

April 10, 2007

*I sort of grew up going into Federal court with the understanding  
that the difference between God and a Federal district judge  
is God doesn't think he is a Federal district judge.  
-- Rep. Darrell Issa (R-CA)*

Council on Judicial Discipline  
United States Courts for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

**Petition for Review by the Judicial Conference**

In re Nottingham and Blackburn, No. 07-10-372-07

In re Nottingham and Watanabe, No. 07-10-372-08

Gentlemen:

I wish to consolidate the two above-referenced appeals here, as their success or failure turn on a single common question. Chief Judge Tacha has asserted that these claims are “directly related to the merits” of a ruling and as such, “not cognizable in this forum.” The ultimate question here is not one of relation, but of degrees of consanguinity. Or, to put this more succinctly, “**What is it that Congress intended you to do?**”

Under Chief Judge Tacha’s unduly stilted and literalistic reading of 28 U.S.C. § 351, if Judge Nottingham suddenly acknowledged that he was routinely deciding cases via consultation with his Magic 8-Ball, this Council would be proscribed from taking appropriate disciplinary action on the grounds that the claim was “directly related to the merits” of that ruling. Surely, the law cannot countenance such a self-evident absurdity. And under any fair reading of the law, it does not.

When Congress enacted modern-day Section 351, they made their intention explicit. As Judge Kozinski of the Ninth Circuit explains:

In the late 1970s, Congress became concerned that Article III judges were, effectively, beyond discipline because the impeachment process is so cumbersome that it's seldom used. *See 126 Cong. Rec. S28091 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini)*. At the same time, Congress was aware of the adverse effects on judicial independence if federal judges could be disciplined by another branch of government using means short of impeachment. *See S. Rep. No. 96-362, at 6 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4320.*<sup>1</sup>

Congress’ solution was to delegate its oversight duty to the courts themselves, and they made

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it clear as to what they wanted done. In crafting Section 351, they made it clear in the legislative history that the phrase, "effective and expeditious administration of the business of the courts," was "intended to include willful misconduct in office, [and] willful and persistent failure to perform duties of the office." *S. Rep. No. 96-362, at 9, reprinted in 1980 U.S.C.C.A.N. at 4323.*

That term should be familiar. As this Council knows, under Article III, judges "shall hold their Offices during good Behaviour," and it "cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). While Article III judges are the only federal servants who enjoy a freehold in their offices, that freehold is limited by "good behavior" tenure, a common-law concept well-known to the Framers. Sir Edward Coke listed three grounds for forfeiture under this standard: abuse of office, nonuse of office, and refusal to exercise an office. *Henry v. Barkley*, 79 Eng. Rep. 1223, 1224 (K.B. 1596). These have been grounds for removal of judges ever since judges have enjoyed good behavior tenure.

It is a matter of record that Congress delegated the bulk of its constitutional task to you: to investigate acts of judicial misconduct, attend to the punishment of minor acts of misconduct, and recommend impeachment in situations where it is warranted. What's more, as Prof. Charles Geyh pointed out to the Judiciary Committee, the historical conduct of Congress has given you a clear road map as to what is to be investigated:

The House has investigated at least 78 judges over time (including the thirteen that the House ultimately impeached). A total of 148 known charges have been leveled against those 78 judges, and it may be useful for the Committee to see the range of conduct that has provoked impeachment inquiries over the years:

- **thirty two charges concerned abuse of judicial power (judges who allegedly made outrageous judicial rulings that disregarded the law);**
- nineteen charges concerned abuse of administrative power
- **fifteen charges concerned favoritism or bias**
- fourteen charges concerned misuse of office for financial advantage
- thirteen charges concerned demeanor on the bench
- thirteen charges concerned solicitation of bribes or favors
- **eleven charges related to nonperformance or incompetent performance**
- ten charges concerned non-judicial misconduct
- eight charges related to the misuse of government funds
- thirteen charges related to other, miscellaneous misconduct, ranging from disloyalty, moonlighting and insanity, to failure to reside within the judicial district and omnibus claims of unfitness.<sup>2</sup>

A quick perusal of that list shows that roughly half of all impeachment inquiries were precipitated by acts "directly related to the merits" of one or more rulings. Clearly, if Congress asked

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<sup>2</sup> *Impeaching Manuel Real, a Judge of the District Court for the Central District of California for High Crimes and Misdemeanors: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 109<sup>th</sup> Cong. (Sept. 21, 2006), Prepared Testimony of Charles G Geyh at 7, available at <http://judiciary.house.gov/media/pdfs/geyh092106.pdf>.

you to investigate incidents of judicial misfeasance, malfeasance, and nonfeasance -- what it no longer had the time to do -- then the Council's willful failure to diligently attend to that task would be in itself nonfeasance. Importantly, the first two impeachments were for flagrant decisional error, of the kind complained of here (and No. 2006-10-372-40). Still, it is not the errors themselves, but what they necessarily imply, that create an impeachable offense. Professor Geyh observes:

In 1805, Justice Samuel Chase was impeached by the House of Representatives for highhanded judicial decision-making. At his Senate trial, Justice Chase drew a distinction between innocent and ill-motivated error that resonates to this day. For Chase, "ignorance or error in judgment," is an impeachable offense only if it has "flown from a depravity of heart, or any unworthy motive." Accordingly, if the Senate found that he **"hath acted in his judicial character with willful injustice or partiality, he doth not wish any favor; but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him."** If not, Chase was "confident that this court will make allowances for the imperfections and frailties incidental to man." The House managers (who prosecuted Chase in the Senate), argued that the Senate should presume an ill-motive from the errors themselves. Manager George Campbell explained:

The judge insists, if he was mistaken, it was an error of judgment. This cannot be presumed. Ignorance of the law is no excuse in any man; but in a character of such high legal standing and known abilities as that of the accused, it is totally inadmissible and not to be presumed. How could any judge with upright intentions commit so many errors or hit upon so many mistakes in the course of one trial? . . . They must have been the result of design . . .

Justice Chase's counsel argued for the opposite presumption. "The best gifted mortals are frail, and a single erroneous decision may be made by any man," argued Philip Barton Key. . . .<sup>3</sup>

While erroneous decisions can be forgiven, it is well established that dishonest and intentional errors are not. Geyh continues:

The same arguments were replayed at the 1830 Senate impeachment trial of district judge James Peck, who had been impeached for abusing his contempt power in an isolated case. Both sides agreed that dishonest errors were impeachable while innocent ones were not. House manager James Buchanan insisted that a bad motive should be presumed from the gravity of the error itself: "If a judge has cruelly and illegally imprisoned and punished an American citizen, the court before whom he is impeached will never set out to hunt after a good motive for this bad action. Judge Peck's counsel begged to differ: "[G]uilty intention is not to be inferred from the alleged incorrectness of his judicial opinion, but must be satisfactorily proved by evidence in the cause."<sup>4</sup>

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<sup>3</sup> Charles G. Geyh, *Rescuing Judicial Accountability From the Realm of Political Rhetoric* (Sept. 2006) at 25-7 (emphasis added), available at <http://ssrn.com/abstract=933703> (copy on file).

<sup>4</sup> Id. at 27.

Again, this is a simple question, with what is presumed to be a simple answer. The complaints, taken together, demonstrate a pattern of misconduct by the named judges. A pattern of cruel and illegal punishment visited upon defenseless American citizens, whose only crime is that they were unfortunate enough to be forced by circumstance to represent themselves and/or ran afoul of corrupt judges.

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>5</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: You all “stick together,” and are “covering one another’s butts.”<sup>6</sup> In turn, this constitutes “conduct prejudicial to the effective administration of the courts,” as the goal of Section 351, et seq. is to provide “a means for dealing with the systematic inability or unwillingness to perform the duties of judicial office.” *In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9<sup>th</sup> Cir. 1979).

The status quo ante cannot long continue. If you don’t do your job, others will, and in a way you might not like. After all, if judges are so independent that they can disregard the law without fear of reprisal, there is no societal value to judicial independence, for there is no ‘rule of law’ left to be defended.

For these reasons, I ask that the Council overturn Chief Judge Tacha’s rulings in both of the aforementioned complaints, and initiate appropriate investigations into the conduct complained of therein.

Respectfully submitted,

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<sup>5</sup>Daniel Webster, *The Writings and Speeches of Daniel Webster*, (Boston: Little, Brown, & Co., 1851), Vol. III, pp. 6-7.

<sup>6</sup>Ronald D. Rotunda, “The Courts Need This Watchdog,” *Washington Post*, Dec. 21, 2006, at A-29.