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**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS**  
**SECTION OF LITIGATION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

**1**           **RESOLVED**, that the ABA opposes legislation such as H.R. 5219 and  
**2** S. 2678 (109<sup>th</sup> Congress) that would establish a statutory Office of Inspector General for the  
**3** Judicial Branch for the purpose of conducting investigations of matters pertaining to the  
**4** Judicial Branch, including possible misconduct in office of judges and judicial proceedings.

**5**           **FURTHER RESOLVED**, that the ABA opposes any legislative proposal creating  
**6** the statutory position of Inspector General for the Judicial Branch that: 1) requires the Chief  
**7** Justice of the United States to consult with congressional leaders over the appointment of an  
**8** inspector general; 2) confers on the inspector general broad power to subpoena judges and  
**9** judicial entities to compel testimony and the production of documents; or 3) requires the  
**10** inspector general to make prompt reports to Congress in open or closed sessions on matters  
**11** that the inspector general believes require action.

**12**           **FURTHER RESOLVED**, that the ABA applauds the recent efforts of the Judicial  
**13** Conference of the United States to examine and respond to concerns raised by Congress and  
**14** the public over judicial adherence to, and oversight of, its rules, guidelines and procedures  
**15** governing judicial recusal, financial disclosure statements, the Judicial Discipline and  
**16** Procedures Act and judicial attendance at privately funded, expense-paid seminars.

**17**           **FURTHER RESOLVED**, that the ABA urges the U.S. Supreme Court, the Judicial  
**18** Conference of the United States, and the circuit council of each judicial circuit to strengthen  
**19** public confidence in the courts by regularly engaging in rigorous oversight of judicial  
**20** administration activities and judicial ethics and promptly adopting and implementing  
**21** improvements when necessary.

**1**           **FURTHER RESOLVED**, that the ABA urges Members of Congress and of the  
**2** Federal Judiciary to confer informally to consider ways to engage in constructive,  
**3** cooperative and regular dialogue over challenging judicial administration issues and  
**4** proposed legislation of mutual concern.

## **REPORT**

This recommendation expresses the Association’s opposition to H.R. 5219 (Sensenbrenner, R-WI) and S. 2678 (Grassley, R-IA), legislation pending in this 109th Congress to establish an Inspector General for the Judicial Branch. In addition to opposing these current bills, the recommendation puts the Association on record as opposing any congressional proposal that would create an Office of Inspector General for the judiciary with broad investigative powers and close ties to Congress. This accompanying report explains that the current legislation offends our notions of separation of powers because it would permit the Office of Inspector General to subpoena judges and their documents and investigate specific judges for opinions rendered; creates too close a nexus between Congress and the Office of Inspector General; and re-calibrates checks and balances by expanding the potential opportunity for Congress to intrude into the decisional and institutional independence of the judiciary.

The report will start with an examination of the congressional–judicial landscape in order to provide context for the current legislative proposal. Section II will provide a brief summary of the history of the Office of Inspector General and distinguish between statutory and non-statutory IGs. Section III will analyze the current IG legislation and report on various responses from other groups. Finally, Section IV will explain the scope of this multi-pronged proposal and the reasons why adoption of each component clause is essential to enable the ABA to defend judicial independence and at the same time contribute to a productive discourse over the underlying issues that have tested public confidence and ratcheted up the tension between Congress and the federal courts.

### **I. Tense Relations and Current Concerns**

During the past few Congresses, multiple bills have been introduced to strip the federal courts of jurisdiction to hear certain controversial categories of decisions or to limit judicial discretion, and a few outraged congressional members have called for the impeachment of certain judges because of judicial decisions with which they disagree and urged that the “activist” judiciary should be controlled by eliminating life tenure or by severely reducing its budget. Congressman F. James Sensenbrenner (R-WI), chair of the House Judiciary Committee, on several occasions, has taken the unusual step of holding oversight hearings focused on the judicial actions of specific judges, including the following:<sup>1</sup>

- During 2002 and 2003, the House Judiciary Committee conducted a wide-ranging investigation into the sentencing decisions of Chief Judge James Rosenbaum of the District of Minnesota, who had testified in favor of proposed amendments to the sentencing guidelines that would have allowed courts to depart downward when sentencing some low-level players in certain narcotics offenses. The committee majority accused Judge Rosenbaum of providing false and misleading testimony and demanded his sentencing

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<sup>1</sup> This list has been excerpted from a more detailed list provided by Justice at Stake.

records under threat of subpoena. The investigation appears to have ended with a compromise.

- In 2002, Rep. Sensenbrenner conducted an investigation of Circuit Judge Boyce Martin, who was then Chief Judge of the Sixth Circuit, regarding another judge's charges that he had manipulated the composition of the panel of judges hearing a landmark affirmative action case to assure that the panel upheld the affirmative action policies under challenge. The Committee subpoenaed records and demanded interviews with judges and court staff under threat of subpoena despite the Sixth Circuit's disciplinary finding of no wrongdoing.
- In 2005, Rep. Sensenbrenner wrote an *ex parte* letter to Chief Judge Flaum of the Seventh Circuit calling upon Judge Flaum to take action to undo a Seventh Circuit panel's decision to uphold a criminal sentence that Rep. Sensenbrenner called illegal but that the Justice Department had not appealed.

Concerned that these targeted inquiries seem to be motivated by disagreement with specific judicial decisions, the Association has spoken out against many of these investigations on the grounds that such methods, even if they were within legitimate inquiry of the Committee, chill independent judicial decision-making, demonstrate a disregard for a co-equal branch, and in certain cases, suggest a misunderstanding of the underlying law.

In addition to these investigations, Rep. Sensenbrenner has given speeches that provide insight into the state of congressional - judicial relations. In March 2004, in an address before the Judicial Conference of the United States, Rep. Sensenbrenner used the occasion to defend the investigation of Chief Judge Rosenbaum, emphatically stating that his Committee's actions were constitutionally authorized and otherwise appropriate. He also criticized the Judicial Discipline and Disability Act of 1980<sup>2</sup> and questioned the judiciary's ability to investigate and discipline itself, threatening, "If the judiciary will not act, Congress will--consistent with its constitutional responsibilities."<sup>3</sup> As result of these comments, the Chief Justice Rehnquist created the Judicial Conduct and Disability Act Study Committee within the judiciary, headed by Justice Breyer and charged it with evaluating the implementation of the discipline statute by the judiciary.<sup>4</sup> The final report of the committee is expected to be released in fall, 2006.

The following year, in a speech presented at Stanford University, Sensenbrenner reported that his Committee was investigating whether Congress needed to create an Office of Inspector General for the Federal Judiciary, stating that he did not believe that it would

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<sup>2</sup> 228 U.S. C. § 351, et seq.

<sup>3</sup> Prepared remarks of Rep. James Sensenbrenner before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary, available at: <http://www.house.gov/judiciary>.

<sup>4</sup> In 1990, Congress created the National Commission on Judicial Discipline and Removal (Pub.L.No. 101-650). One of its charges was to investigate problems and issues relating to judicial discipline and disability. A task force was created within the ABA to assist the commission with its work. The Task Force submitted two policy recommendations to the House of Delegates -- in February 1993 and February 1994. While concluding that the judicial discipline statute was working well, the resolutions recommended certain changes in practice and procedure to **improve the administration of the Act, most of which were implemented or enacted in subsequent years.**

violate the separation -of-powers doctrine. During the same speech, he castigated the judiciary for not accepting the jurisdiction that Congress conferred by engaging in a *de novo* review of the Terry Schiavo right-to die case, and he expressed his objections to the judiciary's citation of foreign sources in its decisions.<sup>5</sup>

While congressional disagreement with controversial decisions accounts for some, if not much, of the increased interbranch friction, the judiciary can increase the problem and undermine public confidence its failure to focus on judicial recusal practices, reporting of gifts on its judicial financial disclosure statements, judicial attendance at privately funded educational seminars and its handling of disciplinary matters through the Judicial Discipline and Disability Act. Recent examples of judges failing to recuse themselves when they have a financial interest in one of the parties, failure to disclose attendance at expense-paid seminars and concern about the judicial disciplinary process have spurred congressional criticism.

## **II. History of the Office of Inspector General**

### **A. Statutory Inspectors General**

Statutory Offices of Inspector General were created for the express purpose of combating waste, fraud, and abuse in federal departments and agencies and, with one exception, have been established to oversee Executive Branch activity. They were established by the Inspector General Act of 1978 and its amendments of 1988<sup>6</sup> as permanent, nonpartisan, independent offices.

Statutory Offices of Inspector General currently exist in 57 federal entities, including all 15 cabinet departments, major executive branch agencies, independent regulatory commissions, various government corporations and foundations, and one legislative branch agency—the Government Printing Office (GPO).<sup>7</sup> All but two of these offices -- the CIA and the GPO -- are explicitly governed by the Inspector General Act of 1978, as amended.<sup>8</sup>

The Act authorizes either the President or agency head to appoint IGs, who are to be selected without regard to political affiliation. The 29 existing IGs who serve cabinet departments and the larger agencies are nominated by the President and confirmed by the Senate and can only be removed by the President. The other 28 are appointed directly by the head of the agency or entity and can be removed by either the President or the appointing authority.

According to the Act, inspectors general have three principal responsibilities:

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<sup>5</sup> The Honorable F. James Sensenbrenner, Jr. Zale Lecture in Public Policy, Stanford University (May 9, 2005), available at: <http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf>.

<sup>6</sup> Pub. L. No. 95-453, as amended, 5 U.S.C. Appendix 3.

<sup>7</sup> A complete list of Offices of Inspectors General is available at the government's IG website at: <http://www.ignet.gov/igs>. Another helpful source for information is the publication, Statutory Offices of Inspector General: Establishment and Evolution, CRS Ret 98-379, updated July 1, 2003. This report may be accessed at: <http://www.opencrs.com/document/98-379>.

<sup>8</sup> The IG in the CIA operates under the Intelligence Authorization Act of 1990 (103 Stat. 1711), and in the GPO, under the GPO Inspector General Act (44 U.S.C. 3901-3902).

- conducting and supervising audits and investigations relating to the programs and operations of the establishment;
- providing leadership and coordination and recommending policies for activities designed to promote the economy, efficiency, and effectiveness of such programs and operations, and preventing and detecting fraud and abuse in such programs and operations; and
- providing a means for keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, and the necessity for and progress of corrective action.<sup>9</sup>

Under the Act, IGs have broad authority to conduct audits and investigations; access directly all records and information of the agency; request assistance from other federal, state, and local government agencies; subpoena information and documents; administer oaths when taking testimony; and hire staff and manage their own resources.

Each IG serves under the general supervision of the department or agency head and is required to report semiannually to that person, who must, in turn submit the IG report, and any comments, to Congress within 30 days. IGs must report “particularly serious or flagrant problems” immediately to the agency head, who must submit the IG report, along with any comments, to Congress within seven days. The IG is required to report suspected violations of federal criminal law directly and expeditiously to the Attorney General.

### **B. Non-Statutory Inspectors General**

While few in number, some governmental entities have established their own Offices of Inspector General, which derive their authority from the authorizing rules or regulations of the entity they serve, not from federal statutory enactments. A prime example of this is the Office of Inspector General for the House of Representatives.

The mission statement posted on the House IG website explains that the Office of Inspector General was initially established in the 103rd Congress pursuant to House Resolution 423, 102nd Congress<sup>10</sup> and that House Rule II, clause 6 of 109<sup>th</sup> Congress delineates the mission of the IG. That rule states:

- (a) There is established an Office of Inspector General.
- (b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.
- (c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only:

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<sup>9</sup> *Id* at Sec. 2.

<sup>10</sup> The House Office of the Inspector General website and mission statement may be accessed at: <http://www.house.gov/IG/Mission.html>

- 1) conduct periodic audits of the financial and administrative functions of the House and of joint entities;
- (2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;
- (3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause;
- (4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration a report of each audit conducted under this clause; and
- (5) report to the Committee on Standards of Official Conduct information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.<sup>11</sup>

The differences between this non-statutory Office of Inspector General and those created pursuant to the Inspector General Act of 1978 are striking. In contrast to statutory IGs,

- the House IG is selected and appointed exclusively by the body it serves;
- the House IG has a very specific, very narrow mandate to conduct periodic audits of the financial and administrative functions of the House;
- the House IG does NOT have authority to issue subpoenas to House Members or other individuals central to an investigation, nor does it have authority to access directly all records and information of the House, nor does it have authority to request assistance from other federal state or local entities or agencies;
- the House IG reports its financial audits ONLY to designated Members of the House; and
- the House IG reports possible ethical or criminal violations ONLY to the House Committee on Standards of Official Conduct, the House entity charged with investigating charges of official misconduct.

It also bears noting that the Senate has no Inspector General of any sort.

### **III. Pending Legislation to Establish the Office of Inspector General for the Judicial Branch**

Rep. Sensenbrenner and Senator Grassley introduced companion IG bills --H.R. 5219 and S. 2678 --entitled, *The Judicial Transparency and Ethics Enhancement Act of 2000* -- on April 27, 2006. The legislation would establish a statutory Office of Inspector General for the judiciary under Title 28 of the U.S. Code, not under the 1978 Act. The two bills are identical

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<sup>11</sup> House Rule II, clause 6 may be accessed at: <http://clerk.house.gov/legisAct/legisProc/rules/rule2.html>

except for one important feature: the jurisdiction of the IG in the House bill does not extend to oversight of the activities or justices of the U.S. Supreme Court, as it does in the Senate bill.

Upon introduction of his bill, Rep. Sensenbrenner said that he hoped that an independent IG would help restore the trust with the public that has been damaged by the actions of some federal judges who have “carelessly ignored the ethical guidelines established.” He said that he was troubled by a recent Washington Post article<sup>12</sup> that reported that a number of judges were continuing to violate ethical rules and others have failed to make proper disclosures of travel to resorts on expense-paid trips and that, given his assessment of the poor performance in self-reporting, he was proposing to create an IG who will be responsible for reporting to both the Chief Justice and to Congress.<sup>13</sup>

Senator Grassley was just as blunt. Appearing before a House Judiciary subcommittee on June 29, 2006, he stated:

[E]ver since I chaired the Senate Judiciary Subcommittee on Administrative Oversight and the Courts in the early 1990s, concerns have been raised about compliance with the judicial ethics rules and whether the judiciary can adequately police itself on these matters. Concerns about alleged ethics violations, conflicts of interests, and appearances of impropriety by judges continue to be reported by the press. Now, I don’t know whether or not these lapses were intentional. I don’t know whether these instances were violations of the judicial ethics rules, the ethics statute, or the judicial code of conduct. But it doesn’t look like the judiciary is acting fast enough to show us that judges are crossing all their “T”s and dotting all their “I”s, or that the rules work as well as they should. I’m sorry to say that these allegations don’t instill much confidence in me, and I’m sure that they don’t instill much confidence in the American people. I know that mistakes happen, but there are enough questions out there for me to conclude that some sort of action is necessary. In my mind, the judiciary hasn’t done enough to reassure the public that it is doing all that it can to address what are perceived to be cracks in the system.<sup>14</sup>

Under both bills, an IG for the judiciary would be appointed by the Chief Justice only after consultation with the minority and majority leaders of the Senate and Speaker and Minority Leader of the House.

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<sup>12</sup> Joe Stephens, *Ethics Lapses by Federal Judges Persist, Review Finds Violations Involve Stock Holdings And* Washington Post at A17 (April 18, 2006).

<sup>13</sup> News Advisory, *Sensenbrenner, Grassley Introduce Legislation Establishing an Inspector General for the Judicial Branch* (April 27, 2006) available at <http://judiciary.house.gov>

<sup>14</sup> Prepared Statement of Senator Charles E. Grassley submitted for the hearing on H.R. 5219 before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (June 29, 2006).

The legislation authorizes the IG to “conduct investigations of matters pertaining to the judicial branch, including possible misconduct in office of judges and proceedings that may require oversight or other action within the judicial branch or by Congress,” conduct and supervise audits and other investigations, recommend changes in laws or regulations governing the judiciary, and "detect waste, fraud and abuse."

In furtherance of its duties the IG would have the power “to obtain information or assistance from any Federal, State or local agency, or other entity, or unit thereof, including all information kept in the course of business by the Judicial Conference of the United States, the judicial councils of circuits, the Administrative Office of United States Courts, and the United States Sentencing Commission.” To assure compliance, the IG would have extensive subpoena authority over persons and documents that would be enforceable by civil action.

The IG would be required report annually to the Chief Justice and the Congress on its operations and to make “prompt” reports to the Chief Justice and Congress on matters that may require action by them. The IG also would be required to report “expeditiously” to the Attorney General if he or she has reasonable grounds to believe there has been a violation of criminal law.

This legislation would establish an Office of Inspector General with a mandate and powers that far exceed those of the IG of the House of Representatives. It also contains provisions that are significantly more troubling for the judiciary than those in the Inspector General Act of 1978, under which 55 of the 57 current statutory inspectors general operate. Specifically, the legislation, but not the 1978 Act, requires consultation with another branch prior to the appointment of an Inspector General; the mandate of the inspector general is more broadly worded and ambiguous;<sup>15</sup> and the IG would be authorized to make reports to Congress in closed session. These differences are troubling and contribute significantly to concerns about the potential for overreaching and interference with decisional independence.

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<sup>15</sup> Section 2 of the 1978 Act, as amended, states:

1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action

In contrast, Section 2 of H.R. 5219 and S. 2678 provides:

With respect to the Judicial Branch, other than the United States Supreme Court, the Office shall--  
(1) conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings under chapter 16 of this title, that may require oversight or other action within the Judicial Branch or by Congress;

(2) conduct and supervise audits and investigations;

(3) prevent and detect waste, fraud, and abuse; and

(4) recommend changes in laws or regulations governing the Judicial Branch

The House Judiciary Subcommittee on Crime Terrorism and Homeland Security held a hearing on H.R. 5219 on June 29, 2006.<sup>16</sup> The Judicial Conference was not invited to testify. It nonetheless submitted a letter for the hearing record, expressing its opposition to the legislation, detailing existing oversight efforts already conducted by the Judicial Conference and other judicial entities, and explaining current efforts to improve oversight.<sup>17</sup> The letter started out by succinctly stating the position of the Judicial Conference:

The proposal to create an IG is an entirely unnecessary and inappropriate imposition of control over the judiciary that creates precedents for further erosion of the fundamental constitutional principle of separation of powers. The Judicial Conference strongly opposes this bill and any other legislation creating an IG in the judicial branch because: (1) it threatens the independence of judicial decision-making, and has serious implications for the separation of powers; and (2) rigorous and effective systems and mechanisms for audit, review, and investigation currently exist in the judiciary, making the legislation duplicative, intrusive, and unnecessary.

Congress has considered legislation to establish an Inspector General of the judiciary once before. In 1995, Senator John McCain (R-AZ) introduced S.1446 to establish an Inspector General of the Administrative Office of the United States Courts pursuant to the Inspector General Act of 1978. The legislation would have provided for appointment by the President from a list of individuals nominated by the Judicial Conference. In his introductory comments, Senator McCain emphasized that the IG's authority would be "limited strictly to the administrative functions performed by the AO."<sup>18</sup> There were no additional cosponsors and the legislation, which was far more benign than the current proposal, received no action other than referral to the Senate Judiciary Committee.

#### **IV. This Recommendation Opposes Pending IG Legislation and Addresses Concerns Regarding the Judiciary's Oversight of its own Activities**

The pending legislation should be opposed by the ABA for a number of reasons, the most salient of which is that it authorizes the IG to "investigate matters pertaining to the Judicial Branch" and confers broad investigative powers on the IG, including the authority to subpoena judges to compel testimony and/or the production of documents. Despite Rep. Sensenbrenner's assurance that under this bill the IG would not have authority or jurisdiction over the substance of a judge's opinions, it is likely that this broad and ambiguous mandate would allow the IG to conduct investigations that impinge on the decisional and institutional independence of the judiciary. Indeed, even if the IG never conducted such an investigation, the authorization itself would have a chilling effect.

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<sup>16</sup> Statements of the witnesses who testified are posted on the committee's hearing page of its website at: <http://judiciary.house.gov/hearings>

<sup>17</sup> Letter of Leonidas Ralph Mecham to Honorable Howard Coble for inclusion in the hearing record on H.R. 5219, dated June 28, 2006.

<sup>18</sup> \_\_\_ Cong. Rec. at S.18017-18 (Dec 5, 1995) (statement of Senator McCain).

Charles Geyh, Professor of Law at Indiana University at Bloomington, who testified at the hearing on H.R. 5219, shares our concerns. Characterizing the proposed legislation as highly problematic, he stated:

Inspector general investigations can and likely will be exploited to punish judges for their judicial decisions...thereby jeopardizing core judicial independence norms that Congress has respected for well over a century.... Finally, even assuming that a judge's decisions are technically outside the scope of section 1023 (of the bill), angry members of Congress may agitate for investigations targeting unpopular judges, ostensibly on the grounds that the judges in question have managed their budgets or engaged in ethical improprieties independent of their decisions. In this context, heightened scrutiny is itself a form of Congressional retaliation.<sup>19</sup>

The Judicial Conference has emphasized similar concerns. We concur with its analysis of the potential dangers of this legislation to the integrity of the judiciary in its letter submitted to the House Judiciary subcommittee, which stated:

We are very concerned that the legislation bestows on the IG the power to become involved in judicial functions such as case management and case management practices, case disposition, and sentencing practices. Even more alarming, the IG could, perhaps with Congressional prompting, target particular judges based upon their rulings and would have the power to subpoena records and testimony.

The IG's extraordinary powers could easily be used to influence, intimidate, or punish particular judges—especially for unpopular decisions. The Judicial branch is particularly vulnerable to this kind of intimidation because the judiciary has no direct role in the legislative process...Investigations of judges could become a highly politicized process. In these ways this IG proposal would be detrimental to separation of powers....<sup>20</sup>

The first clause of this policy recommendation expresses the Association's opposition to the proposed legislation based on these pervasive concerns. While we note that separation-of-powers jurisprudence is animated by concerns of encroachment and aggrandizement, our opposition is not premised on the assertion that enactment of this legislation would in fact constitute a violation of the separation-of-powers doctrine if it were challenged in court. Even if it were constitutionally permissible for Congress to establish an IG under this bill,

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<sup>19</sup> Prepared statement of Charles Geyh submitted for the hearing on H.R. 5219 before the House Judiciary Subcommittee on Crime Terrorism and Homeland Security (June 29, 2006).

<sup>20</sup> *Supra*, note 22.

we still would object to it on policy grounds and because it threatens separation of powers by altering the “well-balanced calibration” in our system of checks and balances.<sup>21</sup>

The second clause identifies additional aspects of the legislation that are highly problematic and makes it clear that the ABA’s opposition extends to any legislative proposal to establish an IG for the judiciary that: 1) requires the Chief Justice of the United States to consult with congressional leaders over the appointment of an inspector general; 2) confers on the inspector general broad power to subpoena judges and judicial entities to compel testimony and the production of documents; or 3) requires the inspector general to make prompt reports to Congress in open or closed sessions on matters that the inspector general believes require action.

Over the past year or so, the Judicial Conference has taken many important additional steps to evaluate and respond to concerns raised by Congress and the public regarding its oversight of judicial conduct and ethics. These include the following actions, listed in its recent letter to Chairman Coble:

- The Chair of the Executive Committee issued a memorandum dated April 27, 2006, to all United States judges, strongly urging strict adherence to ethical obligations.
- The Judicial Conference Committee on the Judicial Branch has a task force studying the issues of judges’ private seminar attendance, in consultation with two other Conference committees. This study is expected to lead to policy recommendations to the Judicial Conference.
- The Chair of the Judicial Conference Committee on Financial Disclosure issued a recent memorandum to all judges reiterating the requirement to disclose seminar attendance on financial disclosure reports and urging judges who have not been in compliance with this reporting requirement to file amended reports now for past years.
- The Judicial Conference Executive Committee has asked the Committee on Codes of Conduct to undertake further ethics training for judges in addition to the substantial training programs on this subject already being conducted.
- The judiciary is improving its automated case management system’s conflict identification capabilities and is promoting the utilization of this computer program by all federal courts.<sup>22</sup>

In addition to these recent efforts, the Chief Justice of the U.S. created a committee to evaluate the effectiveness of the judicial discipline act, and the final report is expected to be released this fall.<sup>23</sup> Clause three of the recommendation applauds these earnest efforts by the

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<sup>21</sup> This phrase comes from an article titled, *A Bench too Far: the Dopey Plan to Appoint an Inspector General for the Judiciary*, written by Dirk Olin and posted July 10, 2006, by Slate, an on-line news service.

<sup>22</sup> *Supra*, note 22.

<sup>23</sup> See discussion, *supra* at. 2.

Judicial Conference to engage in a thorough examination of its current rules, guidelines and practices. These efforts demonstrate that the judiciary is indeed serious about fulfilling its ethical and fiscal responsibilities and that it is sensitive to criticisms leveled against it and concerned about the potential harm to the institution that could result from even the perception by the public that the judiciary is not taking every step possible to prevent or punish instances of judicial misconduct or ethical wrong-doing.

The Judicial Conference's efforts to thoroughly scrutinize its practices should not cease once criticism abates or once the current reviews have concluded. In addition, because the Supreme Court is not subject to the policy determinations of the Judicial Conference, and in recognition of the fact that some of the most publicized incidents of alleged unethical behavior have involved U.S. Justices, separate review of these allegations by the Supreme Court also would strengthen public confidence in the judiciary. Therefore the fourth clause of the recommendation urges the U.S. Supreme Court, the Judicial Conference of the United States, and the judicial council of each judicial circuit to strengthen public confidence in the courts by regularly engaging in rigorous oversight of judicial administration activities and judicial ethics and promptly adopting and implementing improvements when necessary.

The absence of productive channels of communication between the judiciary and Congress was of concern when Congress modified the federal sentencing guidelines by passing the so-called "Feeney Amendment" to the PROTECT Act without consulting with the judiciary or even giving notice of its intentions so that the judiciary could fully convey its views prior to passage.<sup>24</sup> That the House Judiciary subcommittee did not solicit the views of the Judiciary during the drafting stage of the IG legislation or during its hearing affirms that there is a serious break down in channels of communication. The ABA has long been concerned about communication between the branches and sought ways to strengthen informal and formal channels of communication, including encouraging its judicial members to develop informal ties with legislators and trying to renew interest in the idea of regular small, off-the-record congressional-judicial conferences, modeled after the now-defunct Williamsburg Conferences, to address emerging or troubling issues.<sup>25</sup> In furtherance of these goals, the final clause of this recommendation urges Members of Congress and of the Federal Judiciary to confer informally to consider ways to engage in constructive, cooperative and regular dialogue over challenging judicial administration issues of mutual concern and proposed legislation.

## **V. Conclusion**

This recommendation proposes a policy posture for the ABA that is balanced, restrained and constructive. It will enable the ABA to vigorously oppose the current legislation under active consideration, as well as future proposals with similar features, and to make a meaningful contribution to the debate the legislation has engendered. We urge your support for this recommendation and report.

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<sup>24</sup> Pub.L. No.108-21.

<sup>25</sup> See, e.g., Commission on Separation of Powers and Judicial Independence, *An Independent Judiciary* at 52-55 American Bar Association (1997).

Respectfully submitted,

David Craig Landin, Chair  
Standing Committee on Federal Judicial Improvements

August 2006