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I. INTRODUCTION

In October 1977, the United States Government simultaneously petitioned the Tenth Circuit and its judicial council[1] to bar Chief Judge Willis W. Ritter of the United States District Court for the District of Utah from further participation in federal criminal cases.[2] The Government's petition also requested that the business of the District of Utah be reallocated among the judges of that district so that no new civil cases involving the United States would be assigned to Judge Ritter.[3] The petition alleged that it had "become difficult, if not impossible, to vindicate in respondent's court 'the public's interest in fair trials designed to end in just judgments,' "[4] and argued that Judge Ritter had "become a law unto himself."[5]

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1. The judicial council of a circuit court of appeals consists of the judges of that circuit. 28 U.S.C. § 332 (1976).

2. The court of appeals was requested to exercise its authority to control district courts under the All Writs Act, 28 U.S.C. § 1651 (1976), subsection (a) of which reads: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The judicial council was requested to exercise its authority to control district courts pursuant to the provisions of 28 U.S.C. § 332(d) (1976), which reads: "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

3. Petition of the United States for Writ of Mandamus or Prohibition and Petition for Order Reassigning Criminal Proceedings and Civil Proceedings Involving the United States at 2-3, United States v. Ritter, No. 77-1829 (10th Cir., dismissed as moot Aug. 11, 1978) [hereinafter cited as Petition].

4. *Id.* at 8 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

5. *Id.* at 114. The government gave a lengthy rendition of Judge Ritter's questionable actions, using quotes from trial transcripts. *Id.* at 12-112.

While admitting that the United States Government had never before found it necessary to request that a judge be barred from presiding over cases in which it was a party,[6] the Government urged that "[t]he problem in respondent's court is pervasive,"[7] that "the administration of justice has broken down in the Central Division of the District of Utah,"[8] and that the "United States has 'no other adequate means to attain the relief [it] desires.' "[9]

The allegations against Judge Ritter were further summarized in the petition as follows:

> He invents and follows his own rules, is swayed by his own preconceptions of legal procedure, and is determined that no outside force—not the arguments of counsel, not the holdings of this Court—shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered opposition to his views. He attempts to make his decisions in such a way that this Court will be unable to correct his errors.[10]

The Government's petition concluded with a request that Judge Ritter be prevented from exercising any judicial or administrative power over a case involving the federal government.[11] The Tenth Circuit never acted on the Government's petition in *United States v. Ritter.*[12] Judge Ritter died before his response to the court's order to show cause was due. It therefore remains unresolved whether the issuance of a writ such as the one requested by the Government against Judge Ritter would be a proper exercise of an appellate court's power or would constitute instead a de facto impeachment.[13] Until this question is formally answered, it will not be clear in what degree the federal appellate courts have the power to supervise a district judge by managing his caseload.

A strong argument can be made that the federal appellate courts *should* have the power to manage a district judge's

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6. *Id.* at 117.
7. *Id.* at 114.
8. *Id.* at 113.
9. *Id.* at 117 (quoting Kerr v. United States, 426 U.S. 394, 403 (1976)).
10. *Id.* at 114.
11. *Id.* at 126.
12. No. 77-1829 (10th Cir., dismissed as moot August 11, 1978).
13. *See* notes 96-99 and accompanying text *infra.*

caseload under certain circumstances. For instance, if, as the Government alleged in *Ritter*, a federal district judge refuses to try civil cases involving the federal government, tries only a few of the felony cases assigned to his court and in most of those either commits reversible error or acts unlawfully in a way that prevents either conviction or appeal by the Government,[14] and in other ways systematically prevents the Government from obtaining meaningful relief in his court,[15] then the court has ceased to function effectively in that district, at least as far as the Government, as a party to the litigation, is concerned. Surely, the proper exercise of appellate supervision must extend to rehabilitating a federal court that has ceased to function effectively. If a judge refuses to follow the mandates of superior courts, as Judge Ritter often did,[16] the appellate courts or judicial council should have power to prevent that judge from continuing to participate in cases involving the same party. Without appellate court power to grant such relief, the only relief available to an injured party in the position the Government faced in *Ritter* would be impeachment; and impeachment is usually not a feasible option.[17]

If the problem with a particular judge is not his failure to try cases involving a certain party, but an evident bias against that party, the appellate courts should still have the power to bar the judge from participating in future cases involving that party. Any litigant has the right to have a case heard by another

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14. The Government alleged that Judge Ritter would purposely wait until after jeopardy had attached in a criminal case before dismissing it, thus denying the Government the opportunity to prosecute the case again or seek appellate review. Petition, *supra* note 3, at 82.

15. *See id.* at 7-11.

16. *See, e.g.*, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), an antitrust case in which Judge Ritter had at trial approved a plan for the geographical division of markets between two related pipeline companies. The Supreme Court, finding the arrangement illegal under § 7 of the Clayton Act, reversed and remanded with instructions to order divestiture. On remand Judge Ritter again upheld the arrangement because "[i]t seems to make a lot of sense to me." *Id.* at 142 (quoting the trial transcript). He then entered a decree ordering the division of the markets. The Supreme Court responded with apparent frustration:

> [Judge Ritter's decree] therefore does precisely the opposite of what our prior opinion and mandate commanded. Once more, and nearly three years after we just spoke, we reverse and remand, with directions that there be divestiture without delay and that the Chief Judge of the Circuit . . . assign a different District Judge to hear the case.

Id. at 142-43.

17. *See* text accompanying notes 21-22 *infra*.

judge upon a proper demonstration of misconduct, bias, or prejudice on the part of the assigned judge.[18]

II. Is Impeachment the Sole Remedy for Abuses of Judicial Power?

Article II, section 4 of the Constitution states that "all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[19]

Article III, section 1 of the Constitution provides that judges within the federal judicial system, "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The interface of these two provisions has been the source of extensive debate over whether impeachment is the sole remedy for judicial malfeasance. The arguments have focused on the importance of judicial independence on the one hand and on the inadequacy of the arduous process of impeachment as a remedy for judicial misconduct on the other. Some jurists and scholars have urged that our concept of judicial independence requires that the judiciary be completely insulated from discipline or control except through impeachment.[20] Others have reasoned that unless "good behavior" means nothing more than not having been convicted of "high crimes and misdemeanors," the Article III language must be read as authorizing discipline or re-

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18. For cases involving Judge Ritter alone, see Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977); Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1977); United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976); United States v. Ritter, 273 F.2d 30 (10th Cir.), *cert. denied*, 362 U.S. 950 (1960).

19. There has never been any doubt that article III judges are civil officers within the meaning of this section. However, only four federal judges have ever been convicted. *See generally* Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485 (1930). Thomas Jefferson is reported to have said that impeachment is a "bungling way of removing judges" and "an impractical thing—a mere scarecrow." *See* 1 C. Warren, The Supreme Court In United States History 295 (1924).

20. *See, e.g.*, Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting); Kramer & Baron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of 'During Good Behavior'*, 35 Geo. Wash. L. Rev. 455 (1967); Kurland, *The Constitution and Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665 (1969).

moval even though the misconduct does not rise to the level of an impeachable offense.[21]

Unless there is a means of disciplining judges short of impeachment, there may be no effective remedy for even a very serious abuse of judicial power. Impeachment for the commission of a felony might be relatively simple, but removal of a district judge for misuse of judicial power and abuse of public trust would probably be difficult and time-consuming. Such a charge against a judge who is only one among more than 590 federal judges and who sits in a sparsely populated state may not sufficiently shock the public conscience to provoke Congress to action. Even if it does, the lengthy impeachment process would leave the district court in a prolonged state of paralysis, and the court of appeals would likely find it necessary to reallocate the district court's caseload anyway.[22]

It would be a serious weakness in our system to place systematic judicial misconduct beyond the reach of any remedy save impeachment. There are limits beyond which no person—even a federal judge—should be allowed to go with impunity. The courts themselves have the power and the duty to curtail the effect of repeated contrary and erratic actions of a judge that occur too frequently to permit effective appellate supervision in the run of cases.

III. Remedies for Abuse of Judicial Power Short of Impeachment

In order to avoid the constitutional questions that would be raised by the removal of a federal judge for conduct that might not constitute an impeachable offense, federal appellate courts have occasionally taken measures short of removal when circumstances, although not compelling enough to justify mobilization of the impeachment machinery, have nevertheless required immediate corrective action.[23] Two of these procedures are the is-

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21. *See, e.g.*, R. Berger, Impeachment: The Constitutional Problems 122-80 (1973); Ross, *"Good Behavior" of Federal Judges*, 12 U. Kan. City L. Rev. 119, 122 (1944).

22. This has occurred on at least one occasion. *See Hearings on Procedure for the Removal of Unfit Federal Judges Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 1, at 18-19 (1966) (testimony of Judge John Biggs, Jr.)[Hereinafter cited as *Hearings on Removal*].

23. The "good behavior" clause, U.S. Const. art. III, § 1, suggests that it is possible to remove federal judges from office for *bad* behavior which falls short of an impeachable offense. This law review article does not explore that option, but focuses instead on

suance of writs of mandamus under the authority of the All Writs Act[24] and the exercise of the broadly-worded mandate given to the judicial councils of the various federal circuits in 28 U.S.C. section 332(d).[25]

The full scope of these remedies remains unexplored, in part because opportunities for exploration are relatively rare, and in part because their practical use is limited to circumstances in which they will not be characterized as de facto impeachment. Many appellate courts and judicial councils, conscious of the social and professional implications of passing on the behavior of fellow judges, have been reluctant to enter this arena altogether. Still, these measures are the only formal means of discipline yet tried which have the potential of passing constitutional muster, and for that reason merit a closer look.

A. Mandamus

1. Historical background

The power of higher courts to supervise lower courts by writ of mandamus may be traced at least as far back as Blackstone. In his *Commentaries,* Blackstone noted that use of the writ of mandamus in England included its issuance by the Court of King's Bench

> to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.[26]

Speaking for the United States Supreme Court in *Ex Parte Crane,*[27] Chief Justice Marshall adopted Blackstone's formulation as the foundation of the Court's opinion. It was held that under the Judiciary Act of 1789 the Court possessed a power of general superintendence which authorized the issuance of a writ

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remedies short of removal.

24. 28 U.S.C. § 1651 (1976). *See* note 2 *supra.*

25. *See* note 2 *supra.*

26. 3 W. BLACKSTONE, COMMENTARIES *110.

27. 30 U.S. (5 Pet.) 189 (1830).

to compel a lower court to sign a bill of exceptions that it had refused to sign.[28] The Court equated such a use of mandamus with an exercise of the Supreme Court's appellate jurisdiction.[29]

In *Crane*, Chief Justice Marshall quoted from the New York Supreme Court's opinion in *Sikes v. Ransom*,[30] which held that mandamus "ought to be used, where the law has established no specific remedy, and where in justice and good government there ought to be one."[31] The Chief Justice also interpreted English precedents as authorizing the writ to require an inferior court to do something which a superior court "determines, or at least supposes, to be consonant to right and justice."[32]

Although these early formulations of the power to issue mandamus in aid of appellate jurisdiction included a broad power to supervise lower courts, actual use of the writ in this country has never reached the limits of these formulations. Instead, for reasons which are not clear, use of the writ soon came to be governed by a criterion known as the "traditional standard," under which "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[33] This standard has produced a line of federal cases fixing the scope of the writ well within the limits of the early decisions.[34] In each of these cases there existed a

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28. *Id.* at 191-92.

29. In this sense appellate jurisdiction comprehends the appellate court's responsibility for the "orderly, even and efficient administration of justice within its circuit." 9 MOORE'S FEDERAL PRACTICE ¶ 110.28, at 305 (2d ed. 1980).

30. 6 Johns. 279 (N.Y. Sup. Ct. 1810).

31. *Id.* at 280, *quoted at* 30 U.S. at 193.

32. 30 U.S. at 191.

33. Will v. United States, 389 U.S. 90 (1967).

34. The following are examples of exceptional circumstances which were found to justify the granting of a writ of mandamus: United States v. United States Dist. Ct. for S. Dist. of N.Y., 334 U.S. 258 (1948) (district court refused to adhere to the terms of an appellate court's mandate); *Ex parte* Peru, 318 U.S. 578 (1943) (district court refused to surrender a vessel upon a showing that the Secretary of State had recognized the vessel's immunity from suit); McCullough v. Cosgrave, 309 U.S. 634 (1940) (mem.) (district court disregarded one of the Federal Rules of Civil Procedure); *Ex parte* United States, 287 U.S. 241 (1932) (district court refused to perform the plain ministerial duty of issuing a bench warrant upon an indictment sufficient on its face); Maryland v. Soper, 270 U.S. 9 (1926) (district court threatened the doctrine of federal-state comity by removing a criminal case from a state court upon an insufficient petition for removal); *Ex parte* United States, 242 U.S. 27 (1916) (district court refused to impose a sentence); Kanaster v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953) (district courts granted new trials when they had no power to do so); United States v. Ritter, No. 76-1331 (10th Cir. Sept. 10, 1976) (order granting relief in the nature of mandamus) (district court impeded the lawful functioning of a sitting grand jury); United States v.

clear abuse of discretion or a usurpation of judicial power giving rise to error of sufficient magnitude to justify an extraordinary writ. The writ was thus usually directed at a lower court which either lacked the power to do what it purported to do or refused to exercise power when it had a duty to do so.[35]

Until recent years judicial analysis of the mandamus remedy was dominated by this "power" rubric, combined with the general requirement that the petitioner's claim for relief by extraordinary writ had to be clear and indisputable.[36]

2. *Modern supervisory mandamus*

The grant of the writ for usurpation of power in a specific, pending case is indeed an exercise of supervision, but only in a narrow sense. Not until *La Buy v. Howes Leather Company*[37] did the broader superintendence of the lower courts mentioned by Blackstone begin to find an identity of its own in the United States. In *La Buy*, the Supreme Court approved the issuance of a writ of mandamus by the Seventh Circuit to halt a district court's questionable practice of regularly referring antitrust cases for trial before a special master under rule 53(b) of the Federal Rules of Civil Procedure. By concluding that the practice in issue was only questionable—that the discretionary power under rule 53(b) was being used too often—and by approving the writ as much to discourage the practice as to bar its use, the Court signalled an expansion of the mandamus power beyond traditional limits.

Although Justice Clark's majority opinion in *La Buy* pays

Ritter, No. 76-1011 (10th Cir. May 20, 1976)(order granting mandamus) (district court refused to rule on pretrial motions in a criminal case until after jeopardy had attached); United Sates v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976) (district judge refused to disqualify himself when there existed a reasonable likelihood that the case would not be tried impartially); Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972) (district court defied a rule of a judicial council); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963) (district court improperly stayed proceedings in an antitrust case); Atlass v. Miner, 265 F.2d 312 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960) (district court adopted a local rule inconsistent with the Supreme Court Admirality rules); Frankel v. Woodrough, 7 F.2d 795 (8th Cir. 1925) (district court refused to hear motions on an indictment in a criminal case properly within its jurisdiction). *See also* United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960); United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958).

35. *See* Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943).

36. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (citing United States v. Duell, 172 U.S. 576, 582 (1899)).

37. 352 U.S. 249 (1957).

lip service to the traditional standard by stating that Judge La Buy had abused his power, it is rather clear that in the traditional sense there was no abuse of power involved. The practice of the district court to which the writ was directed in *La Buy* was specifically authorized under rule 53(b) as long as "some exceptional conditions [required] it,"[38] and determination of exceptional conditions was left to the trial judge. Thus, it could not be said that the district judge acted without or beyond his power in referring cases to a master. A judge always has power to enter an erroneous order.[39]

Rather than being a usurpation of power case, *La Buy* is viewed by both courts and commentators as a precedent for expanded appellate court supervision of lower courts.[40] The implication has arisen from *La Buy* that mandamus may be used to discourage an erroneous practice and prevent its recurrence, and in this context it is the likelihood of recurrence and the need to prevent it that are the critical factors, not the jurisdictional excess or usurpation of power which were determinative under the traditional standard. Hence, notwithstanding the actual absence of usurpation of power in the traditional sense, the Supreme Court approved the writ, stating:

> We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.[41]

La Buy also confronted the thorny problem presented in many mandamus cases by the final judgment rule. The Supreme Court described the problem in another mandamus case, stating: "All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after judgment has been rendered by the trial court."[42] The primary purpose of the final judgment

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38. FED. R. CIV. P. 53(b).

39. Will v. United States, 389 U.S. 90, 98 n.6 (1967).

40. *See, e.g.*, United States Bd. of Parole v. Merhige, 487 F.2d 25, 30 (4th Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); United States v. Dooling, 406 F.2d 192, 198 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969); Rapp v. Van Dusen, 350 F.2d 806, 810 n.10 (3d Cir. 1965). *See* Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

41. 352 U.S. at 259-60.

42. Will v. United States, 389 U.S. at 96.

rule is to promote judicial economy by avoiding the expense and delay of interlocutory review of issues that might be rendered either moot or subject to appeal if the case were allowed to go to final judgment. It is a policy against the piecemeal appeal of cases.

Mr. Justice Clark's opinion in *La Buy* brushed aside the final judgment rule with the statement that "[t]he question of naked power has long been settled by this Court."[43] Since there was no question that at some stage the appellate court could entertain appeals in the antitrust proceedings before Judge La Buy, the Supreme Court concluded that the court of appeals possessed the power to issue writs of mandamus reaching those proceedings. Thus, the question of granting or withholding the writ became one of whether the court's exercise of the mandamus power was proper, rather than whether the court actually possessed the power.[44] In this same spirit one commentator has characterized such an exercise of mandamus power as "an expression of prospective or concurrent appellate jurisdiction."[45] It is a power of review extending to all proceedings where the action of the trial judge might be reviewable at some future time, or, put differently, it is an example of appellate jurisdiction which is continuously existent over "[m]atters which disturb that jurisdiction, either before or after it is invoked."[46]

The Government contended in *United States v. Ritter*[47] that it sought a writ of mandamus for the very purpose of avoiding piecemeal litigation. It alleged that " 'it is in the interest of fair and prompt administration of justice' to bring to an end piecemeal litigation concerning respondent's conduct of federal cases."[48] Referring to the petition's documentation of the respondent's deliberate misuse of judicial powers to thwart justice,

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43. 352 U.S. at 255.

44. *Id.* Justice Black essentially agreed in his concurring opinion in *Will v. United States,* in which he stated the following:

> Finality, then, while relevant to the right of appeal, is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order.

389 U.S. at 108 (Black, J., concurring).

45. Bell, *The Federal Appellate Courts and the All Writs Act,* 23 Sw. L.J. 858, 860 (1969).

46. United States v. Malmin, 272 F. 785, 792 (3d Cir. 1921).

47. No. 77-1829 (10th Cir., dismissed as moot August 11, 1978).

48. Petition, *supra* note 3, at 117 (quoting Kerr v. United States Dist. Ct., 426 U.S. 394, 403 (1976)).

consistent prejudice against the United States, and defiance of higher courts, the Government maintained that it sought the "resolution in a single case of contentions that govern hundreds of cases and that will have a profound effect upon the administration of justice in Utah."[49] Quoting *La Buy,* the Government urged that "there is an end of patience"[50] and when that stage is reached, mandamus lies to achieve the "supervisory control of the District Courts . . . necessary to proper judicial administration in the federal system."[51]

3. *Cases since* La Buy

A history now exists of using supervisory mandamus to put an end to highly improper judicial conduct which disrupts the efficient administration of justice. Relying on *La Buy,* the Fourth Circuit in *United States Board of Parole v. Merhige*[52] repudiated the former restrictive and inflexible concept of mandamus and approved a writ restraining two district judges from compelling discovery in a case with tenuous jurisdictional grounds.[53] In *Rapp v. Van Dusen,*[54] the Third Circuit discussed the latter-day emergence of supervisory mandamus and concluded that a district judge should not sit in further consideration of a case which had been the subject of prior mandamus proceedings.[55] And in *United States v. Newman,*[56] the district court had entered orders disallowing the Government's preemptory challenge of certain black jurors, in effect requiring that blacks be represented on juries in close proportion to their representation in the general population. The Second Circuit granted a writ vacating the district court's orders because the orders "cannot but have an immediate and continuing detrimental impact on the administration of criminal justice."[57]

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49. *Id.*

50. *Id.* at 118 (quoting 352 U.S. at 258).

51. Petition, *supra* note 3, at 118 (quoting 352 U.S. at 259-60).

52. 487 F.2d 25 (4th Cir. 1973), *cert. denied,* 417 U.S. 918 (1974).

53. *Id.* at 30.

54. 350 F.2d 806 (3d Cir. 1965).

55. *See also* United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied,* 429 U.S. 951 (1976); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied,* 362 U.S. 950 (1960).

56. 549 F.2d 240 (2d Cir. 1977).

57. *Id.* at 251. For examples of the other circumstances where supervisory writs of mandamus have been issued to improve the administration of justice, see United States v. Ritter, No. 76-1917 (10th Cir. Nov. 6, 1976)(order granting mandamus) (writ issued to condemn a district court's unreasonable calendaring practices); United States v. Ritter,

Mandamus has not been confined to pending cases over which the appellate courts would have statutory review jurisdiction at a later stage. In the often overlooked case of *United States v. Malmin*,[58] a writ of mandamus was employed to disqualify a district judge entirely. In *Los Angeles Brush Corp. v. James*,[59] the Supreme Court said that it could issue a writ of mandamus to make district courts conform to the equity rules.[60] In *McCullough v. Cosgrave*,[61] a writ was issued to remedy disregard of federal rules of procedure affecting numerous cases, both pending and future.

Basing his argument on *Los Angeles Brush* and *McCullough*, Justice Harlan urged in his concurring opinion in *Chandler v. Judicial Council of the Tenth Circuit*[62] that the mandamus power extends to correct judicial acts affecting hundreds of cases not yet even filed, stating, "It is difficult to see how the very multiplicity of the cases affected by the council's orders could derogate from this Court's authority under section 1651(a) to issue an extraordinary writ in aid of its appellate jurisdiction over them."[63]

In *Chandler* the Judicial Council had issued an order finding that Judge Chandler was unable or unwilling to discharge his duties efficiently as a district judge and directing that he not act in any case filed in that district after a certain date. Judge Chandler petitioned the Supreme Court for a writ of mandamus

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No. 76-1331 (10th Cir. Sept. 10, 1976) (order granting mandamus) (writ issued to enforce the Tenth Circuit's ongoing supervision of a district judge's handling of a grand jury); Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) (order granting mandamus) (writ issued to correct improper certification of a class action); *In re* Virginia Electric and Power Co., 539 F.2d 357 (4th Cir. 1976) (case remanded) (court held that supervisory mandamus can issue to prevent significant waste of judicial effort and to offer guidance to district judges concerning correct treatment of a problem not likely to be presented on appeal); United States v. Ritter, No. 76-1011 (10th Cir. May 20, 1976) (order granting mandamus) (writ issued to require a district court to hear and dispose of pretrial motions at least ten days before trial); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) (writ issued to void a local rule of court limiting *pro hac vice* ("for this one particular occasion") appearances by out-of-state attorneys).

58. 272 F. 785 (3d Cir. 1921). In *Malmin*, a governor of the Virgin Islands improperly discharged one judge and appointed a new one in his stead. The circuit court issued a writ to the first judge compelling him to reassume his office, thereby indirectly disqualifying the second judge.

59. 272 U.S. 701 (1927).

60. *Id.* at 706.

61. 309 U.S. 634 (1940) (mem.).

62. 398 U.S. 74 (1970).

63. *Id.* at 115 (Harlan, J., concurring). Section 1651(a) refers to the All Writs Act, 28 U.S.C. § 1651(a) (1976).

prohibiting the council from " 'acting [in] violation of its powers and in violation of [his] rights as a federal judge and an American citizen.' "[64] In his majority opinion denying the petition, Chief Justice Burger did not reach the issue of whether jurisdiction existed to entertain the action, holding that the petition was not ripe because other avenues of relief were still open to Judge Chandler. Nonetheless, in his concurring opinion Justice Harlan proceeded to the merits of the case. He concluded that jurisdiction existed because Judge Chandler's reliance on section 1651(a)

> is bottomed on the fact that the action of the Judicial Council "touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction." . . . Although this expansive use of section 1651(a) has no direct precedent in this Court, it seems to me wholly in line with the history of that statute and consistent with the manner in which it has been interpreted both here and in the lower courts.[65]

Although the majority in *Chandler* did not reach the mandamus issues, writs *have* been issued in several other instances in which they affected both pending cases and a "multiplicity" of cases yet to be filed.[66]

4. Advisory mandamus

In *Schlagenhauf v. Holder*,[67] the Supreme Court approved a form of advisory mandamus to resolve important questions of first impression that the courts of appeal wish to settle expeditiously. *Schlagenhauf* involved the first challenge to a district court's power to require a party to submit to a physical or mental examination under rule 35(a) of the Federal Rules of Civil Procedure. The Supreme Court held that because of the unusual circumstances of the case the court of appeals "had the power to review on a petition for mandamus the basic, undecided question of whether a district court could order the mental or physical examination of a defendant."[68]

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64. 398 U.S. at 76-77 (first brackets in original).

65. *Id.* at 113 (Harlan, J., concurring).

66. *See* United States v. Newman, 549 F.2d 240 (2d Cir. 1977); United States v. Ritter, No. 76-1917 (10th Cir. Nov. 6, 1976) (order granting mandamus); United States v. Ritter, No. 76-1011 (10th Cir. May 20, 1976)(order granting mandamus).

67. 379 U.S. 104 (1964).

68. *Id.* at 110.

Advisory mandamus can be characterized as an extension or amplification of supervisory mandamus for use where the orderly administration of justice hinges on a prompt resolution of an important, novel question. But how much *Schlagenhauf* extended the scope of appellate courts' mandamus power is not clear.[69] The scope of the *Schlagenhauf* rule has been characterized as narrowly as the Ninth Circuit's statement in *Goldblum v. National Broadcasting Corp.*[70] that "a petition for a writ of mandamus is 'properly before [a] court on a substantial allegation of *usurpation of power* [involving] an issue of first impression,' "[71] and as broadly as the Sixth Circuit's statement in *United States v. United States District Court for Eastern District of Michigan*[72] that the "Courts of Appeals have the power to review by mandamus 'an issue of first impression,' . . . involving a 'basic and undecided problem.' "[73] One court read the case law on advisory mandamus as authorizing "such mandamus only where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible."[74] But other courts have not imposed that requirement on the issuance of advisory writs. There also seems to be some question whether the doctrine of advisory mandamus applies to criminal cases.[75]

5. *Summary*

While questions remain concerning the scope of supervisory and advisory mandamus, there is no doubt that *La Buy* and *Schlagenhauf* have breathed new life into the mandamus power. The *La Buy-Schlagenhauf* rationale is not restricted to the pro-

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69. *See* Kaufman v. Edelstein, 539 F.2d 811, 817 (2d Cir. 1976).

70. 584 F.2d 904 (9th Cir. 1978).

71. *Id.* at 906 n.2 (quoting Schlagenhauf v. Holder, 379 U.S. at 111) (brackets in *Goldblum*) (emphasis added). Here the court clearly is attempting to restrict the scope of the *Schalgenhauf*-type writ. The "usurpation of power" language was commonly used in cases under the traditional standard, when the scope of mandamus was narrow and rigid.

72. 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972).

73. *Id.* at 656 (quoting Schlagenhauf v. Holder, 379 U.S. at 110).

74. National Right to Work Legal Defense and Education Foundation, Inc. v. Richey, 510 F.2d 1239, 1243 (D.C. Cir. 1975), *cert. denied*, 422 U.S. 1008 (1975).

75. *Compare In re* United States, 598 F.2d 233, 237-38 (D.C. Cir. 1979) ("Today we need not and do not decide whether the doctrines of 'supervisory' and 'advisory' mandamus apply in criminal cases, where the policy against piecemeal appeals, particularly by the Government, reaches its zenith.") *with In re* Arvedon, 523 F.2d 914 (1st Cir. 1975) (the court, citing *Schlagenhauf*, relied in part on the fact that the petition raised a question of first impression to grant a writ of mandamus in a criminal case).

tection of existing appellate jurisdiction. It extends to the protection of appellate jurisdiction in cases yet unfiled and in cases that may never reach the courts of appeals because of district court errors or misconduct that deprive the appellate courts of jurisdiction. Whether or not a claim of judicial misconduct arises in a suit already pending in the district court (and a case serving as a "vehicle" for such a claim could easily be found if necessary) mandamus should supply a remedy.

The *La Buy* line of cases supports the exercise of "inherent powers of appellate jurisdiction to effectuate what seems to . . . be the manifest ends of justice,"[76] whether that jurisdiction is exercised to correct defiance of a higher court, delay of justice, or judicial bias and whether the misconduct is isolated or recurrent. All these considerations are within the "vital corrective and didactic . . . aims [which] lay at the core of . . . [the] decision in *La Buy* and *Schlagenhauf v. Holder*."[77]

B. The Judicial Councils

The judicial councils of the federal courts of appeals are creatures of the Administrative Office Act of 1939.[78] Subsection (d) of the Act empowers a judicial council to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."[79] Notwithstanding this mandate and the need to use it from time to time, the judicial councils, with rare exceptions, have not even begun to explore their purpose and potential. They have been described as "pillars of passivity" and the "rusty hinges of federal judicial administration."[80]

The legislative history of the judicial councils suggests an intention to grant them broad authority. Testifying in support of the bill that became the Administrative Office Act, then Chief Judge Groner of the District of Columbia Circuit described the function of the councils: "[W]hatever is wrong in the administration of justice, from whatever sources it may arise, [should

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76. United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

77. Will v. United States, 389 U.S. 90, 107 (1967).

78. Ch. 501, 53 Stat. 1223 (codified in scattered sections of 28, 48 U.S.C.).

79. 28 U.S.C. § 332(d) (1976).

80. *See* Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970).

be] brought to the attention of the judicial council, that it may be corrected, by the courts themselves . . . ."[81]

The most important legislative document pertaining to the judicial councils since their creation is a 1961 report to Congress which contains the following statement concerning section 332:[82]

> It seems patent that . . . the legislative understanding and object of the provision, was that it imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision and correction went to the whole of a court's functioning, in both personal and institutional aspect.
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> . . . .
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> . . . [T]heir responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice in them, from any nature of action by an individual judge or a person attached to the courts.[83]

1. *Cases under the Administrative Office Act*

Chandler v. Judicial Council[84] is the sole case arising out of aggressive disciplinary action taken by a judicial council against a federal district judge. As noted earlier, a majority of the Supreme Court decided that Judge Chandler still had other avenues of relief open to him to contest the merits of the judicial council order, and therefore denied the judge's petition for a writ of mandamus. In his concurring opinion Justice Harlan called the judicial council's order "a permissible interim step toward exploration and solution of the problem presented"[85] and "entirely within the authority of the Council."[86] Furthermore,

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81. *Hearings on S. 188 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 12-13 (1939).

82. *See* note 2 *supra*.

83. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS, H.R. DOC. No. 201, 87th Cong., 1st Sess. 6-7 (1961).

84. 398 U.S. 74 (1970).

85. *Id.* at 125 (Harlan, J., concurring).

86. *Id.* at 119.

the "circumstances, taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the adminstration of justice."[87]

Again, Justice Harlan urged that section 332(d) was intended "to encompass the making of orders that would . . . channel cases to other judges when a situation existed with respect to one judge that was inimical to the effective administration of justice."[88]

Congress thoroughly reexamined the powers of the judicial councils and reenacted subsection (d) verbatim in 1971, fully aware of the use made of that authority by the judicial council in *Chandler*.

The actual scope of the councils' power has been addressed in very few cases. In *Hilbert v. Dooling*,[89] the Second Circuit considered the power of its judicial council to adopt rules for the prompt disposition of cases. The court held that dismissal of criminal charges under such rules was with prejudice and therefore precluded reindictment for the same offense. For authority that section 332 was intended to grant broad powers to the judicial councils, the court quoted the following statement from an article by former Chief Judge Lumbard: " 'As this language is about as broad as it could possibly be, there is no doubt that Congress meant to give to the [judicial] councils the power to do *whatever might be necessary* more efficiently to manage the courts and administer justice.' "[90]

In *Utah-Idaho Sugar Co. v. Ritter*,[91] the Tenth Circuit granted a writ of mandamus to enforce prior orders of the Tenth Circuit Judicial Council regarding the division of business in the District of Utah. The court held that the judicial council has broad power to see that "the district court's business is conducted effectively, expeditiously and in a manner that inspires

87. *Id.* at 125.

88. *Id.* at 121.

89. 476 F.2d 355 (2d Cir.) *cert. denied*, 414 U.S. 878 (1973).

90. 476 F.2d at 360 (quoting Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A. J. 169 (1961)) (emphasis added by the court). The court also quoted then Judge Warren E. Burger, who stated that § 332 was intended to "confer almost unlimited power" upon the circuit judicial council to deal with "any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit." *Id.* at 360.

91. 461 F.2d 1100 (10th Cir. 1972).

public confidence."[92]

The Third Circuit has also taken a broad view: its judicial council reassigned all criminal cases to other judges when one district judge became suspected of corruption.[93]

The judicial councils offer great promise for relief from patterns of judicial conduct which threaten public confidence in the federal court system. Indeed, the councils were established for the very purpose of taking whatever action is necessary to thwart "a threat to public confidence in the administration of justice."[94]

IV. Article III and Appellate Supervision of Lower Courts by Managing Caseloads

Article III, section 1 of the Constitution contains language that is considered the heart of the doctrine of judicial independence. The salary and tenure provisions of Article III provide that judges "shall hold their Offices during good Behaviour," and that their salary may not be "diminished" during their tenure. Thus, even though judicial decisions may often be politically or socially unpopular, the judge's power to make his own decisions is largely protected from threats of removal from office or from financial pressures. The question of how much control short of impeachment can or ought to be exercised by other governmental officers, including appellate court judges, over judges who "misbehave" without offending the Article III prohibitions is not yet fully answered.

The conflict on this point is brought into focus in the minority opinions in *Chandler v. Judicial Council.*[95] Justice Black filed a vigorous dissent in which he argued that the judicial council order barring Judge Chandler from hearing cases filed after December 28, 1965 amounted to a removal from office. This, he argued, violated the Constitution, since the salary and tenure provisions of Article III guaranteed that judges could be removed only by impeachment proceedings before Congress.[96]

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92. *Id.* at 1103.

93. *See Hearings on Removal, supra* note 22, at 19 (testimony of Judge John Biggs, Jr.).

94. Chandler v. Judicial Council, 398 U.S. at 125 (Harlan, J., concurring). The ability of judicial council to fulfill this purpose has recently been enhanced by the enactment of the Judicial Council Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035.

95. 398 U.S. 74 (1970).

96. *Id.* at 141-42 (Black, J., dissenting). *See also id.* at 136-37 (Douglas, J., dissenting). Justice Douglas vehemently argued that the Constitution gave judges "no power . . . to censor or discipline any [other] federal judge and no power to declare him ineffi-

On the other hand, Justice Harlan argued in his concurrence that the council's order was not a removal from office, but nothing other than "an effort to move along judicial traffic in the District Court."[97]

Had the majority reached the merits in *Chandler*, the question of the point at which appellate court management of a district judge's caseload becomes an unconstitutional removal from office—a de facto impeachment—may have been decided.

The *Chandler* case represents a situation in which caseload management by the appellate court was carried to the extreme. No matter how the Court may have decided the issue of judicial management in that context, an analysis of the case law shows that reassignment of a *category* of cases away from a particular judge, as the Government requested in *Ritter*,[98] should not be constitutionally suspect.

Article III does not contain a guarantee that a judge will be allowed to decide any particular types of cases. In fact Article III specifically vests in Congress the power to establish "inferior courts" and to regulate the jurisdiction of the courts, including the Supreme Court. Pursuant to this constitutional power, Congress has established our present geographically-defined district and circuit court systems, and has created special courts of limited subject matter jurisdiction, such as the Court of Claims and the Court of Customs and Patent Appeals.[99] Furthermore, Congress has withdrawn from certain courts, including the Supreme Court, the jurisdiction to proceed with cases already before them and even these acts were found to be consistent with Article III.[100]

Congressional power to control the jurisdiction of the federal courts is not limited to setting the jurisdictional bounds for each type of court, but also reaches the qualifications of individual judges. For example, Congress has gone so far as to enact laws requiring judges to disqualify themselves under certain circumstances.[101]

As discussed above, courts have used statutory mandamus

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cient and strip him of his power to act as a judge." *Id.* at 137.

97. *Id.* at 119 (Harlan, J., concurring).

98. Petition, *supra* note 3, at 2-3.

99. *See* Glidden v. Zdanok, 370 U.S. 530 (1962) (holding that such special courts are Article III courts).

100. *See* District of Columbia v. Eslin, 183 U.S. 62 (1901); Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

101. *See* 28 U.S.C. §§ 144, 455 (1976).

and the supervisory powers of the judicial council to bar a judge from hearing a particular pending case and even to affect a judge's power over the conduct of a "multiplicity" of cases not yet filed. Such actions have been upheld as constitutional and within the Congressional mandate embodied in the statutes.

Justice Harlan, writing for the majority in *Glidden v. Zdanok*,[102] described the history of Congress' Article III power as follows:

> The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. . . . Once created, they passed almost a century without exercising any very significant jurisdiction. . . . Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment.[103]

This power of Congress to curtail the jurisdiction of federal courts is neither an aspect of the impeachment power, nor an encroachment upon the independence of Article III judges. To the extent the existence of this power demonstrates that impeachment is not the sole means of disciplining or controlling judges, it opens the door to acceptance of appellate court orders reallocating the caseload of district judges to improve the expeditious and effective administration of justice.

Thus, it is not necessary that a precise standard be laid down as to how far such reallocation may be taken under Article III in order to decide that a judge may be barred from hearing a category of cases as the Government requested in *Ritter*. Whether the need for such orders arises out of a simple backlog in the district court, disagreement among district judges, or the improper conduct of a single problem judge, Article III does not bar an appellate court from granting such relief. "Some supervisory and administrative control of judges by other judges is necessary if we are to have a functioning judiciary as well as a sitting one."[104]

V. Conclusion

Under Article III no federal judge should be subject to discipline only because he makes erroneous decisions. Whereas the

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102. 370 U.S. 530 (1962).
103. *Id.* at 551 (citations omitted).
104. Petition, *supra* note 3, at 124.

Constitution does shield judges against unpopularity, it does not shield them from corrective action by other judges designed to ensure that the law is effectively administered. The appellate courts have the power to prevent action so obviously improper as to place it beyond established rules of law. The power of a district judge is great and the opportunity for abuse too frequent to limit appellate supervision to decisions in cases appealed in due course. Where the rule of law has been effectively nullified by district judges, higher courts should not hesitiate to restrain them.

Congress has seen fit to give the appellate courts the necessary supervisory power, through the use of writs of mandamus and orders of the judicial councils, to impose restraints short of impeachment to ensure that the law is effectively administered by the lower courts. Although principles of judicial independence make it clear that such restraints may not disturb a federal judge's salary or tenure, appellate courts should not otherwise hesitate to alter the caseload of a judge if appropriate to provide temporary, interim, or even long-term relief from judicial misbehavior. For above all, those provisions of law securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged.