Indeed, Canon 3A of the Code of Conduct for U.S. Judges provides that "A judge should be faithful to and maintain professional competence in the law." The judge whose decision arguably reflects a lack of competence or fidelity to the law would thus seem to fall within the zone of inquiry. It is possible to limit the construction of section 1023 still further to confine "misconduct in office" to matters actionable under Chapter 16—which calls for the dismissal of complaints related to the merits of judicial decisions. If, however, the objective is to place judicial decision-making clearly outside the scope of inspector general inquiries, the bill should say so with clarity.

• Finally, even assuming that a judge's decisions are technically outside the scope of section 1023, angry members of Congress may agitate for investigations targeting unpopular judges, ostensibly on the grounds that the judges in question have mismanaged their budgets or engaged in ethical improprieties independent of their decisions. In this context, heightened scrutiny is itself a form of Congressional retaliation.

The Judiciary Lacks the Powers of the Executive Branch to Thwart Congressional Overreaching into its Inspector General Investigations.

Proponents of HR 5219 have pointed to the success of inspector general programs within administrative agencies as evidence of their potential value within the judiciary. The judiciary, however, is not an administrative agency. It is a separate and independent branch of government—and one that lacks the powers at the executive branch's disposal to resist Congressional overreaching.

HR 5219 gives Congress a significant role to play in the workings of the proposed office of inspector general for the federal judiciary. First, under §1022, the Chief Justice appoints the inspector general "after consultation" with Congressional leaders. Although the Chief Justice's nominee may not technically require Congressional approval, in the current political climate such approval will be a practical necessity. Second, in §1023(1), the ambit of the Inspector General's duties are defined to reach "matters pertaining to the judicial branch . . . that may require oversight or other action . . .by Congress." Third, §1025(a)(1) directs the Inspector General to make annual reports to Congress, while §1025(a)(2) directs the Inspector General to "make prompt reports to . . . Congress on matters that may require action by [it]."

Taken together, these powers would give Congress the leverage to influence who is named Inspector general, which judges are targeted for investigation, what kinds of

information the inspector general provides to Congress, and when. When Congress intrudes too far on the prerogatives of inspectors general within the executive branch, the executive branch is well equipped to push back, given the President's considerable political influence and his veto power in the legislative arena. The history of inspectors general within administrative agencies is thus one of constructive tension between the legislative and executive branches as they jockey for influence.[8]

The judiciary, however, lacks the power to push back, and is thus far more vulnerable to Congressional incursions upon its autonomy, where, as here, the legislation affords Congress so significant a role to play in the inspector general's operations. The only weapon at the judiciary's disposal to fend off such incursions is judicial review—which all agree should be used sparingly, and which, if employed in this context, could precipitate a constitutional crisis.

[8] For a history of inspectors general within the executive branch, see PAUL C. LIGHT, INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

Conclusion

HR 5219 seeks to address a bona fide problem. Federal judges have come under fire for their attendance at expense-paid seminars, their failure to disqualify themselves from cases in which recusal would seem to be warranted, the absence of ethical standards applicable to the Supreme Court, and the failure of the disciplinary process to call judges to task in cases where it was arguably warranted. For the reasons specified above, HR 5219 is an ill-advised solution to these problems that would jeopardize a tradition of restraint in the relationship between courts and Congress that is well over a century in the making. The preferred approach is to await the report of Justice Breyer's Commission together with the results of related efforts by Judicial Conference Committees on the Judicial Branch and the Codes of Conduct, and then work cooperatively with the Judicial Conference to meet Congress's remaining concerns. If the judiciary is unwilling to reform itself in the teeth of evidence that further reform is necessary, that may be the time to consider stronger medicine. But not now.