

September 26, 2007

*[T]he greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.*  
-- Chief Justice John Marshall

Circuit Judge Ralph Winter  
Chair, Committee on Judicial Conduct and Disability  
c/o Office of the General Counsel  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

Re: Proposed Rules Governing Judicial Conduct and Disability

Gentlemen:

**“[T]he 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.”**

*-- Senior Judge John L. Kane, District of Colorado<sup>1</sup>*

As one who has filed not one but three separate complaints against federal judges pursuant to 28 U.S.C. §§ 351-364, I can state from experience that Judge Kane has a gift for understatement. While the current rules governing judicial misconduct may be adequate to deal with the spectacle of a judge like Edward J. Nottingham, who admitted under oath to having become so drunk in a strip-bar that he couldn't remember how he spent \$3,000,<sup>2</sup> they do nothing to address the serious injustices suffered by defenseless litigants on a daily basis. The Proposed Rules could be a substantial improvement in this regard, provided that they are tweaked ever-so-slightly.

When a judge "does a favor" for a friend, as District Court Judge James Mahan of the Southern District of Nevada is alleged to have done by the *Los Angeles Times*,<sup>3</sup> the only evidence an aggrieved litigant is likely to see is a decision that makes no earthly sense. A corrupt judge won't alert his or her victims to the problem, and appellate courts can't always be trusted to fix it.

### **Rule 3: Egregious Decisions May Now Constitute Evidence Of Judicial Misconduct**

The Judicial Councils of the various circuits have been charged with the task of disciplining judges who engage in “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). As Judge Alex Kozinski of the Ninth Circuit notes, a truly indefensible judicial decision may well constitute sanctionable misconduct:

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<sup>1</sup> Ronald D. Rotunda, “The Courts Need This Watchdog,” *Washington Post*, Dec. 21, 2006 at A-29, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122001329.html>.

<sup>2</sup> E.g., “Judge: Too Drunk To Remember Night At Strip Club,” *Tampa Bay's 10.com*, Undated (approximately Aug. 10, 2007), available with video at <http://www.tampabay10.com/news/national/article.aspx?storyid=60928>.

<sup>3</sup> Michael J. Goodman and William C. Rempel, “Juice v. Justice,” *Los Angeles Times*, Jun. 8, 2006, reprinted at <http://www.nonpublication.com/juice.htm>.

Judicial action taken without any arguable legal basis ... is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." See 28 U.S.C. § 351 (a); *Shaman, Lubet & Alfini, supra*. § 2.02, at 37 ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); *In re Quirk*, 705 So. 2d 172, 178 (La. 1997) ("**A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct.**" (citing Jeffrey M. Shaman, *Judicial Ethics*. 2 *Geo. J. Legal Ethics* 1, 9 (1988))).<sup>4</sup>

States with functional systems of judicial discipline such as California purport to discipline judges for indefensible decisions:

A judge's error in a decision or ruling -- by itself -- is not misconduct. ... The California Supreme Court has determined that a judge who commits legal error is subject to investigation and possible discipline **only if** the legal error clearly and convincingly reflects **in addition** bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duties.<sup>5</sup>

By stark contrast, there may not be a bar for judicial conduct on the planet set lower than the one established by the Tenth Circuit. Professor Ronald Rotunda observes:

[Judge] John Kane (who gave me permission to quote his e-mail), wrote, "I've been a district judge for 29 years and think the federal judicial house has brought this legislation on itself." He sat on the 10th 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 the judge.**

Judge Kane's e-mail is worth quoting at length. He voted for discipline. The vote was 3 to 3, "and 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.' "<sup>6</sup>

The judges of that Circuit have established a standard for perfidy Judge Nottingham couldn't live down to if he *moved into* the Diamond Cabaret. Assuming Judge Kane's veracity, Tenth Circuit judges saw nothing wrong **with one of their colleagues soliciting a bribe!**

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<sup>4</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting; emphasis added).

<sup>5</sup> State of California Commission on Judicial Performance, "How To File a Complaint" (web page), available at <http://cjp.ca.gov/filingacompl.htm> (visited Apr. 15, 2006, copy on file) (emphasis in original).

<sup>6</sup> Ronald D. Rotunda, "The Courts Need This Watchdog," *Washington Post*, Dec. 21, 2006 at A-29 (emphasis added; html copy on file).

In pertinent part, Proposed Rule 3(b) defines “misconduct” thusly:

(1) Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, **but is not limited to**, use of the judge’s office to obtain special treatment for friends and relatives, acceptance of bribes, gifts, or other personal favors related to the judicial office [...]

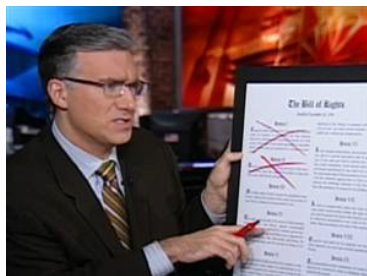
(A) Exclusions.

(i) Allegations that are directly related to the merits of a decision or procedural ruling are excluded from the definition of misconduct. Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, without more, is merits related. **However, a complaint that involves both the merits and an improper motive**, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, **is excluded only to the extent it attacks the merits.**

In light of Judge Kozinski’s observation, Rule 3(b) seems to be a restatement of pre-existing law: While an erroneous decision does not in itself constitute misconduct warranting discipline, an erroneous decision made with an improper motive certainly does. Moreover, as courts routinely infer illicit motives from perpetrators’ actions, any responsible tribunal will be able to reasonably infer an improper motive from an egregious decision itself. As long as a core allegation extends beyond the decision itself to assert an improper motive, an investigation must ensue. This clarification is a well-considered improvement, though it could perhaps be made more explicit.

### **The Elephant In the Room: Judges’ Willful Refusal To Discipline Colleagues**

Integrity is what you do when no one is watching, and character is what you do when doing it will cost you something. The fundamental problem with this illusory system of discipline is, as Judge Kane asserts, that it places decision-making power in the hands of people who are highly motivated not to use it. As a result, your colleagues routinely turn a blind eye to felonious acts.



A century ago, Justice Moody described the right of access to the courts as “the right conservative of all other rights.”<sup>7</sup> His reasoning is self-evident, for without it, as Keith Olbermann demonstrated so graphically, the “Bill of Rights” becomes the “Bill of Right.” For all the drama of his presentation, Olbermann understates the case<sup>8</sup>: If our govern-

<sup>7</sup> *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

<sup>8</sup> Keith Olbermann, “The Death Of Habeas Corpus,” *MSNBC.com*, Oct. 11, 2006.

ment can do whatever it wants to you, and the courts have legal authority to willfully refuse to hear your grievances, you don't have any "rights" at all. Thus, it is not without cause that Chief Justice Marshall described a judge's willful refusal to take jurisdiction over a case which he had a duty to hear as "treason to the constitution."<sup>9</sup>

#### **A. A Real-Life Rule 26 Problem: Systematic Discrimination Against Pro Se Litigants**

My three complaints to the Tenth District's judicial council center around a common theme: the readily demonstrable fact that the judges of the District Court for the District of Colorado systematically discriminate against pro se litigants, depriving them of their federal right of access to the courts for committing the unforgivable sin of being unable to afford a lawyer. Stuningly, Magistrate O. Edward Schlatter put this remarkable confession into writing: "Since I've been here, in 12 years nobody who does not have a lawyer has ever proceeded to a trial and won. And that's out of 600 cases filed per year."<sup>10</sup>

The recipient of Magistrate Schlatter's remarkable confession, Ivy League-educated physician Dr. Elizabeth Steiner, was understandably aghast. She accurately perceived that he had "cooked the books" to her detriment, and sought his recusal. She recognized the ugly ramifications of his confession, and 'did the math.' Schlatter continued:

She learned from me that I have been a magistrate judge for 12 years. I mentioned "600 cases per year," so she concluded that I handled that number of cases -- each year, every year -- for a total number of 7,200 cases over the span of my career. She figures that if approximately 60 per cent of those cases are cases that were filed by pro se litigants, I have been responsible for 4,320 pro se cases. Plaintiff learned from my remarks that none of the pro se cases survived to a jury trial where the pro se litigant prevailed.<sup>11</sup>

The math can be refined somewhat. Roughly 10% of the District's business is comprised of non-prisoner pro se cases.<sup>12</sup> That translates to roughly 3,500 pro se civil cases filed during Magistrate Schlatter's career -- his "600 case" figure may well be accurate, if one counts pro se prisoner petitions -- and one is hard-pressed to find a civil case that even made it to trial.

According to the Department of Justice, [t]he percentage of tort cases concluded by trial in U.S. district courts has also declined from 10 percent in the early 1970s to 2 percent in 2003."<sup>13</sup> As plaintiffs prevailed in 48% of tort cases during the study period, *id.*, and the overwhelming majority of pro se actions are in tort, the odds of this outcome occurring by random chance are  $(1 - (.02 * .52)) ^ 3500$ , or roughly one in 2,174,000,000,000,000. Moreover, as availability of alternative dispute resolution was cited as a contributing factor to the decline of jury trials, *id.*,

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<sup>9</sup> *Cohens v. Virginia*, 16 U.S. 264, 404 (1821) (emphasis supplied).

<sup>10</sup> *Order Denying Pl's Mot. To Recuse, Steiner v. Concentra, Inc., No. 03-N-2293 (Colo. Dist. Ct. Aug. 6, 2004)* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> Administrative Office of the United States Courts, *2006 Annual Report of the Director: Judicial Business of the United States Courts* (Washington, D.C.: U.S. Government Printing Office, 2007) at 99.

<sup>13</sup> *Number of Federal Tort Trials Fell By Almost 80 Percent From 1985 Through 2003*, United States Dept. of Justice, Aug. 17, 2005, at 1.

and this feature of the judicial system is unavailable to pro se litigants, the chances of a case going to the jury would be somewhat higher; in which case, the odds cited above would be understated (easily in the range of one in a quintillion or higher).

This state of affairs is pregnant with constitutional significance. 18 U.S.C. § 242 states, in pertinent part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both;

As civil litigants have a long-standing federal right to self-representation under 28 U.S.C. § 1654, any judge who deprives a litigant of that right has committed a federal crime. Similarly, as it has been long established that litigants have a constitutional right to equal protection of the law, *see, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), disparate treatment based only on the fact that the billionaire litigant can afford the services of Baker and Botts, and the man of modest means must proceed without a lawyer, is so unjustifiable as to be violative of due process. Accordingly, if the rule of law is to mean anything -- and experience has taught us that it does not -- systematic discrimination against pro se litigants is a federal crime, and a conspiracy to discriminate against pro se litigants is a federal felony punishable by up to ten years in prison. 18 U.S.C. § 241.

#### **B. In re: Charge of Judicial Misconduct No. 2006-10-372-40**

On or about November 7, 2000, I filed an action in Colorado district court challenging the facial constitutionality of Colorado's bar admission statute. My complaint was summarily dismissed on motion in a threadbare opinion by Judge Nottingham, on the grounds that the court did not have subject-matter jurisdiction over the matter. I timely appealed to the Tenth Circuit, quoting the Supreme Court's *Feldman* decision in direct refutation of the District Court's claim:

In one of the decision[sic] for which the *Rooker-Feldman* doctrine is named, the Supreme Court asserted that "[t]o the extent that [plaintiffs] Hickey and Feldman mounted a general challenge to the constitutionality of [the District of Columbia's bar admission statute], however, the District Court did have subject matter jurisdiction over their complaints." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). Smith has mounted facial challenges to Colorado's bar admission statute. As such, he is entitled to have them heard in federal court. It doesn't get any more complicated than that.<sup>14</sup>

In its unpublished opinion affirming the decision below, the Tenth Circuit admitted that it knew and understood the nature of the suit:

...[Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights.

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<sup>14</sup> Brief for Appellant at 15, *Smith v. Mullarkey*, 67 Fed.Appx. 535 (10<sup>th</sup> Cir. Jun. 11, 2003) (No. 02-1481).

**Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**<sup>15</sup>

It is but a simple syllogism: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a federal district court must hear his claim, by virtue of *Feldman*). Condition X is true (a fact the Tenth Circuit openly admitted in the highlighted text). Therefore, Y (a federal district court must hear that claim). Yet, the Tenth Circuit wrote designer law, applicable to me and only me, saying that I could not challenge the constitutionality of a statute directly and uniquely affecting me as a bar applicant. What's more, in a published decision, the Tenth Circuit actually said that this didn't violate my rights!<sup>16</sup>

Now, contrast that with the Tenth Circuit's decision in *Roe v. Ogden*, 253 F.3d 1225 (10<sup>th</sup> Cir. 2001), which I relied upon in my appeal. As they pertained to standing, the salient facts were identical: a group of potential bar applicants were challenging Colorado's practice of requiring bar applicants to submit to psychiatric examinations at the State's discretion. The only difference was that the plaintiffs in that suit were represented by two of the most high-powered law firms in Colorado: Holland and Hart and Brownstein, Hyatt, and Farber.<sup>17</sup> They got their day in court, even though there wasn't any precedent ... while I was denied my day in court, despite the fact that *Roe v. Ogden* stood as binding precedent. *Cf.*, *In re Smith*, 10 F.3d 723 (10<sup>th</sup> Cir. 1993).

The only conclusion that can possibly be drawn from that set of facts, established conclusively in the public record, is that Judge Nottingham and his counterparts on the Tenth Circuit acted in bad faith, deliberately discriminating against me on account of my pro se status. This is not only grounds for appropriate sanctions but also, criminal prosecution. Moreover, as this is but a part of "a habitual pattern of [misconduct] in a significant number of unrelated cases and an allegation of deliberate [misconduct] in a single case arising out of an illicit motive,"<sup>18</sup> it is not (under the Proposed Rules) "merits-related."

As a citizen, I don't ask much from my government; as a Republican, I don't *want* much from my government. But I think I have a right to insist that my most basic human rights and liberties -- due process of law, equal protection under law, and the right of access to the courts, to ensure that those rights can be vindicated -- be protected against the depredations of that most voracious of predators: the government itself. In effect, all I really want is what President Reagan asked of the Soviet bloc during the Cold War: that 'our country live up to its own constitution, abide by its own laws, and comply with the international obligations it has undertaken.'<sup>19</sup>

I have filed two other complaints wherein litigants were discriminated against on account of their pro se status<sup>20</sup> (I have not bothered to file a complaint in the *Steiner* case, as the problem of

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<sup>15</sup> *Smith v. Mullarkey*, slip op. at 4 (emphasis added).

<sup>16</sup> *Smith v. United States Court of Appeals for the Tenth Circuit*, 484 F.3d 1281 (10<sup>th</sup> Cir. 2007).

<sup>17</sup> Civil Docket for Case # 1:99-cv-00967-ZLW-BNB, U.S. District Court, District of Colorado (Denver), obtained via PACER (visited Sept. 26, 2006; copy on file).

<sup>18</sup> Proposed Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364 at 7.

<sup>19</sup> Ronald Reagan, Speech (to the U.K. House of Commons), June 8, 1982.

<sup>20</sup> *In re Charge of Judicial Misconduct* Nos. 2007-10-372-07 and 2007-10-372-08.

home-field advantage will not go away until the complaint process is improved), both of which were wrongfully dismissed under the Proposed Rules (also, under a careful reading of the current rules). All three complaints were not “merits-related,” but dismissed without investigation.

Judicial misconduct is like a bear in the woods: while you might not always see him, when you find his paw-print in the mud, you know he’s out there. While few litigants can ever expect to see a wad of bills being slipped under a robe, or the kind of judicial “favor-trading” described by Prof. Dershowitz,<sup>21</sup> the paw-prints -- irrational decisions, in irreconcilable conflict with precedent -- are unmistakable. Professor Karl Llewellyn observes that judges often

manhandl[e] ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.<sup>22</sup>

When our judges cook the books, the stench is unmistakable. As Llewellyn remarked, “[s]uch action leaves the particular point moderately clear: the court has wanted [the result] badly enough to lie to get it.”<sup>23</sup>

The easiest way to uncover bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, and even bribery is to examine decisions which cannot be rationally defended. But if the tribunal charged with looking for this is deliberately trying to not look, it will never be found. Therein lies the problem, which Rule 26 is intended to correct.

Proposed Rule 26(a) states, in pertinent part: “In exceptional circumstances, a chief circuit judge or a judicial council may request the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit.” The Commentary goes on to explain that

[s]uch transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council; where the issues are highly visible and a local disposition may weaken public confidence in the process; where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, **or where a complaint calls into question policies or governance of the home court of appeals.**<sup>24</sup>

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<sup>21</sup> Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford U. Press, 2001), p. 116:

“It is widely known that many state court judges and some lower court judges play favorites among litigants and lawyers. Roy Cohn once famously quipped, “I don’t care if my opponent knows the law, as long as I know the judge.” In the old days, it was financial corruption -- cash changed hands. Then it became the “favor bank,” in which personal favors are quietly stored and exchanged. I have seen it with my own eyes in the courts of Boston, New York, and elsewhere.”

<sup>22</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.

<sup>23</sup> Llewellyn, at 135 (emphasis added).

<sup>24</sup> Proposed Rules at 46.

As Magistrate Schlatter publicly alluded to in the Steiner case,<sup>25</sup> his actions could have no force without the complicity of his direct superiors in the District but also, the knowing complicity of every active member of the Tenth Circuit Court of Appeals. As judges of the Court of Appeals have by the fact of their knowing participation committed a federal felony punishable by up to ten years in prison, they have an overwhelming interest in refusing to take action. Placing such a decision in the hands of either the chief judge of the Circuit or a local judicial council seems perilous in the extreme, as it has been established that no man can be trusted to be judge in his own cause. *Bonham's Case*, 8 Co. Rep. 114 [1610].

The solution to this problem is to provide the complainant with some sort of appellate rights when a chief judge and/or local judicial council refuses to investigate an appropriate complaint in accordance with the Rule. The power to transfer complaints like this to another Circuit could go a long way toward preventing the recurrence of the spectacle of home-cooked “good-ol’-boy justice” Judge Kane has rightly complained about, enhancing the integrity of the process.

### **Tale Of the Tape: The Current Federal Judicial Discipline System Doesn't Work**

A quick perusal of the judicial blotters in California, Michigan, and Texas confirms Thomas Jefferson's famous bromide that judges “are as honest as most men and not more so.”<sup>26</sup> While it is a damning indictment of human nature in general, Michigan's blotter is the most consistently amusing. One alcoholic judge recently insisted that he hadn't been drinking when he managed to plow his SUV into a convenience store.<sup>27</sup> Another got busted for lighting up a doobie at a Rolling Stones concert.<sup>28</sup> Others include a judge who reportedly referred to himself as God,<sup>29</sup> another caught fixing traffic tickets in exchange for sexual favors, and another suspended for lying to investigators about her love affair with an attorney now serving life in prison for murdering his wife.<sup>30</sup> And then, there was the one about the married judge who exposed himself in an airport men's room, apparently while soliciting anonymous gay sex (he ‘got off’ -- because district attorneys try *hard* not to prosecute judges).<sup>31</sup>

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<sup>25</sup> Order (*Steiner v. Concentra, Inc.*) at 4.

<sup>26</sup> Thomas Jefferson, Letter (to William C. Jarvis), 1820, excerpted at <http://etext.lib.virginia.edu/jefferson/quotations/jeff1030.htm> (visited May 6, 2004).

<sup>27</sup> Kathy Jessup, “Judge's Removal Sought,” *South Bend Tribune*, May 1, 2004, available at [http://www.southbend-tribune.com/stories/2004/05/01/local.20040501-sbt-MICH-A5-Judge\\_s-removal.sto](http://www.southbend-tribune.com/stories/2004/05/01/local.20040501-sbt-MICH-A5-Judge_s-removal.sto) (visited May 8, 2004).

<sup>28</sup> *In re the Hon. Thomas S. Gilbert*, Case No. 02-14294 (Mich. Judicial Tenure Comm. Sept. 25, 2003), reprinted at [http://www.weartraversecity.com/concerns/Judge\\_Gilbert/JudicialTenureCommission.htm](http://www.weartraversecity.com/concerns/Judge_Gilbert/JudicialTenureCommission.htm) (visited May 12, 2004).

<sup>29</sup> Maureen Feighan, “Scathing Report Says Judge Should Go,” *Detroit News*, Mar. 20, 2003, available at <http://www.detnews.com/2003/wayne/0303/20/d03-113700.htm> (visited May 12, 2004).

<sup>30</sup> Norb Franz, “Scandal Stigma Fueled,” *Macomb Daily*, Apr. 24, 2004, available at [http://www.zwire.com/site/news.cfm?newsid=11382659&BRD=988&PAG=461&dept\\_id=141265&rfi=6](http://www.zwire.com/site/news.cfm?newsid=11382659&BRD=988&PAG=461&dept_id=141265&rfi=6) (visited May 7, 2004). The *Macomb Daily* further reports that the judge, who resigned his post rather than face a hearing, has been sued by a woman who had her perform oral sex on him and continued a “forced sexual relationship” with him for months,” Chad Holcom, “New Sex Claim Surfaces Against Ex-Judge James Scandirito,” *Macomb Daily*, Mar. 3, 2000, available at [http://www.zwire.com/site/news.cfm?newsid=92518&BRD=988-&PAG=-461&dept\\_id=141265&rfi=8](http://www.zwire.com/site/news.cfm?newsid=92518&BRD=988-&PAG=-461&dept_id=141265&rfi=8) (visited May 12, 2004). He moved to Florida, conveniently failing to tell Florida authorities he had been disbarred. Kathleen Chapman, “DCF Hires, Fires Disbarred Judge,” *Palm Beach Post*, Jan. 16, 2003, reprinted at <http://www.judicial-accountability.org/articles/dcfhiresfiresdisbarredjudge.htm> (visited May 12, 2004).

<sup>31</sup> E.g., David Shepardson, “Judge is Accused of Indecent Act,” *Detroit News*, Jul. 31, 2001, available at <http://det-news.com/2001/metro/0107/31/d01-258053.htm> (visited May 19, 2004) ([official discipline report on file](#)).

The robust judicial blotters of California, Michigan, and Texas stand in stark counterpoise to the scandalously barren ones of our federal courts. Anne Gearan of the Associated Press reports that out of 766 complaints lodged against federal judges in a given year, only one resulted in a penalty: a private censure, which means that no one even knows who the offending judge was.<sup>32</sup> Accordingly, we can conclude that either (a) there were no instances complained of wherein a judge's decision was motivated by improper considerations or (b) none of the judicial councils ever bothered to explore the question. As the Federal Judicial Center estimated that 80% of complaints were dismissed on the ground that they were "related to the merits of a decision,"<sup>33</sup> we can estimate the probability of the first hypothesis being true.

The Federal Judicial Center informs us that some 50% of complaints were deemed frivolous by the Councils<sup>34</sup>; this leaves us with  $766 * .50 * .80$  or 306 potentially meritorious complaints per year. If we assume that even one in ten judicial decisions complained of was motivated by improper considerations, the odds of this occurring by random chance is  $(1-.10) ^ 306$ , or **one in 100 trillion!** And that is just in a single year! Accordingly, the only reasonable conclusion one can reach is that judicial councils have been deliberately turning a blind eye to malfeasance by their colleagues. This, in turn, implies a shockingly pervasive lack of personal character among our judges, which appears to extend as far as the Supreme Court itself.

Remarkably, the Breyer Commission asserted that in their examination of 141 complaints that were dismissed on the sole grounds that they were merits-related, only three were problematic.<sup>35</sup> I find that assertion almost inconceivable, as I know personally of three instances of where the standard was improperly applied, and I would never waste my time in filing a complaint which I knew to be manifestly frivolous. While I knew at the outset that my complaints were an exercise in futility, I filed them with an eye toward establishing that the disciplinary system is broken, and providing compelling documentation of that unfortunate fact.

### **A. It's All About Character**

There was a day, not long ago, when federal judges were perceived as men of great learning, scrupulous private conduct, and sterling personal character. Modern judges are more exemplified by Chief Judge Edward Nottingham of the District of Colorado, who reportedly paid \$150 to join what is billed as "the world's largest **SEX & SWINGERS** personal community,"<sup>36</sup> where people sporting pseudonyms like "BobbyBangem" and "secretnymphotoo" literally display their wares<sup>37</sup>

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<sup>32</sup> Anne Gearan, "Judges Escape Ethical Punishment," *Associated Press*, Aug. 6, 2002, available at <http://www.judicialaccountability.org/articles/judgeescapeethi.htm>.

<sup>33</sup> Jeffrey N. Barr and Thomas E. Willging, *Statement of Allegations and Reasons in Chief Judge Dismissal Orders Under the Judicial Conduct and Disability Act of 1980: A Report to the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary, United States House of Representatives* (Federal Judicial Center, May, 2002) at 8, available at <http://www.fjc.gov/library>, copy on file)

<sup>34</sup> *Id.*

<sup>35</sup> The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, Sept. 2006, at 55.

<sup>36</sup> <http://adultfriendfinder.com/> (PDF of page captured on Sep. 1, 2007; emphasis in original).

<sup>37</sup> E.g., "kindguylovesoral2's blog post, "The Magic Scrotum," available at

for other swingers to examine as a prelude to extramarital encounters.<sup>38</sup> The thought of a federal judge “displaying his wares” in such a manner, while admittedly legal, exposes the bench to ridicule and scorn; the thought that one’s life, livelihood, or life’s savings is literally subject to the martini-besotted caprice<sup>39</sup> of a man prone to displaying such unfathomably poor judgment in his own life is offensive to any sane man.

Nor does it help that there is a fair perception that judicial sinecures are bought on E-bay by third-rate political hacks. Of special interest is *Salon’s* recent observation that “The money trail leading from Bush judges to influential politicians runs particularly deep through the political battleground states of Ohio and Pennsylvania.”<sup>40</sup> Suffice it to say that the underlying report by the Center for Investigative Reporting doesn’t exactly portray federal district judge John Jones of Pennsylvania in a flattering light:

Jones, a former attorney in private practice, gave \$1,000 to the state GOP and \$1,000 to Sen. Santorum’s political action committee after having interviewed for the judgeship. He also gave more than \$1,000 to state and local Republicans after his August 2001 interview process, including \$380 to his county Republican committee. Overall, Jones gave about \$15,000 in federal contributions to Republicans from 1990 to 2001, including more than \$4,000 each to both Sens. Specter and Santorum. Jones had been involved in Republican politics, making an unsuccessful run for Congress in 1992, and serving on the finance committee of the Pennsylvania Republican State Committee from 1999 till his nomination. He also has hosted fundraisers at his house for Sens. Specter and Santorum, as well as other Republicans.<sup>41</sup>

Can men of such dubious character honestly be counted upon to police themselves? This is the Achilles’ heel of our current self-administered judicial discipline system: it is only as strong as the character of the people running it. And that is not a comforting thought.

### **Unpublished Opinions: A Problem Beyond the System’s Capacity To Handle?**

Certain modern judicial practices are so manifestly unethical and illegal, but so pervasive, that it may be almost impossible for disciplinary proceedings to even address them, the most grievous of which is the pervasive practice of issuing so-called “unpublished” opinions.<sup>42</sup>

If appellate courts could be counted on to perform a competent review of decisions brought to their attention, there wouldn’t be a pressing need to perform searching ethics reviews when

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[http://adultfriendfinder.com/blog/kindguyluvSORal2/index.html?site=ffadult&who=UmFuZG9tSVYfKoybXIWW0fDenDaNfohQrnVyFXxTBuSYvwS552d4n9Qz67c9SbR1BF7GCAzSqYMGvvRgptCLX2v1vEzY9x9/4ixNcKemwmh\\_t\\_Euaj9e/6M4wOz1oVzOoHMOM92uhA8ojNcJB/R\\_scq/WnU3WG7toDp59eZg4nZ0xHCw1CMv8yjXB4siriegXIWd7WgEkDYw-](http://adultfriendfinder.com/blog/kindguyluvSORal2/index.html?site=ffadult&who=UmFuZG9tSVYfKoybXIWW0fDenDaNfohQrnVyFXxTBuSYvwS552d4n9Qz67c9SbR1BF7GCAzSqYMGvvRgptCLX2v1vEzY9x9/4ixNcKemwmh_t_Euaj9e/6M4wOz1oVzOoHMOM92uhA8ojNcJB/R_scq/WnU3WG7toDp59eZg4nZ0xHCw1CMv8yjXB4siriegXIWd7WgEkDYw-) (visited Sept. 1, 2007; PDF on file). The blogger claims to be a 51-year-old male.

<sup>38</sup> Felisa Cardona, “Feds Grill Nacchio Judge’s Ex-Wife,” *Denver Post*, Aug. 14, 2007 (“When I asked about the dating service, he turned around in his chambers, and he hit his computer and he told me all about the dating service; it was a porn site,” Jaeger testified....”), available at [http://test.denverpost.com/news/ci\\_6598184](http://test.denverpost.com/news/ci_6598184) (PDF on file).

<sup>39</sup> *Supra* n. 2.

<sup>40</sup> Will Evans, “Money Trails Lead to Bush Judges,” *Salon.com*, Oct. 31, 2006 (copy on file).

<sup>41</sup> “Money Trails to the Federal Bench,” *Center for Investigative Reporting*, Oct. 31, 2006, at 51-2 (copy on file).

<sup>42</sup> It is more technically accurate to refer to them as “non-precedential,” as most are available on the Web.

judges issue plainly irregular ones. Unfortunately, most appellate judges are too busy writing law review articles, teaching classes, and/or engorging themselves on the rubber-chicken circuit<sup>43</sup> to be bothered with doing the task they are paid so handsomely to do. As a result, the work product of these bodies is so uniformly poor that we would perhaps be better served by farming the work out to India.

Every one of the indefensible decisions complained of in my ethics complaints were affirmed at the appellate level, often in unpublished opinions. Appellate courts perform no meaningful oversight of most lower court decisions in even the best of times -- and unfortunately, this sloth appears to be evenly distributed throughout the Circuits. The only time a judge even considers an appeal not selected for publication is in a judicial conference, where judges spend more time bragging about their golf game than on an individual appeal. The leading proponent of unpublished opinions, Judge Kozinski, openly admitted that panels in his circuit may issue 150 rulings per three-day session<sup>44</sup> -- that's less than ten minutes per decision! But even they are total slackers compared to the late Judge Richard Arnold of *Anastasoff*<sup>45</sup> fame, who confessed in a speech at Drake University that he participated in a two-hour conference deciding fifty appeals.<sup>46</sup> Every marginally competent judge is aware of this shocking state of affairs, and some are even willing to admit it in open court. Professor Sarah Ricks uncovered this remarkable exchange in a trial transcript:

**THE COURT: At a conference of the Third Circuit, the Court of Appeals defended their unpublished opinions on the ground that they're not well reasoned, they don't give them much thought.** So it's hard to say that that's a well-reasoned opinion that has any precedential value.

MR. WINEBRAKE: Well, we concede—

THE COURT: It's instructive on what they'll do without much thought.<sup>47</sup>

At the end of the day, the typical unpublished appellate opinion is more toxic than a Chinese Barbie doll. Judge Kozinski famously described them as “inedible sausage,” unfit for human consumption -- which begs the question attorney Philip Mann asks:

In [Judge Kozinski's] words, "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway." True. But the real problem lies not with the committee but with the faulty sausage itself. If future litigants shouldn't have to consume

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<sup>43</sup> E.g., Federalist Society 2007 Student Symposium (ironically, entitled “Law and Morality”), moderated by Judge Timothy Tymkovich, at <http://www.law.northwestern.edu/federalist/symposium/program.asp>.

<sup>44</sup> Alex Kozinski, Letter (to Judge Samuel A. Alito, Jr), Jan. 16, 2004, p. 5, available at <http://www.nonpublication.com/kozinskiletter.pdf> (visited May 10, 2004).

<sup>45</sup> *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir.), vacated as moot, 223 F.3d 1054 (8th Cir. 2000) (en banc).

<sup>46</sup> Perfunctory Justice; Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings," *Des Moines Register*, March 26, 1999, at 12.

<sup>47</sup> Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit, *81 Wash. L. Rev.* 217, 269 (2006) (emphasis added).

the "sausage" of an ill-considered decision, why should the parties to that particular case have to eat it either?<sup>48</sup>

Permit me to dismiss one obvious canard: **The problem here is not one of volume.** Truth be told, federal appellate judges tend to see their opinions as monuments to themselves, with Judge Kozinski as one of the more flagrant offenders. Emily Bazelon reports that he is "one of the best stylists on the bench, routinely working through 50 or more drafts. 'He would often ask, 'Does it sing?''"<sup>49</sup> Bear in mind that this is the very same Judge Kozinski who admitted that panels of his Circuit spend roughly ten minutes on appeals not selected for publication, and claims that the crushing appellate workload makes non-publication a necessity.

Now, it would seem that if Judge Kozinski only worked through three or four drafts of each case, he could give every appeal the consideration litigants have a right to expect. There can be no justification for a judge writing a Shakespearean sonnet to justify a decision,<sup>50</sup> while willfully ignoring a dozen other appeals brought to his or her attention. This practice visits grave injustice upon those children of a lesser god, unable to curry the judges' rarefied favor. Judge Murnaghan of the Fourth Circuit admits that

...it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, **a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law.**<sup>51</sup>

Judge Kozinski forgets that his job is not to produce literary masterpieces as monuments to his ego or as fodder for legal casebooks<sup>52</sup> but rather, to adjudicate disputes. And while the elite few who got his legal Rolls Royces may delight in his craftsmanship, the vast majority saddled with his judicial Yugos have cause to be livid.<sup>53</sup>

If I were to raise the legitimate claim that I did not receive equal justice or even a reasonable facsimile thereof, I would not necessarily be complaining about the raw decision, but the process by which it was arrived at. As such, my complaint would survive summary disposition under Rule 3(a). Similarly, as it would call "into question policies or governance of the home court of appeals," it would warrant transfer under Rule 26. Problem is, there aren't any circuits which

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<sup>48</sup> Philip Mann, Citation To "Non-Precedential" Opinions To Be Permitted. It's About Time, *IP Litigation Blog*, Apr. 14, 2006, available at <http://www.iplitigationblog.com> (visited Dec. 31, 2006).

<sup>49</sup> Emily Bazelon, The Big Kozinski, *Legal Affairs*, Jan-Feb. 2004, available at [http://www.legalaffairs.org/issues-January-February-2004/feature\\_bazelon\\_janfeb04.htm](http://www.legalaffairs.org/issues-January-February-2004/feature_bazelon_janfeb04.htm) (internal citations omitted) (visited Jun. 10, 2004).

<sup>50</sup> *E.g.*, *Busch v. Busch*, 773 A.2d 1274 (Pa.Super. 1999) (Judge Eakin's opinion was actually put into verse).

<sup>51</sup> *Wilson v. Layne*, 141 F.3d 111, 124 n.6 (4<sup>th</sup> Cir. 1998) (Murnaghan, J., dissenting) (emphasis added). One can only wonder whether, in light of that savage indictment of the quality of appellate justice, Judge Kozinski stands by his quip about whether you should eat the sausage when people like Judge Murnaghan "making the sausage tell you it's not safe for human consumption." *Kozinski, supra*.

<sup>52</sup> Kozinski admits to writing opinions "precisely for the purpose of getting into" a casebook. Bazelon, *supra*.

<sup>53</sup> This is especially true in light of the fact that the very same Judge Kozinski, who while pontificating for the press in the Unabomber case, suggested that there is "something worse than being tried and punished for one's crimes, and that is being treated by our legal system as less than human." *United States v. Kaczynski*, 262 F.3d 1034, 1035 (9<sup>th</sup> Cir. 2001) (Kozinski, J., dissenting from denial of petition for reh'g en banc).

prohibit the issuance of unpublished opinions.<sup>54</sup>

The better solution would be to have the constitutionality of the practice decided -- with Judge Arnold, I maintain that it is manifestly unconstitutional, and quite obviously so -- but courts have obstructed challenges to the practice via an unreasonable interpretation of standing, *e.g.*, *Smith v. Tenth Circuit, supra.*; *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002); *Loritz v. United States Court of Appeals for the Ninth Circuit*, 382 F.3d 990 (9th Cir. 2004), thus precluding this outcome. As such, the question would have to be resolved in the context of an ethics violation. In this instance, the creation of an independent tribunal, preferably comprised of senior judges throughout the nation, would be desirable, to avoid the obvious Rule of Necessity problem.

### **The Alternative: Putting Wayward Judges On Trial**

Still, the fundamental flaw with this system is that judges are judging their colleagues, with an eye toward currying a lenient decision when they commit malfeasance. Echoing Judge Kane's concerns, Judge Kozinski crystallizes the problem -- and the larger problems you will face, if this problem is not addressed forthrightly:

Disciplining our colleagues is a delicate and uncomfortable task, not merely because those accused of misconduct are often men and women we know and admire. It is also uncomfortable because we tend to empathize with the accused, whose conduct might not be all that different from what we have done-or been tempted to do-in a moment of weakness or thoughtlessness. And, of course, there is the nettlesome prospect of having to confront judges we've condemned when we see them at a judicial conference, committee meeting, judicial education program or some such event.

Pleasant or not, it's a responsibility we accept when we become members of the Judicial Council, and we must discharge it fully and fairly, without favor or rancor. If we don't live up to this responsibility, we may find that Congress-which does keep an eye on these matters-will have given the job to somebody else, materially weakening the independence of the federal judiciary.<sup>55</sup>

While Article III of the Constitution grants lifetime appointments to federal judges, they are conditioned on so-called "good Behaviour." *U.S. Const. art. III, sec. 1*. As such, a judge can be removed not only for the commission of "high Crimes and Misdemeanors," *Id., art. II, sec. 4*, but for failure to meet conditions constitutionally imposed on his or her tenure.<sup>56</sup> Sir Edward Coke listed three grounds for forfeiture under the "good Behaviour" standard: abuse of office, non-use of office, and refusal to exercise an office. *79 Eng. Rep. 1223, 1224 (1597)*. Accordingly, the judge who abuses his or her office forfeits that office, and may thus be removed. There is no textual requirement in the Constitution that that judge be impeached.

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<sup>54</sup> "A Few Words on Unpublished Opinions," <http://www.daubertontheweb.com/unpublished.htm> (visited Sept. 17, 2007).

<sup>55</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1183 (9th Cir. 2005) (Kozinski, J., dissenting).

<sup>56</sup> *Marbury v. Madison*, 5 U.S. 137, 173 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.").

As the power to remove a judge is one vested in Congress, it is one Congress can delegate. Hence, Congress can create an office of inspector general to investigate and prosecute acts of judicial misconduct, and authorize (or even ordain) courts to conduct actual trials. Congress can even mandate jury trials, to keep the process from being tainted by judicial cronyism.

#### **A. Separation Of Powers Concerns**

While we are told that an independent judiciary is indispensable to the protection of our rights as against encroachments by the government, the evidence shows that no one can protect us from a completely unaccountable judiciary. Moreover, as modern judges have demonstrated that they are just as likely to extinguish our inalienable human rights as protect them, there is no longer a compelling need for an independent judiciary. With brutal candor, Judge Miner of the Second Circuit explains:

The major cause of the loss of public confidence in the American judiciary, however, is the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. In brief, it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry....<sup>57</sup>

Today, we stand on the cusp of the ultimate constitutional crisis -- the one Jefferson foretold of two centuries ago. Every shred of personal freedom that you think you have is at risk, directly and immediately threatened by the most dangerous tyrants that we as a people have ever faced. I speak not of Osama bin Laden, Kim Jong-il or even Ahmadinejad but rather, the men and women of our federal courts. Through their long train of subtle and gradual usurpations,<sup>58</sup> our courts have emasculated the Legislature, silenced the voice of the people, and nullified our Bill of Rights. A crime wave of staggering proportion is occurring at our courthouses, facilitated by the destructive doctrine of unbridled judicial independence.

The system of government Thomas Jefferson bequeathed to us is predicated on a sensible presumption, borne out by millenia of experience, that no one can be trusted with power. Those who have it become intoxicated by it, invariably craving more of it. Those who don't have it yearn to be free from others' domination and where necessary, will kill to secure freedom. As violent revolution is inherently destructive to society, the Framers of our Constitution devised a system of limited government, wherein one person (or a small cadre of people) would find it difficult to obtain despotic power. As Jefferson observed in his *Notes on the State of Virginia*:

An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.<sup>59</sup>

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<sup>57</sup> Roger J. Miner, *Judicial Ethics In the Twenty-First Century: Tracing the Trends*, 32 *Hofstra L. Rev.* 1107, 1108 (2004).

<sup>58</sup>"There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." James Madison, *Speech* (to the Virginia Ratifying Convention), June 6, 1788, available at [http://www.constitution.org/rc/rat\\_va\\_05.htm](http://www.constitution.org/rc/rat_va_05.htm) (last visited Jan. 13, 2007).

<sup>59</sup> Jefferson, *Notes on the State of Virginia* (1781-82), Query 13, reprinted at <http://etext.virginia.edu/toc/modeng/>

This proposal restores checks and balances to our system, without any effect upon legitimate judicial independence. The process doesn't even start until a judge transcends the legal limits of his or her lawful authority, and the other branches work in concert to check and restrain the judge by removing him or her from office.

### **Every Ethics Complaint Should Be Posted On the Web**

A brief comment should be raised in connection with 28 U.S.C. § 360. Federal judicial disciplinary proceedings have the appearance of a star-chamber, because there is no reliable way for the general public to properly audit those proceedings. Those of us who have been through the process know is that the judicial council decisions in our cases appear on their face to be arbitrary and capricious, and that there is no discernible body of law that would let us know whether our complaints were granted fair consideration. Sunshine, said Justice Brandeis, "is a marvelous disinfectant."

When asked how he would deal with the Soviets' compliance with arms treaties (as they were notorious for cheating), President Reagan remarked famously, "Trust, but verify." Sunshine is the best disinfectant, and it appears to this observer that a healthy dose of disclosure would harm no one unduly. At the very least, we should be able to examine complaints and appeals, so that we can determine whether judicial councils like that of the Tenth Circuit are "covering one another's butts," or discharging their duties to the best of their abilities. This would require a change in the law, but it would certainly be a welcome one.

## **CONCLUSION**

While every breach of public trust is a matter for concern, few can be more serious than those committed by the men and women of our judiciary. As famed orator Daniel Webster, referred to as the "Defender of our Constitution," once remarked:

There can be no office in which the sense of ... responsibility is more necessary than in that of a judge; especially of those judges who pass, in the last resort, on the lives, liberty, and property of every man. ... The judiciary power, on the other hand, acts directly on individuals. The injured may suffer without sympathy or the hope of redress. The last hope of the innocent, under accusation and in distress, is in the integrity of his judges. If this fail, all fails; and there is no remedy on this side the bar of Heaven.<sup>60</sup>

Due to the unexpected candor of Judge Kane, we now know why there are no reported cases in the Tenth Circuit interpreting 28 U.S.C. § 351: the local judges all "stick together," and are "covering one another's butts."<sup>61</sup> In turn, this constitutes "conduct prejudicial to the effective administration of justice, as a pattern of cruel and illegal punishment visited upon defenseless

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[public/JefVirg.html](http://public/JefVirg.html).

<sup>60</sup> Daniel Webster, *The Writings and Speeches of Daniel Webster*, (Boston: Little, Brown, & Co., 1851), Vol. III, pp. 6-7.

<sup>61</sup> Rotunda, *supra*.

Americans, whose only crime is that they were unfortunate enough to be forced by circumstance to represent themselves and/or ran afoul of corrupt and/or indifferent judges.

This state of affairs needs to be changed, and it is heartening to see that our federal judiciary is discerning the need for change. As Judge Kozinski rightly suggests, if you refuse to police your own, someone else will, and the results will not be desirable. I respectfully submit these comments as my humble contribution to a solution to the problem.

Respectfully submitted,

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