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#COURTSTOO: CONSTITUTIONAL JUDICIAL ACCOUNTABILITY IN THE #METOO ERA

Zachary Johnson*

INTRODUCTION

The federal judiciary in recent years has been rocked by allegations of sexual harassment.¹ In 2017, on the heels of the Judge Kozinski scandal,² Chief Justice Roberts recognized that the judiciary is not immune to the problem of sexual harassment in the workplace.³ In an effort to devise a workable solution to the problem

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¹ For example, on February 13, 2020, Olivia Warren, a former law clerk to the late Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, testified before a House Judiciary subcommittee that Judge Reinhardt kept “a shelf in [his] office where he kept pictures of some of his female ‘pretty’ clerks” and “routinely and frequently made disparaging statements about [Warren’s] physical appearance, [her] views about feminism and women’s rights, and [her] relationship with [her] husband (including [their] sexual relationship).” *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the H. Subcomm. on Courts, Intellectual Prop., and the Internet*, 116th Cong. 6–7 (statement of Olivia Warren). Shortly after Warren’s testimony, a statement published “by 72 former Reinhardt clerks in support of Warren” indicated that “at least some of the signatories experienced or witnessed sexist behavior, bullying or other mistreatment in chambers . . .” Kathryn Rubino, *70+ Former Reinhardt Clerks Come Out in Support of Sexual Harassment Accuser*, ABOVE THE LAW (Feb. 21, 2020), <https://abovethelaw.com/2020/02/reinhardt-clerks/>.

As another recent example, consider the case of United States District Judge Carlos Murguía of the District of Kansas. On September 30, 2019, Judge Murguía was reprimanded by the Judicial Council of the Tenth Circuit for “sexually harassing female judiciary employees,” “having an affair with a felon that made him ‘susceptible to extortion,’” and “for being ‘habitually late’ for court meetings.” Mihir Zaveri, *Federal Judge in Kansas City Is Reprimanded for Sexual Harassment*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/us/judge-carlos-murguia-sexual-harassment.html>.

Chief Judge Tymkovich of the Tenth Circuit wrote in his disciplinary order that Judge Murguía gave “preferential treatment and unwanted attention to female employees of the Judiciary in the form of sexually suggestive comments, inappropriate text messages, and excessive, non-work-related contact, much of which occurred after work hours and often late at night.” In Re: Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90022, 2 (Judicial Council of the Tenth Circuit, 2019). The harassed employees “stated that they were reluctant to tell Judge Murguía to cease his behavior because of the power he held as a federal judge. One of the employees eventually told him explicitly to stop his harassing conduct, but he continued.” *Id.* at 2–3.

Judge Tymkovich reported that Judge Murguía was “less than candid” during an investigation into his alleged misconduct. *Id.* at 5. When Judge Murguía did apologize, his apologies “appeared more tied to his regret that his actions were brought to light than an awareness of, and regret for, the harm he caused to the individuals involved and to the integrity of his office.” *Id.* Judge Murguía will face no further punishment from the council, which said that the reprimand was “[t]he most severe sanction available.” *Id.* at 6.

² See *infra* notes 10–12 and accompanying text.

³ See CHIEF JUSTICE JOHN G. ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017).

of harassment in the third branch, one little-known bill appeared: the Judicial Transparency and Ethics Enhancement Act of 2017.⁴ Senator Chuck Grassley of Iowa proposed this bill to identify and remedy the clandestine problem of judicial harassment. This bill targeted an extraordinary problem by proposing an extraordinary solution: the establishment of a judicial inspector general.

Harassment in the federal judiciary is particularly difficult to uncover because of the power imbalance that exists between a life-tenured Article III judge and a dispensable subordinate like a law clerk.⁵ Many law clerks are just beginning their legal careers and are dependent on the judges for whom they clerk for favorable recommendations to potential employers. This power imbalance could discourage reporting by vulnerable victims. A judicial inspector general would counteract the effects of this power imbalance by bringing to light cases of harassment that victims might not feel empowered to report themselves.

While Senator Grassley's bill would almost certainly effect positive change in the judiciary, the policy question must nevertheless submit to the legal one: Is the bill constitutional? To ask the constitutional question is to raise another perennially vexing structural one, all the more salient in the #MeToo era: *quis custodiet ipsos custodes* ("who watches the watchers")? This Note argues that even under a rigorous separation-of-powers analysis, a judicial inspector general is constitutional. Further, because of the light shed by the #MeToo movement on the pervasiveness of sexual harassment in the workplace, a judicial inspector general is not only a constitutional solution to the dangers posed by judicial harassment; it is also a prudent one. To make this argument, Parts I and II of this Note evaluate the history and implications of the #MeToo Movement as well as the significant (and largely unresolved) issues the movement raises concerning judicial misconduct. Part III considers the power of Congress to regulate the federal courts and analyzes the constitutional issues raised by the prospect of a judicial inspector general from formalist, functionalist, and practical perspectives.

I. THE HISTORY OF THE #METOO MOVEMENT, AND THE MOVE TOWARD JUDICIAL ACCOUNTABILITY

It all goes back to 2006. It was then that Tarana Burke, a survivor of sexual assault who wanted to help fellow survivors, coined the phrase "Me Too"⁶—a phrase that is now ingrained in the modern American lexicon. The movement's true spark was lit on October 5, 2017 by actress Ashley Judd's bombshell claims that media mogul Harvey Weinstein sexually harassed her and the subsequent disclosure of "allegations

⁴ Judicial Transparency and Ethics Enhancement Act of 2017, S. 2195, 115th Cong. (2017).

⁵ See Zaveri, *supra* note 1; Sharlene Koonce, #MeToo: Sexual Harassment in the Courtroom, AM. B. ASS'N (Feb. 5, 2019), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/metoo-sexual-harassment-in-the-courtroom/; Dana Liebelson et al., *Law Clerks Say Federal Judiciary Isn't Equipped to Handle Sexual Harassment*, HUFFPOST (Dec. 20, 2017), https://www.huffpost.com/entry/federal-court-clerk-sexual-harassment-judges_n_5a3acf5ae4b025f99e1449f8.

⁶ Chicago Tribune, #MeToo: A Timeline of Events, CHI. TRIB. (Jan. 6, 2020), <https://www.chicagotribune.com/lifestyle/s/ct-me-too-timeline-20171208-htmlstory.html>.

against Mr. Weinstein stretching over nearly three decades.”⁷ Ten days after Judd’s accusations, her spark ignited a cultural powder keg when Actress Alyssa Milano resurrected the “Me Too” slogan by tweeting, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”⁸ Milano’s tweet effectively launched the #MeToo Movement, which has contributed to the resignations of many prominent businessmen, politicians, and media personalities up to the present day.⁹

Within a year, #MeToo accusations were directed at a prominent federal judge. On December 8, 2017, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit was accused of misconduct by six women including former law clerks and externs.¹⁰ On December 15, The Washington Post published a story with allegations against Judge Kozinski from nine more accusers. Among these accusers were law students, a professor, some of Judge Kozinski’s colleagues, and a former judge.¹¹ On December 18, Judge Kozinski announced his immediate retirement, and he was subsequently able to collect retirement payments.¹²

Modern efforts to ensure accountability for judicial misconduct began with the enactment of the Judicial Conduct and Disability Act of 1980.¹³ The Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct “prejudicial to the effective and expeditious administration of the business of the courts” or has become, by reason of a mental or physical disability, “unable to discharge all the duties” of the judicial office.¹⁴ In enacting the statute, Congress sought to provide “‘a fair and proper procedure whereby the Judicial Branch of the Federal Government can keep its own house in order’ by identifying and correcting instances of judicial misconduct and disability that do not involve impeachable offenses.”¹⁵

⁷ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region®ion=top-news&WT.nav=top-news>.

⁸ @Alyssa_Milano, TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

⁹ See Chicago Tribune, *supra* note 6.

¹⁰ Matt Zaptosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who*

Say He Touched or Kissed Them, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html.

¹¹ *Id.*

¹² Matt Zaptosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct*

Allegations, WASH. POST (Dec. 18, 2017), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.491862d67e5f.

¹³ 28 U.S.C. §§ 351–364 (2018).

¹⁴ *Id.* § 351.

¹⁵ THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 28–29 (2018) (quoting S. REP. NO. 96-362 (1979), as reprinted in 1980 U.S.C.C.A.N. 4315, 4325).

In a lecture in which he argued against the creation of a judicial inspector general, Judge Scirica of the U.S. Court of Appeals for the Third Circuit provided a succinct summary of the features of the 1980 Act:

Under the 1980 Act and the Rules, the process begins with a complaint, which can be initiated by anyone. A complaint can also be initiated by the chief circuit judge—an important change with 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, or whether it presents questions of fact that require further investigation. If questions of fact remain, the chief circuit judge must appoint a special committee of judges to conduct an investigation. The special committee then makes findings and recommendations to the circuit judicial council on disposition and any appropriate remedies or sanctions. Remedies or sanctions may range from a reprimand or censure to a recommendation to Congress to consider impeachment. 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.¹⁶

In 2004, Chief Justice Rehnquist requested that a committee be formed to examine the effectiveness of the Act. He pointed out that there “has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented.”¹⁷ Consequently, the Chief Justice created the Judicial Conduct and Disability Act Study Committee. He asked the Committee to examine the Act’s implementation—particularly in light of the recent criticism—and to report its findings and any recommendations directly to him. Chief Justice John Roberts later asked the Committee to continue its work. The Committee submitted a comprehensive report in 2006 that found “no serious problem with the judiciary’s handling of the vast bulk of complaints under the Act” but recommended a number of changes in the Conduct Rules to further enhance the effectiveness of the Act.¹⁸ The Judicial Conference’s Committee on Judicial Conduct and Disability drafted proposed changes, which the Judicial Conference adopted.

In September 2006, the Committee presented its report, known as the Breyer Committee Report.¹⁹ The report included numerous findings and recommendations. For example, the Committee found that “[m]any courts do not use their websites to provide the public with information about the Act [or] about how to file a complaint,”

¹⁶ Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 787–88 (2015) (footnotes omitted).

¹⁷ THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 5 (2006).

¹⁸ *Id.* at 5.

¹⁹ *See id.* 5–6.

and the Committee recommended that the Judicial Conference adopt policies that would help “inform chief judges, judicial council members, and interested members of the media and the public how chief judges and councils have terminated complaints and why.”²⁰

After 2006, little thought was given to judicial accountability until the Judge Kozinski scandal broke on December 8, 2017. Thereafter, Chief Justice Roberts established a working group to examine the judiciary’s procedures for protecting court employees from judicial misconduct. In his 2017 annual report, the Chief Justice wrote:

We have a new challenge in the coming year. Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.²¹

In early 2018, James Duff, the Director of the Administrative Office of the U.S. Courts, formed the Federal Judiciary Workplace Conduct Working Group, which was composed of eight judges and court administrators. In June 2018, the Working Group released a report. The report concluded that while inappropriate workplace conduct is not pervasive within the judiciary, it is not limited to a few isolated instances involving law clerks.²² The Working Group asserted that misconduct, when it does occur, is more likely to take the form of incivility or disrespect than overt sexual harassment, and it frequently goes unreported.²³ The report made three broad recommendations:

First, the Judiciary should revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior. Second, the Judiciary should improve its procedures for identifying and correcting misconduct, strengthening, streamlining, and making more uniform existing processes, as well as adding less formal mechanisms for employees to seek advice and assistance. Third, the Judiciary should supplement its educational and training programs to raise awareness of conduct issues, prevent harassment, and promote civility throughout the Judicial Branch.²⁴

²⁰ *Id.* at 6, 8.

²¹ CHIEF JUSTICE JOHN G. ROBERTS, *supra* note 3, at 11.

²² See THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, *supra* note 15, at 6–7.

²³ *Id.* at 7.

²⁴ *Id.* at 21.

The advocacy group Law Clerks for Workplace Accountability (“LCWA”) praised many aspects of the Working Group’s report, including its recommendation that the Judicial Conference create a national Office of Judicial Integrity to serve as a national resource for current and former judicial employees to seek advice regarding how to formally or informally respond to workplace misconduct. LCWA also criticized the report, however, claiming that its proposals were often vague.²⁵

On June 13, 2018, the Senate Judiciary Committee held a hearing on sexual harassment and other workplace misconduct in the federal judiciary. Three witnesses testified at this hearing: James Duff, the Director of the Administrative Office of the U.S. Courts; Jaime Santos, an associate at Goodwin Procter LLP; and Jenny Yang, a strategic partner at Working Ideal—an organization that provides advice on how organizations can become more inclusive.²⁶

Director Duff largely defended the Working Group’s report. He argued that the judiciary’s existing procedures for reporting and addressing harassment work effectively; the problem is that judiciary employees are often unaware of the existence of such procedures or are confused about how to take advantage of them.²⁷ In contrast, Ms. Santos argued that the Working Group’s report “does not go far enough” because “many of its recommendations are still quite vague.”²⁸ She highlighted additional steps that must be taken to effect lasting change. For example, noting that “the [W]orking [G]roup’s report is [almost] entirely forward-looking,” Ms. Santos called for a study of judicial “employees’ past experiences with harassment or abusive behavior.”²⁹ Similarly critical, Ms. Yang pointed out “the lack of a full Article III judicial remedy or any external review or outside appeal process” for claims of harassment in the judiciary.³⁰ She recommended that “the judiciary explore holding itself to the same standards as all other employers by providing employees with the right to a jury trial and the ability to obtain compensatory damages which are often the only remedy available in harassment cases.”³¹

In response to the Working Group’s report, the Judicial Conference published changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules in September 2018.³² For example:

Revised Canon 3 provides that judges “should not engage in behavior that is harassing, abusive, prejudiced, or biased.” The Rules define cognizable misconduct as including “engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault.” Finally, Canon 3 now states that judges should take

²⁵ See Brooke D. Coleman, *Accountability Requires Tenacity*, JOTWELL (Apr. 23, 2019), <https://courtslaw.jotwell.com/accountability-requires-tenacity/>.

²⁶ See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) [hereinafter *Hearing*].

²⁷ See *id.* at 17 (statement of James Duff, Director, Administrative Office of the U.S. Courts).

²⁸ *Id.* at 22 (statement of Jaime Santos, Associate, Goodwin Procter LLP).

²⁹ *Id.* at 23.

³⁰ *Id.* at 28 (statement of Jenny Yang, Strategic Partner, Working Ideal).

³¹ *Id.*

³² See Coleman, *supra* note 25.

appropriate action when learning of these types of behaviors, whether that behavior be from a fellow judge, a court employee, or lawyer.³³

Finally, in his 2018 Year-End Report, Chief Justice Roberts again addressed the judiciary's efforts to end "inappropriate conduct in the workplace."³⁴ He provided an update on the Working Group's report, the revised Code and Rules, and the new Federal Judicial Center Training materials. Recognizing that there is more to be done, the Chief Justice stated that "[t]he job is not finished until we have done all that we can to ensure that all of our employees are treated with fairness, dignity, and respect."³⁵

II. ISSUES THAT REMAIN UNRESOLVED AND QUESTIONS THAT REMAIN UNANSWERED

Although progress has been made toward establishing institutional safeguards that will prevent judges from harassing subordinates, there is still much more work to be done. In the world outside the judiciary, the #MeToo Movement is charging ahead. Within the walls of the third branch, however, change has been modest and slow going. Many questions raised and many problems presented by judicial harassment have not been given sufficient attention. At least as long as the issues discussed below remain unresolved, a judicial inspector general would—and should—play a role in policing judicial misconduct. While it is unlikely that all of these problems can be solved by a single legal solution, the establishment of a judicial inspector general would alleviate at least some of the detrimental consequences created by these problems as further solutions are explored.

First, neither the judiciary nor Congress have conducted a broad study of the problem of harassment in the judiciary. During the Senate Judiciary Committee's hearing on judicial harassment, Ms. Santos testified, "I know of [f]ederal judges who have been sitting on the bench in the last several months who have, it is commonly known, engaged in [harassing] behavior. . . . Within the past several months, they have done it."³⁶ Motivated by reports of such harassment, Ms. Yang and Ms. Santos have called for a national, retrospective survey of judicial employees to determine the prevalence of harassment in the judiciary. At the hearing, Ms. Santos stated, "I do not share the [W]orking [G]roup's conclusion that [harassment] is not pervasive in the judiciary. I do not think the judiciary has any idea. We have recommended that the [W]orking [G]roup do a survey of law clerks and other employees"³⁷

Senator Dianne Feinstein of California has likewise addressed the need for a study on the extent of harassment in the judiciary. She has noted that such a study is important because "in 2016 not one claim was filed under the current process for reporting within the Judiciary Conduct Act, even though over 700 clerks signed a letter

³³ *Id.* (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (JUDICIAL CONFERENCE OF THE U.S. 2019)). Coleman's article also describes some "critical shortcomings" of the revisions.

³⁴ CHIEF JUSTICE JOHN G. ROBERTS, 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2018).

³⁵ *Id.*

³⁶ *Hearing, supra* note 26, at 69 (statement of Jaime Santos, Associate, Goodwin Procter LLP).

³⁷ *Id.* at 61.

raising concerns and several high-profile cases of harassment came to light.”³⁸ Director Duff has opposed such a survey, preferring instead to prospectively focus on how the judiciary can change its policies to protect future potential victims.

Similarly, it is uncertain how pervasive harassment is in the legal profession generally, such as in law firms. Ms. Santos, in response to a question for the record, stated:

In my view, sexual harassment is a significant problem within the legal profession more generally, just as it is a problem within the entertainment industry, the media industry, and within the halls of Congress. One thing these industries all have in common is the concentration of men in positions of power, which can allow harassment to thrive and be concealed.³⁹

There is also a need for more input from current and former law clerks. In responding to a question for the record asked by Minnesota Senator Amy Klobuchar, Ms. Santos insisted that more input from former law clerks is needed because “even well-intentioned judges and judicial executives cannot be expected to recognize their own blind spots, especially when they are on the powerful end of a disparate power dynamic.”⁴⁰ Ms. Santos lamented that law clerks were not included as formal members of the Working Group.⁴¹

It is unclear what role law schools play in informing students about and preventing judicial harassment. To provide clarity on this issue, law school deans, professors, and administrators should explain how they can help law clerks avoid and respond to harassment. With regard to rumors that law school officials sometimes hear about judicial harassment, Director Duff has stated that “working with the law schools and learning more about [harassment]” is important “because sometimes we are not as fully aware of the rumors out there within the branch as maybe we should be.”⁴² Director Duff has said that collaboration with law schools is important because “in some cases the schools may possess informal knowledge that is not always communicated to the proper channels in the Judiciary.”⁴³

Problems have also been caused because of the public’s general inability to access records concerning judicial misconduct. A CNN investigation reported that records on judicial misconduct are not searchable and thus not easily accessible to the public.⁴⁴ Director Duff has said that “the Working Group encourages individual circuits to seek ways to make decisions on complaints in their courts more readily accessible to the

³⁸ *Id.* at 11 (statement of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary).

³⁹ S. COMM. ON THE JUDICIARY, 115TH CONG., JAIME A. SANTOS’ RESPONSE TO QUESTIONS FOR THE RECORD 8 (2018) [hereinafter SANTOS QFR].

⁴⁰ *Id.* at 15 (referring to the relationship between judges and law clerks).

⁴¹ *See id.*

⁴² *Hearing, supra* note 26, at 44 (statement of James Duff, Director, Administrative Office of the U.S. Courts).

⁴³ S. COMM. ON THE JUDICIARY, 115TH CONG., JAMES C. DUFF’S RESPONSE TO QUESTIONS FOR THE RECORD 12 (2018) [hereinafter DUFF QFR].

⁴⁴ *See* Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN (Jan. 26, 2018), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html>.

public through searchable electronic databases.”⁴⁵ Similarly, Ms. Yang has encouraged the judiciary to issue “an annual report summarizing judicial discipline decisions by issue and court [in order to] make this information accessible to the public.”⁴⁶ The lack of transparency on these matters hampers the ability of the public and media to hold judges accountable by exposing their misconduct, increasing the need for a judicial inspector general.

Similarly, complaints of judicial misconduct are generally not made public in the first place. As Ms. Yang has explained:

Currently, victims of harassment in the Judiciary . . . must utilize an internal complaint process that . . . is unlikely to lead to disciplinary action. Unlike all other federal and private sector employees, judicial employees have . . . no right to ensure public sunshine on their complaints.⁴⁷

Ms. Yang has concluded that the general lack of remedies for victims of judicial harassment, including the lack of an effective mechanism to hold harassers accountable, creates “a substantial deterrent for employees to come forward to report discrimination.”⁴⁸ A judicial inspector general would facilitate public consequences for harassers and thus encourage victims to report misconduct.

Of significant concern is how the harassment of a law clerk at the hands of his or her judge can be logistically difficult to address. Director Duff has explained:

Reassignment is possible [after the harassment occurs], but judges vary in terms of reputation and ideological background. The power disparity between a judge and a law clerk may create a strong disincentive to report any inappropriate conduct by a judge. A law clerk may fear that any complaint will destroy the bond of trust and cause strife in the chambers. It may also impact the judge’s recommendations for the law clerk which could impact future job prospects.⁴⁹

While there is no easy solution to this problem, a judicial inspector general would at least confirm claims of harassment found to be valid through investigation (thus preserving the law clerk’s reputation for integrity) and prevent the harassing judge from threatening to derail the law clerk’s career if misdeeds are reported.

Importantly, there are problems inherent in a system where *judges* report and investigate *other judges*. As Ms. Santos has explained:

⁴⁵ DUFF QFR, *supra* note 43, at 21.

⁴⁶ S. COMM. ON THE JUDICIARY, 115TH CONG., JENNY R. YANG’S RESPONSE TO QUESTIONS FOR THE RECORD 13 (2018) [hereinafter YANG QFR].

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*

⁴⁹ DUFF QFR, *supra* note 43, at 20.

If an employee experiences harassment or misconduct by a judge, the knowledge that the report will be referred to another judge for investigation and resolution could discourage employees from reporting misconduct Indeed, the lack of virtually any official complaints of harassment by judges is perhaps the best illustration that this process discourages reporting The Working Group has not yet focused on the procedures for investigating allegations of harassment, but in my view, this issue is a crucial if the judiciary hopes to be effective in encouraging reporting.⁵⁰

Similarly, Ms. Yang has stated,

[T]he chief judge is a peer of an accused judge who may understandably tend to give valued colleagues the benefit of the doubt when evaluating whether they have engaged in harassing behavior. This process could certainly deter individuals from coming forward out of a concern that they will not be believed or appropriate disciplinary action will not be taken. Indeed, the current process garners strikingly few complaints as compared with anecdotal reports of harassment.⁵¹

Conversely, Judge Scirica has insisted that ideals of judicial stewardship are enough to encourage judges to investigate other judges in an honest, unbiased way. He has explained:

The process now in place requires discipline, rigor, and self-assessment, seen in the searching inquiry now undertaken by the chief 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.⁵²

As sympathetic as one may be to Judge Scirica's admirable ideals, the #MeToo Movement has caused the public to question whether those in power may sufficiently regulate themselves. It is worth noting that Judge Scirica gave the lecture from which

⁵⁰ SANTOS QFR, *supra* note 39, at 11.

⁵¹ YANG QFR, *supra* note 46, at 7.

⁵² Scirica, *supra* note 16, at 795–96.

the statement above was taken in 2015 before the #MeToo Movement began. At that time, Judge Scirica believed that “there is no need to create constitutional tension” because “[t]he judiciary is faithfully discharging its duties of accountability.”⁵³ The numerous allegations of judicial misconduct that have come to light since 2015 bring Judge Scirica’s assertion into question. Given the revelations of the #MeToo Movement, an independent inspector general, immune from intra-branch judicial pressures, would naturally be the best investigator of judges accused of misconduct.

Despite calls for the establishment of a national reporting system for victims of judicial harassment to utilize at a safe distance from their alleged harassers, there is currently no such system in place. Ms. Santos has argued that a “national reporting avenue would ensure that employees in smaller districts or circuits—where all local employees know each other well—are not siloed into reporting to someone who may be close to the accused harasser.”⁵⁴ Similarly, Senator Grassley, as the Chairman of the Senate Judiciary Committee, stated:

[T]he [Working Group’s] report did not recommend establishing a national reporting mechanism, so it leaves victims no other avenue except to report to chief judges of their local district or circuit courts. This is a major issue because law clerks may be intimidated by reporting to a local chief judge instead of an independent national office.⁵⁵

Director Duff is not in favor of such a national reporting system because he believes that the newly established Office of Judicial Integrity, which will “counsel and advise callers and potential complainants on all their options early in the process as well as facilitate informal resolution of issues,”⁵⁶ will play a comparable role. However, a judicial inspector general could bridge the gap and carry out the functions of both a national reporting system and an informal dispute resolution resource.

The position of Director Duff and the Administrative Office of the U.S. Courts (“AO”) is that, ultimately, ignorance of remedial options is what leads to the scarce reporting of judicial misconduct.⁵⁷ The accuracy of this position is disputed. During the hearing on judicial harassment, Ms. Santos stated:

I would like to . . . respond to . . . something [Director] Duff has said several times, which is that people are not reporting this because they are not educated about it. I just really disagree with that point. I think that that is a piece of it. Education is important. But I know many women who went to HR and tried to report it and were discouraged from doing so. They were told that if this gets reported, it is going to

⁵³ *Id.* at 801.

⁵⁴ SANTOS QFR, *supra* note 39, at 10.

⁵⁵ *Hearing*, *supra* note 26, at 8–9 (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary).

⁵⁶ DUFF QFR, *supra* note 43, at 1.

⁵⁷ *See Hearing*, *supra* note 26, at 17 (statement of James Duff, Director, Administrative Office of the U.S. Courts).

go up to the chief judge, and he is really good friends with the person you are talking about.⁵⁸

The establishment of a judicial inspector general solves both of the issues raised by Director Duff and Ms. Santos, regardless of which one is the “true” fundamental problem. As a neutral party independent of the judicial branch, an inspector general could supplement the AO’s educational efforts at the same time that he or she encourages victims to report misconduct when they come forward.

Additionally, there are issues related to a judge’s retirement in the midst of an investigation. Normally, if a judge retires during an investigation of the judge’s alleged harassment, the investigation ends.⁵⁹ And the judge’s retirement pay will be the same amount that he or she would have made on the bench.⁶⁰ During the hearing on harassment in the judiciary, Senator Richard Blumenthal of Connecticut asked Director Duff, “[s]houldn’t the judiciary continue to pursue [judges accused of harassment who have retired] and have jurisdiction to stop that person’s pay . . . ?”⁶¹ A judicial inspector general could be given such authority.

A judicial inspector general could also provide official governmental affirmation that the problem of judicial harassment is serious and not something that should be disregarded or minimized. In response to a question for the record, Ms. Yang stated, “[w]here leadership is male dominated [as it is in the federal courts], women may not feel comfortable coming forward with concerns of sexual harassment for fear that these problems may be minimized.”⁶² The establishment of a judicial inspector general would send the message that the problem of judicial harassment is serious and will not be dismissed. This would both reassure the public and deter future judicial harassment.

It is clear from the foregoing that a judicial inspector general would address many of the problems posed by harassment in the judiciary. It would, therefore, be prudent to establish such an inspector general, especially given how the #MeToo Movement has exposed the prevalence of sexual harassment in society. Regardless, is a judicial inspector general a constitutional solution to the problem of harassment in the judiciary?

III. THE CONSTITUTIONALITY OF A JUDICIAL INSPECTOR GENERAL

A. CONGRESSIONAL REGULATION OF THE FEDERAL COURTS

An important background principle to keep in mind is that Article I of the United States Constitution not only concerns the nature and powers of Congress but also the

⁵⁸ *Id.* at 38–39 (statement of Jaime Santos, Associate, Goodwin Procter LLP).

⁵⁹ *See* Biskupic, *supra* note 44.

⁶⁰ *See* *Hearing*, *supra* note 26, at 65 (statement of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary).

⁶¹ *Id.* at 67.

⁶² YANG QFR, *supra* note 46, at 13.

“overall powers of the Federal Government.”⁶³ This is perhaps revealed most clearly in the Necessary and Proper Clause, which empowers Congress to legislate in order to execute “all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.”⁶⁴ Further, while Article III vests the judicial power in one Supreme Court, “nothing else about [the judiciary’s] structure and its operation is specified”⁶⁵ Thus, it appears to be Congress’ prerogative to “fill out the powers conferred on the Executive and Judiciary.”⁶⁶ Pursuant to this prerogative, Congress may have the authority to appoint an inspector general to investigate judicial misconduct. James Duff, the Director of the Administrative Office of the U.S. Courts, has described an apparent precedent for such an inspector general, stating, “In 1984 . . . in the Administrative Office of the Courts, [there] was [an office] called the ‘Office of Inspector General.’ Chief Justice Burger instituted that with Director Foley of the AO.”⁶⁷

The Congressional Research Service has concluded that “Congress has significant authority over administration of the judicial system”⁶⁸ In the past, Congress has regulated several aspects of the federal courts. It has funded the courts’ operation (including judicial salaries) through its spending power, and—by statute—it established the AO, the judicial councils of the circuits, the judicial conferences of the circuits, and the Judicial Conference of the United States.⁶⁹ Congress has also delegated a significant portion of its authority to make rules for the courts to the courts themselves. In the Judiciary Act of 1789, for example, Congress gave the federal courts the power “to make and establish all necessary rules for the orderly conducting of business in [the] courts, provided such rules are not repugnant to the laws of the United States.”⁷⁰ This grant of power to the judiciary implies that Congress retained the power originally, which is further evidence of the authority that Congress has to regulate the courts under the Constitution. Similarly, the management of judicial discipline was established by the Judicial Conduct and Disability Act of 1980,⁷¹ by which Congress sought to provide “a fair and proper procedure whereby the Judicial Branch of the Federal Government can keep its own house in order” by identifying and correcting instances of judicial misconduct that do not rise to the level of impeachable offenses.⁷² From 1789 to 1980, Congress has regulated, or has allowed the courts to regulate, the administration of the federal judiciary.

⁶³ ELIZABETH B. BAZAN ET AL., CONG. RESEARCH SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 4 (2005).

⁶⁴ U.S. CONST. art. I, § 8, cl. 18.

⁶⁵ BAZAN ET AL., *supra* note 63, at 5.

⁶⁶ *Id.* at 1.

⁶⁷ *Hearing, supra* note 26, at 38 (statement of James Duff, Director, Administrative Office of the U.S. Courts). The previous existence of a judicial inspector general and the apparent compatibility of such an office with the federal courts’ exercise of the judicial power at that time is evidence that such an officer would not interfere with the federal courts’ constitutional duties. *See infra* notes 122–32 and accompanying text.

⁶⁸ BAZAN ET AL., *supra* note 63, at 10.

⁶⁹ *See id.* at 6.

⁷⁰ Judiciary Act of 1789, 1 Stat. 73, § 17 (1789).

⁷¹ 28 U.S.C. §§ 351–364 (2018).

⁷² S. REP. NO. 96-362 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 4315, 4325.

Given the significant authority that Congress has to regulate the judiciary, some scholars have argued that “[t]here are no well-accepted arguments supporting the proposition that the judiciary has, or should have, as a branch, the level of independence in its administration that individual judges have in their judicial decisionmaking.”⁷³ Such scholars typically distinguish “decisional independence,” which is defined as “the ability of a judge to make a legal decision unfettered by the threat of coercion,” from “administrative” or “institutional” independence, which is defined as “the ability of the judiciary to administer itself according to systems it establishes.”⁷⁴ From this distinction follows the conclusion that “while [c]onstitutional protections exist to protect ‘decisional independence,’ they do not exist for ‘administrative’ independence.”⁷⁵

Decisional independence cannot be compromised in any way, for it is inherently connected to the legitimacy of the rule of law and thus the functioning of democratic self-government. As Judge Scirica has explained, decisional judicial independence

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. 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.⁷⁶

In contrast to decisional independence, Judge Scirica has pointed out that

institutional independence is not absolute. The Constitution empowers Congress to create and regulate the lower federal courts. In doing so, Congress has granted self-regulatory power to the judiciary itself, while retaining an oversight role. 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.⁷⁷

Thus, unlike decisional independence, institutional independence can be reduced to some extent to ensure judicial accountability.

Assuming that judicial independence is not impermissibly affected, the benefits to be gained from the creation of a judicial inspector general demonstrate the value of Senator Grassley's bill and why it should become law. First of all, the bill would allow

⁷³ Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 254 (1999) (citing Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 845 (1995)).

⁷⁴ *Id.* at 256 n.106.

⁷⁵ *Id.*

⁷⁶ Scirica, *supra* note 16, at 782 (footnotes omitted).

⁷⁷ *Id.* at 783–84 (footnotes omitted).

Congress to better oversee the conduct of the federal judiciary. As an example of the benefits that such oversight can produce, consider how after Congress enacted the Civil Justice Reform Act,⁷⁸ it was discovered that a federal district court judge had fifty-five cases that had been pending more than three years and one case in which the parties had been waiting eleven years for a decision.⁷⁹

Furthermore, as Diane Hartmus recognized in 1999, the “appointment of an [inspector general] in the judiciary, properly publicized, could be an important step toward stemming growing public distrust of judicial accountability.”⁸⁰ If that were true in 1999, long before the #MeToo Movement and the Judge Kozinski scandal, it is even more true now. Hartmus noted that “because an [inspector general] is required to file reports with Congress on a regular basis which are available to the public, the courts would thus provide the public with an increased ability to monitor and understand the workings of the judiciary.”⁸¹ Because the public’s trust in public institutions has eroded significantly in the wake of the #MeToo Movement and other public scandals, the investigations (and mere existence) of a judicial inspector general would demonstrate to the public that the judiciary is able and willing to be held accountable.

Others have argued that the creation of a judicial inspector general impermissibly intrudes upon judicial independence, upsetting the fragile balance of power between Congress and the judiciary. Judge Scirica has championed such a position:

[The introduction of bills supporting the creation a judicial inspector general] mark[s] a troubling shift . . . toward a system that would give power to an inspector general and, in turn, to Congress. The office of a judicial inspector general . . . could be misused to retaliate against judges who made unpopular decisions. In addition, the comparison of the proposed inspector general to the offices of inspector general in executive agencies [is] flawed because the judiciary “lacks the power to push back if Congress erodes” its independence. 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.⁸²

Similarly, Eric Robbins has argued:

⁷⁸ 28 U.S.C. §§ 471–482 (2018).

⁷⁹ See Hartmus, *supra* note 73, at 263 (first citing Doreen Carvajal, *New York’s Clogged U.S. Courts Delaying Civil Verdicts for Years*, N.Y. TIMES, Apr. 17, 1995, at A1; and then citing *Brown v. Trion Indus., Inc.*, 575 F. Supp. 511 (E.D.N.Y. 1983)).

⁸⁰ *Id.* at 265.

⁸¹ *Id.* (footnote omitted).

⁸² Scirica, *supra* note 16, at 792 (quoting *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the H. Subcomm. on Crime, Terrorism & Homeland Sec.*, 109th Cong. 47–48 (2006)).

Because judges can be disciplined for acts that create the appearance of impropriety, a necessarily vague standard, whomever disciplines judges has a great deal of discretion. Because of their experience on the bench and insulation from political pressure, judges are better equipped to determine what behavior they are willing to tolerate within their own ranks.⁸³

However, Senator Grassley's bill would give the Chief Justice of the United States the authority to remove the judicial inspector general at will, so the judiciary would be able to "push back" if the inspector general abused his power or discretion in some way. Further, the mere possibility that authority may be abused is typically no reason to abstain from creating the authority in the first place (at least as long as proper safeguards, such as appointment and removal provisions, are in place). Ultimately, given Congress' significant authority to oversee the federal judiciary, and considering the pressing need to ensure greater accountability in the #MeToo era, it is clear that the concerns raised by Robbins and Judge Scirica are not enough to preclude the creation of a judicial inspector general.

B. THE AUTHORITY OF THE JUDICIAL INSPECTOR GENERAL

Senator Grassley's bill would authorize a judicial inspector general to "make investigations and reports."⁸⁴ During an investigation, the inspector general would be authorized to obtain information from federal, state, and local governmental agencies.⁸⁵ The inspector general would wield a subpoena power in order to compel the testimony of witnesses and the production of "books, records, correspondence, memoranda, papers, and documents."⁸⁶ Finally, the inspector general would be authorized to administer oaths, affirmations, and affidavits.⁸⁷

However, the judicial inspector general would be specifically prohibited from investigating or reviewing "any matter that is directly related to the merits of a decision or procedural ruling by any judge, justice, or court," and would have no authority to "punish or discipline any judge, justice, or court."⁸⁸ As Donald Campbell has recognized, provisions like these are "meant to ensure the independence of the judiciary."⁸⁹ The bill would authorize the inspector general to commence investigations in only certain situations:

The Inspector General shall not commence an investigation under section 1023(1) until the denial of a petition for review by the judicial

⁸³ Eric Robbins, Note, *In re Nottingham, the Model Code of Judicial Conduct, and the Judicial Conduct and Disability Act of 1980*, 23 GEO. J. LEGAL ETHICS 783, 794 (2010) (footnotes omitted).

⁸⁴ S. 2195, 115th Cong. § 1024(a)(1) (2017).

⁸⁵ *See id.* § 1024(a)(2).

⁸⁶ *Id.* § 1024(a)(3).

⁸⁷ *See id.* § 1024(a)(4).

⁸⁸ *Id.* § 1024(c).

⁸⁹ Donald E. Campbell, *Should the Rooster Guard the Henhouse: Evaluating the Judicial Conduct and Disability Act of 1980*, 28 MISS. C.L. REV. 381, 402 (2009).

council of the circuit under section 352(c) of [Title 28] or upon referral or certification to the Judicial Conference of the United States of any matter under section 354(b) of [Title 28].⁹⁰

Thus, the inspector general would not be authorized to initiate investigations of his own accord; rather, he would have to wait for a denial of a petition for review or for a matter to be referred or certified.⁹¹ Consequently, the judicial inspector general's authority would be limited from the outset.

The judicial inspector general's limited authority under Senator Grassley's bill addresses many concerns raised by critics of past efforts to establish a judicial inspector general. For example, Diane Hartmus criticized a bill proposed by Senator John McCain of Arizona to create a judicial inspector general on the grounds that the bill gave to the judicial inspector general an "unfettered grant of investigative power over judges."⁹² In fact, Hartmus complained that Senator McCain's bill "[did] not address an [inspector general's] investigative authority in any manner."⁹³ Hartmus proposed ways to constrain a judicial inspector general's authority and explained how these limitations are essential to maintaining an independent judiciary:

The investigative jurisdiction of the [inspector general] into allegations of judicial misconduct should be limited. Specifically, an [inspector general] should become involved in investigations of judicial misconduct only at the invitation of either the chief judge of the circuit, or any other judicial body involved in the discipline procedure. Furthermore, an [inspector general] should have no authority to review, or even comment on, the substance of court decisions. Without these limitations, the creation of an office of [inspector general] with the authority to investigate a particular judge on a complaint of judicial misconduct, or review the content of judicial opinions, threatens the concept of judicial independence that is the cornerstone of our democracy and the foundation of a fair, impartial judiciary.⁹⁴

By the limitations it imposes on the authority of the judicial inspector general, Senator Grassley's bill satisfies Hartmus' concerns. Further, because the judicial council may refer or certify a matter to the judicial conference and thereby authorize the inspector general to investigate the matter, the judicial council has "the option to

⁹⁰ S. 2195, 115th Cong. § 1024(b) (2017).

⁹¹ Nevertheless, some have argued that this limit is ineffective. For example, Judge Scirica has stated, "It is worth noting, though, that in recent years, roughly fifty percent of all resolved complaints have been denied [by the circuit judicial council], totaling approximately five to six hundred complaints per year, so the restriction is not significant, nor would the restriction affect any contentious case." Scirica, *supra* note 16, at 791 (citing *Complaints Against Judges*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2013> (last visited Feb. 18, 2020)).

⁹² Hartmus, *supra* note 73, at 267 (footnote omitted).

⁹³ *Id.* n.178 (citing S. 1446, 104th Cong. § 2(a)(2)).

⁹⁴ *Id.* at 267–68.

call upon the investigative skills of the [inspector general] in matters deemed appropriate for investigation by someone other than a fellow judge.”⁹⁵ As Hartmus notes, “allegations that involve personnel issues or administrative irregularities are best investigated by an [inspector general], while issues related to judicial decisionmaking or courtroom demeanor are probably best left to fellow judges.”⁹⁶ Thus, Senator Grassley’s bill—unlike the previous bill proposed by Senator McCain—would grant a judicial inspector general only limited powers. This would preserve the independence of the judicial branch while holding judges accountable in a way that is appropriate and effective.

C. APPOINTMENT AND REMOVAL

Senator Grassley’s bill requires the Chief Justice of the United States to appoint a judicial inspector general.⁹⁷ The bill also authorizes the Chief Justice to remove the judicial inspector general for any reason; the Chief Justice must only communicate the reasons for removal to the House and Senate.⁹⁸ Thus, one may ask: Are the appointment and removal powers Congress has over executive officials analogous to the appointment and removal powers it has over judicial officials such as a judicial inspector general? A foundational inquiry is whether a judicial inspector general is a principal or inferior officer under Article II of the Constitution. Principal officers must be appointed by the President and confirmed by the Senate, but Congress may direct the President, department heads, or a court of law to appoint inferior officers.⁹⁹

In *Morrison v. Olson*,¹⁰⁰ the Supreme Court did not establish a bright-line rule for distinguishing between principal and inferior officers, but considered several factors before concluding that an independent counsel is an inferior officer.¹⁰¹ The following factors were considered: the independent counsel could be removed by a higher executive branch official; the independent counsel was authorized to perform only certain, limited duties and had no policy-making authority; and the independent counsel had limited jurisdiction and tenure.¹⁰² In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹⁰³ the Court adopted the “subordinate test”: whether one is an inferior officer “depends on whether he has a superior,” and inferior officers are officers “whose work is directed and supervised at some level” by “other officers appointed by the President with the Senate’s consent.”¹⁰⁴

Under both the *Morrison* and *Free Enterprise Fund* tests, it appears that a judicial inspector general would be an inferior officer. The judicial inspector general would be supervised by the Chief Justice, who is appointed by the President and confirmed

⁹⁵ *Id.* at 268.

⁹⁶ *Id.*

⁹⁷ See S. 2195, 115th Cong. § 1022 (2017).

⁹⁸ See *id.*

⁹⁹ See U.S. CONST. art. II, § 2, cl. 2.

¹⁰⁰ *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁰¹ See *id.* at 670–77.

¹⁰² *Id.* at 691–92.

¹⁰³ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

¹⁰⁴ *Id.* at 510 (quoting *Edmond v. United States*, 520 U.S. 651, 662–663 (1997)).

by the Senate. Under Senator Grassley's bill, the inspector general would have a limited tenure of four years (although he may be reappointed by the Chief Justice for any number of additional terms).¹⁰⁵ Further, the inspector general has no authority to make policy for the judicial branch, although he would be allowed to recommend changes in laws or regulations governing the judicial branch.¹⁰⁶ Finally, the inspector general's jurisdiction and duties would be limited: He would only possess the authority to conduct investigations of alleged misconduct in the judicial branch, and he would only be able to commence an investigation after the denial of a petition for review or after a matter has been referred or certified to the Judicial Conference of the United States.¹⁰⁷ For these reasons, it appears that the inspector general would be an inferior officer who could be appointed by a court of law.

In *Morrison*, the Supreme Court allowed Congress to vest the power to appoint an independent counsel in a court.¹⁰⁸ To determine if this vesting of the appointment power was constitutional, the Court looked for "incongruity"—the connection between the appointer and the appointee.¹⁰⁹ In *Morrison*, the Court concluded that there was sufficient congruity in having a court appoint a prosecutor and investigator: Such a relationship was congruent because investigations and prosecutions typically occur under judicial supervision.¹¹⁰ In the case of a judicial inspector general, a similar outcome would be expected because discovering judicial misconduct and facilitating the judicial disciplinary process (the judicial inspector general's task) has traditionally been one of the tasks of the Chief Justice. Thus, the Supreme Court would probably find sufficient congruity in having the Chief Justice appoint an inspector general for the federal courts.

While Senator Grassley's bill does not restrict the Chief Justice's ability to remove the inspector general, it is worth considering whether a future bill could do so. In *Humphrey's Executor v. United States*,¹¹¹ the Supreme Court stated:

The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.¹¹²

Humphrey's held that if an agency is not *executing* the law, then restricting the President's power to remove officers within the agency will not hinder the President's ability to take care that the laws are faithfully executed.¹¹³ Would this same rationale

¹⁰⁵ See S. 2195, 115th Cong. § 1022(b) (2017).

¹⁰⁶ See *id.* at § 1023(5).

¹⁰⁷ See *id.* at § 1024.

¹⁰⁸ See *Morrison v. Olson*, 487 U.S. 654, 675–76 (1988).

¹⁰⁹ See *id.* at 676.

¹¹⁰ See *id.*

¹¹¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

¹¹² *Id.* at 629.

¹¹³ See *id.* at 631–32.

apply to the judicial branch and to a judicial inspector general? If the inspector general is not exercising the judicial power, would restricting the Chief Justice's power to remove the inspector general be constitutional on the ground that the Chief Justice's ability to exercise the judicial power would not be hindered? Considering *Humphrey's* reasoning, an affirmative answer seems likely.

The appointment provision in Senator Grassley's bill addresses concerns that critics of past bills have raised. For instance, Diane Hartmus has argued that the judicial inspector general bill introduced by Senator McCain contained a "glaring error" because it required the judicial inspector general to be "chosen by the President from a list of individuals submitted by the Judicial Conference of the United States."¹¹⁴ Hartmus argued:

By requiring the [inspector general] . . . to be a presidential appointee, Senator McCain's bill infringes on the separation of powers doctrine. Because the judiciary is an independent branch of government, the appointment process for an [inspector general] should parallel, not copy, that of the Executive branch. The Chief Justice, the leader of the judiciary, should appoint the [inspector general] for the courts, with the advice and consent of the Senate.¹¹⁵

Senator Grassley's bill properly takes Hartmus' separation-of-powers concern into account by authorizing the Chief Justice to appoint the judicial inspector general and by allowing the Chief Justice to remove the inspector general at will. As Donald Campbell has noted, bills like Senator Grassley's give "the Chief Justice a great deal of authority in hiring and firing the judicial inspector general."¹¹⁶

Similarly, the removal provision that authorizes the Chief Justice to remove the judicial inspector general for any reason satisfies criticism of past bills. In discussing Senator McCain's judicial inspector general bill, Hartmus argued that "[t]he Chief Justice alone should have the power to remove the [inspector general], communicating the reasons for removal to the Senate."¹¹⁷ Senator Grassley's bill does exactly that. Incidentally, Senator Grassley's bill also incentivizes offending judges to "remove" themselves. By facilitating the discovery of judicial misconduct, the judicial inspector general puts informal pressure on exposed judges to resign. As Hartmus has noted, "given the [c]onstitutional salary and tenure protections afforded federal judges, peer pressure is perhaps the most effective method of handling incidents of misconduct among federal judges."¹¹⁸

¹¹⁴ Hartmus, *supra* note 73, at 267.

¹¹⁵ *Id.*

¹¹⁶ Campbell, *supra* note 89, at 402.

¹¹⁷ Hartmus, *supra* note 73, at 267.

¹¹⁸ *Id.* at 269.

D. FUNCTIONALISM, FORMALISM, AND PRACTICAL CONSIDERATIONS

The establishment of a judicial inspector general who will investigate judicial misconduct and report to Congress raises questions about the separation of powers and judicial independence. As noted by scholars, “[t]ension between the branches over the administrative operations of the judiciary is ongoing,” and “[t]he exact location of the line between judicial independence and congressional oversight of the judiciary has never been firmly established.”¹¹⁹ Further, as the discussion below demonstrates, there is no agreement concerning what methodological approach the courts should take when analyzing separation-of-powers issues. Thus, the separation-of-powers problems posed by a judicial inspector general should be addressed from as many perspectives as possible.

When deciding separation-of-powers cases, the Supreme Court has taken formalist, functionalist, and practical approaches. At root, the Court evaluates whether the acting branch, which is usually Congress, has “impermissibly undermine[d]” the power of another branch.¹²⁰ Specifically, the Court considers whether the acting branch has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] [b]ranch from accomplishing its constitutionally assigned functions.”¹²¹ In conducting this inquiry, courts and judges have emphasized different formalist, functionalist, and practical considerations.

i. Functionalism

A functionalist approach “focuses upon the preservation of the core functions of the three branches, looking in a given case to whether the exercise of power by one branch impinges upon a core function of a coordinate branch.”¹²² For example, in *United States v. Nixon*,¹²³ President Nixon was named as a co-conspirator in various criminal charges, and the district court subpoenaed tapes and documents relating to specific meetings involving Nixon. In opposition to the subpoena, Nixon asserted a claim of absolute privilege.¹²⁴ In approaching the case, the Supreme Court sought to ensure that the *functions* of the judicial and executive branches worked properly.¹²⁵ The Court weighed the importance of a general claim of confidentiality against the fair administration of criminal justice and concluded that the legitimate needs of the judicial process outweighed the broad claim of presidential privilege.¹²⁶ The Court reasoned that the President’s general interest in confidentiality would not be vitiated by disclosure of a limited number of conversations “preliminarily shown to have some

¹¹⁹ Hartmus, *supra* note 73, at 254.

¹²⁰ *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986)).

¹²¹ *Id.* (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

¹²² BAZAN ET AL., *supra* note 63, at 11.

¹²³ *United States v. Nixon*, 418 U.S. 683 (1974).

¹²⁴ *See id.* at 703.

¹²⁵ *See id.* at 707.

¹²⁶ *See id.* at 707–14.

bearing on the pending criminal cases.”¹²⁷ This disclosure would also ensure that the judiciary would be able to carry out its Article III task of adjudicating federal criminal prosecutions.¹²⁸ Thus, because disclosure of the documents would preserve the functions of both the executive and judicial branches, disclosure was allowed.

Following *Nixon*’s functionalist approach, an analysis of Senator Grassley’s bill would involve a balancing of the judicial and legislative interests. A court would ask whether the appointment of a judicial inspector general would impair the judiciary’s efforts to exercise the judicial power and whether allowing or disallowing the creation of a judicial inspector general would impair the efforts of Congress to exercise its constitutional powers. The court would then attempt to resolve the case in a way that allows both the judiciary and the legislature to exercise their core constitutional functions.

On the face of Senator Grassley’s bill, it does not appear that the inspector general is given any authority that would interfere with the exercise of the judicial power, which has been defined as “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”¹²⁹ The inspector general would merely be empowered to conduct investigations and create reports in order to facilitate either punishment within the judicial branch or impeachment by the legislative branch. The facilitation of either action would not interfere with the exercise of the judicial power, and neither action poses a constitutional problem: The former has been statutorily authorized by Congress (and the judiciary does not protest the practice), and the latter is eminently constitutional.¹³⁰

As Hartmus points out, it could be argued that “the mere presence of an [inspector general], with unfettered investigatory powers, would be chilling to judicial independence” because the judiciary “is founded upon the belief that judges must remain free from outside pressure, political or otherwise, in rendering decisions in the cases before them.”¹³¹ However, the solution to this potential problem is to “not grant[] [inspectors general] the power to investigate a judge’s ‘every move.’”¹³² In particular, a judge’s *decision-making* should not be investigated by a judicial inspector general. Because Senator Grassley’s bill would specifically prohibit a judicial inspector general from investigating judicial decision-making, judges’ decisions are protected from investigation, which should prevent any chilling of judicial independence.

ii. Formalism

A formalist approach to a separation-of-powers issue “examines the text of the Constitution to determine the degree to which branch powers and functions may be intermingled, emphasizing that powers committed by the Constitution to a particular

¹²⁷ *Id.* at 713.

¹²⁸ *See id.* at 707–14.

¹²⁹ *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (quoting JUSTICE SAMUEL MILLER, ON THE CONSTITUTION 314 (1891)).

¹³⁰ *See* U.S. CONST., art II, § 4.

¹³¹ Hartmus, *supra* note 73, at 256.

¹³² *Id.*

branch are to be exercised exclusively by that branch.”¹³³ One performing a formalist analysis may locate Congress’ authority to establish a judicial inspector general in the Necessary and Proper Clause.¹³⁴ In order for Congress to exercise its impeachment power,¹³⁵ it must first learn of impeachable offenses. However, judicial harassment is often difficult to uncover because of the stark power disparity that exists between life-tenured federal judges and vulnerable judicial employees, such as law clerks.¹³⁶ Thus, for Congress to impeach judges who are secretly engaging in harassing behavior, the investigations of an inspector general may be necessary. Further, there would be no usurpation of the judicial power because the judicial inspector general would not decide cases or interfere with judicial decision-making,¹³⁷ and there would be no usurpation of executive power because the judicial inspector general would only conduct investigations—a principal function of Congress.¹³⁸

In opposition, Judge Scirica has insisted that a judicial inspector general would indeed encroach upon the formal powers of the judiciary. He has argued:

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.¹³⁹

Judge Scirica rejects the argument that “life tenure and protection of salary [would] be sufficient to shield the judiciary from real coercion,” insisting that “[a]ny outside influence on the judicial conduct and disability process contains the seeds for improper pressure and persuasion.”¹⁴⁰

This argument is unpersuasive, however, because Judge Scirica does not explain how Congress would be able to “direct or influence” the investigations of the judicial inspector general. This assertion is questionable, at least under Senator Grassley’s bill, since the inspector general’s authority would be carefully constrained and the Chief Justice of the United States would be authorized to remove the inspector general at will. The removal provision alone appears to be an adequate safeguard against

¹³³ BAZAN ET AL., *supra* note 63, at 11; *see, e.g.*, *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

¹³⁴ U.S. CONST. art. I, § 8, cl. 18.

¹³⁵ *See id.* art. I, §§ 2–3.

¹³⁶ *See sources cited supra* note 5.

¹³⁷ *See supra* notes 129–32 and accompanying text.

¹³⁸ *See Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976) (first citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881); then citing *McGrain v. Daugherty*, 273 U.S. 135 (1927); and then citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975)) (noting that powers that “are essentially of an investigative and informative nature” are “in the same general category as those powers which Congress might delegate to one of its own committees”).

¹³⁹ Scirica, *supra* note 16, at 794.

¹⁴⁰ *Id.* (footnote omitted).

politically motivated investigations. Judge Scirica's argument is further undermined by his recognition that "the proposed mandate of the inspector general would duplicate the existing judicial conduct and disability process in several ways."¹⁴¹ If the current process does not intrude upon the independence of the judiciary or obstruct the exercise of its powers, neither will a process headed by a neutral judicial inspector general who has only limited authority and who is removable at will by the Chief Justice.

iii. Practical Considerations

A final approach to separation-of-powers questions is to consider the practical consequences of different outcomes. In his *Clinton v. New York*¹⁴² dissent, Justice Breyer argued that the Court should interpret separation-of-powers principles in light of the need for "workable government."¹⁴³ He argued that the Constitution authorizes Congress and the President to experiment with "novel methods" to improve government, such as the line-item veto.¹⁴⁴ To Justice Breyer, this novel method was an appropriate experiment that could have helped "representative government work better."¹⁴⁵ Interestingly, Justice Scalia, who typically employed a formalist methodology, took a rather functionalist approach and agreed with Justice Breyer's conclusion. Justice Scalia looked to the *effect* of the line-item veto and concluded that there was no material difference between Congress authorizing the President to cancel a spending item and Congress authorizing money to be spent on a particular item at the President's discretion.¹⁴⁶ To Justice Scalia, because the latter was constitutional, so was the former.

Taking a practical approach, one could argue that a government of checks and balances cannot function properly without some way for the people, acting through their congressional representatives, to hold federal judges accountable for their misconduct. Thus, a judicial inspector general should be permitted, especially since such an office is apparently not directly prohibited by the text of the Constitution. This conclusion receives even more support when one considers the #MeToo Movement's profound and troubling revelations concerning the prevalence of sexual harassment in the workplace, including in the judiciary.

Justice Scalia's approach to the line-item veto would also support this outcome. One could argue that judicial harassment may already be discovered and punished by the judiciary and Congress through the Judicial Conduct and Disability Act of 1980 or through the impeachment process, so the investigations of a judicial inspector general effects the same result, just by different means. This mirrors Justice Scalia's argument in *Clinton* that as long as the effect is constitutional, so are the means.

¹⁴¹ *Id.* at 794.

¹⁴² *Clinton v. New York*, 524 U.S. 417 (1998).

¹⁴³ *Id.* at 472 (Breyer, J. dissenting) (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

¹⁴⁴ *Id.* at 497 (Breyer, J. dissenting).

¹⁴⁵ *Id.* (Breyer, J. dissenting).

¹⁴⁶ *See id.* at 468–69 (Scalia, J. concurring in part and dissenting in part).

CONCLUSION

Ultimately, the separation of powers doctrine jealously protects the decisional independence of the judiciary, rather than its institutional independence. Accordingly, since the founding of the United States, Congress has played a significant role in regulating the institution and administration of the judiciary. So long as an inspector general is not authorized or allowed to affect the judiciary's decisional independence in any way, an inspector general may constitutionally aid Congress in regulating the judiciary as an institution. For the reasons above, and primarily because (1) an inspector general would not interfere with the exercise of the judicial power and thus would not violate the Constitution, (2) an inspector general would be expressly prohibited from investigating matters pertaining to the judiciary's decisional independence, and (3) a judicial inspector general is needed in the wake of the #MeToo Movement, Senator Grassley's bill appears to be both constitutional and prudent.