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# Protecting Judicial Whistleblowers In The War On Poverty

*A Proposed International Initiative Focusing On The United States*

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## OVERVIEW

As a global coalition against corruption, Transparency International (TI) submits "(i)t is . . . crucial that the transparency of the judiciary be continuously scrutinized, and when found to be lacking, enforced with particular momentum in order to prevent the weakest sections of the society to bear the costs of corruption in the judicial system." After acknowledging that, among others, "(i)t is often courageous members of the . . . judicial system itself who speak out against specific instances of corruption", TI proposes that such action be encouraged through development of "confidential and rigorous formal complaints procedure". Missing from the coalition's key recommendations are direct measures to protect and/or help vindicate as needed, Doctors of Jurisprudence and licensed attorneys whom authorities have identified as judicial whistleblowers.

TI and many others attest that judicial corruption "erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and most importantly, it denies citizens impartial settlement of disputes with neighbors and authorities." While the United States of America is in no way a worse culprit when it comes to administering judicial systems, its example has international ramifications and is far less than stellar. In fact Congress virtually ignores most Americans contending with endemic, systematic abuses of judicial power, including lawyers and judicial officers.

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**All these are prerequisites for an environment promoting access to justice:
the capacity of (usually) disadvantaged groups of citizens to gain access to courts (or alternative resolution mechanisms) by removing various institutional as well as corruption related barriers within the legal system.**

***Transparency International 2007 Global Corruption Report***

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## I. Introducing POPULAR And Its Mission To Help Poor And Other Disadvantaged People By, Among Other Things, Seeking Protection For Judicial Whistleblowers

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Transparency International (TI) acknowledges early in its *2007 Global Report on Judicial Corruption* that "(i)t is difficult to overstate the negative impact of a corrupt judiciary".[1] Mary Noel Pepys, a senior

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attorney specializing in international legal and judicial reform, adds that "(w)hile it would be foolhardy to assert that corruption is non-existent in certain judicial systems, it is fair to say that in some countries corruption is minimal, sporadic and the result of individual, unethical behaviour."[2] While the United States of America is presumably among those countries with relatively few instances of judicial corruption, they are no less intolerable to founders of POPULAR, "Power Over Poverty Under Laws of America Restored".

POPULAR is an association of public interest attorneys and law school graduates also known as Juris Doctors or Doctors of Jurisprudence. These good government advocates are committed to helping poor and other disadvantaged people access affordable and competent legal representation, appropriate judicial oversight, and important civil and criminal justice system reforms. Supplementing the nonprofit's corporate board of directors is an advisory board of lay community leaders. As its name suggests, POPULAR strives to tear down the figurative "Wall Of Poverty" by helping safeguard justice and the rule of law in America.

It seems that "(c)orruption, by itself, does not produce poverty".[3] Reportedly "*corruption has direct consequences on economic and governance factors, intermediaries that in turn produce poverty.*"[4] However Eric M. Uslaner determined in 2005 that "(f)airness of the legal system is not as strongly connected to economic inequality as we might suppose."[5]

POPULAR figuratively brings the "Battle Against Judicial Corruption" to the "War on Poverty". But its mission is not premised on a strict causal connection between judicial corruption and poverty or economic inequality. Instead POPULAR proceeds in recognition that "(i)t is the poor and disadvantaged who suffer disproportionately from judicial corruption due to their marginalized status and inability to pay bribes".[6]

As a global coalition against corruption, TI submits "(i)t is . . . crucial that the transparency of the judiciary be continuously scrutinized, and when found to be lacking, enforced with particular momentum in order to prevent the weakest sections of the society to bear the costs of corruption in the judicial system."[7] After acknowledging that, among others, "(i)t is often courageous members of the . . . judicial system itself who speak out against specific instances of corruption", TI proposes that such action be encouraged through development of "confidential and rigorous formal complaints procedure".[8] Missing from the coalition's key recommendations are direct measures to protect and/or help vindicate as needed, Doctors of Jurisprudence and licensed attorneys whom authorities have identified as judicial whistleblowers.

In making its 2006 report, the "Judicial Conduct and Disability Act Study Committee" chaired by Associate Supreme Court Justice Stephen Breyer, acknowledged that lawyers generally fear retaliation for alleging misconduct or disability on the part of any judge or judges.[9] Unfortunately for America's poor and otherwise disadvantaged, judicial "(c)orruption generally comes to light only through a partnership between courageous (journalists and lawyers)."[10] When addressing "(t)he media and judicial corruption", TI makes related hazards quite clear:

> In most democracies today, corrupt politicians, officials and businessmen can exploit both civil and criminal law to silence their critics. In the case of judges, they have a special power to punish critics for contempt of court, and they can misinterpret these laws or twist the facts to support unjust rulings in favour of the state, or its favourites.[11]

Certainly processes for screening bar candidates and lawyer disciplinary proceedings are no less amendable to abuse.[12]

"(I)t is important . . . to ensure not only that . . . substantive First Amendment standards are sound, but also that they are applied through reliable procedures."[13] Federal trial, appellate, and state courts of America do not always apply to lawyers and judges, the standards for free speech enunciated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), and *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991). The Supreme Judicial Court of Massachusetts provides a convenient survey of American states on ". . . the standard to be applied in disciplinary proceedings where an attorney invokes the First Amendment protection of free speech when defending against charges that he impugned the integrity of a judge, without basis, during a pending case" in *The Matter of Cobb.*[14] "A majority of the State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements".[15] In addition, "(a)t least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis (and applied) the 'actual malice' or subjective knowledge standard of *New York Times Co. v. Sullivan* . . ."[16]

Admittedly, ". . . the speech of lawyers representing clients in ***pending cases*** may be regulated under a less demanding standard . . ." than would otherwise apply.[17] In 1907, the U. S. Supreme Court determined that '***(w)hen a case is finished***, courts are subject to the same criticism as other people . . .'[18] However, the collective applications of free speech

standards tracked by the *Cobb Court*, do not correspond to a "pending case/concluded proceedings" distinction.[19]

II. Subjecting A Right As Fundamental As Free Speech To The Prerogative Of Fifty (50) Different States And The Various Jurisdictions Of America's Federal Courts Is To Suggest Geography Should Impact Its Scope As Much As Anything Else.

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Scholarly writings suggest that beyond considerations of orderly and fair trials, the regulation of a lawyer's speech on anything less than a national basis is proscribed by the U. S. Constitution's Privileges and Immunities Clause, Commerce Clause, and First Amendment.[20] Also, a school of thought proposes that ". . . courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda."[21] Criticism of a judge prompted by his or her resistance to this "forum for protest" or even an "institutional reform" model for American courts, could be core political speech and accordingly beyond suppression.

Most troubling is that there are traps for the wary and unwary legal professional/judicial critic, regardless of the free speech standard ostensibly applied. Perhaps the most notable traps are as follows:

1. A few states hold that '(t)he standard of proof for a determination of professional misconduct in an attorney's disciplinary proceeding is a "fair preponderance" of the evidence instead of "clear and convincing evidence";

2. The quantum and/or quality of knowledge or suspicion that would justify a challenge of a judge's qualifications or integrity are generally undefined by "settled usage or tradition of interpretation in law";

3. Though the falsity of a statement is a threshold consideration in *New York Times v. Sullivan* and a "disciplinary body bears the burden of proving falsity", lawyers and judges find themselves having to justify their criticism of a judicial officer to avoid discipline when it has not been proven false (an unconstitutional burden of proof shifting);

4. A lawyer's justification of his or her judicial criticism may be disregarded based on unsound or otherwise unsupported (*eg.* negative credibility determinations with no articulated basis) determinations that the lawyer/critic is not credible;

5. Negative inferences (*eg.* with regard to motive) may be drawn from the context in which a lawyer or judge is critical of a judicial officer, though the facts are equally consistent with honorable and correct behavior (i.e. violation of the equal inference rule);

6. Exculpatory evidence is often ignored in whole or significant part or excluded from the disciplinary record;

7. The time, effort, and sometimes tremendous cost of even successfully defending against professional disciplinary charges can chill the exposure of judicial misconduct or corruption by attorneys and judges;

8. Some bankruptcy courts construe costs assessed against an attorney through disciplinary proceedings as a nondischargeable "fine, penalty or forfeiture", thereby fostering a class of lawyers who cannot return to the bar due to indigency;

9. There may well be heightened scrutiny of attorneys and judges for conduct seemingly unrelated to First Amendment rights when their activities have included criticism of the judiciary; and

10. Federal trial and appellate courts arguably misapply/misconstrue the *Rooker-Feldman* and other abstention doctrines to avoid policing attorney disciplinary matters.

III. Protecting Judicial Whistleblowers Helps Protect The Sanctity Of America's Judiciary And Should Be An International Endeavor.

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Professor Monroe H. Freedman aptly explains:

> There are some criticisms that do indeed threaten the independence of the judiciary, but these are not the criticisms of practicing lawyers . . . Rather the real threat to judicial independence comes from public officials, from lawyers like (former) Mayor Rudolph Giuliani, Governor George Pataki, and President Bill Clinton – that is to say, from people who have the power to affect a judge's career on the bench. And, ironically, when those officials criticize judges and expressly threaten them with removal from office because of particular decisions, no disciplinary action is ever taken.[22]

One of the multiple lessons of Freedman's foregoing observation is that lawyers on the front lines of exposing judicial corruption, are arguably its most likely casualties.[23]

"(H)istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law."[24] Federal statutes afford whistleblower protection to the employees and independent contractors of less powerful malefactors. But Congress has

yet to fortify America's judiciary by directly extending reasonable protection to judicial whistleblowers.

Russell Wheeler, a scholar in Governance Studies, notes that "(m)embers of the 109th Congress who pushed court-curbing measures are no longer in the majority, if they are in Congress at all", and concludes "(t)he hot-button issues (of that term) may return but with less visibility and even less chance of success."[25] Already Congress has retreated from the idea of an inspector general 'investigat[ing] or review[ing] any matter that is directly related to the merits of a decision or procedural ruling by any judge or court' when that work product is generally the ultimate manifestation of judicial corruption brought to bear.[26]

TI and many others attest that judicial corruption "erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and most importantly, it denies citizens impartial settlement of disputes with neighbors and authorities."[27] While the United States of America is in no way a worse culprit when it comes to administering judicial systems, its example has international ramifications and is far less than stellar. In fact Congress virtually ignores most Americans contending with endemic, systematic abuses of judicial power, including lawyers and judicial officers.

Just as "corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation",[28] so does the U. S. Congress' unresponsiveness to largely disenfranchised constituents, trying to redress the problem. POPULAR provides a voice for them, and while its founders are formally trained for that advocacy, it is diminished by the questionable exclusion of most of them from bars of attorneys. Their professional tribulations are *prima facie* evidence that state administered, lawyer disciplinary processes can be misused to silence government critics; the devastating impact extends beyond targeted lawyers and their families; in fact scores if not hundreds or thousands of poor and other disadvantaged Americans lack access to affordable, competent legal representation as a result; and the most fundamental, underlying problem is that state regulation of speech among lawyers and judges, transgresses the Privileges and Immunities Clause, Commerce Clause, and First Amendment of the U. S. Constitution beyond considerations of orderly, fair trials.

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## IV. POPULAR's Proposed International Relief Strategy

For the foregoing reasons, POPULAR hereby requests that by February 16, 2009, the U.N. High Commissioner for Human Rights; Transparency International; the Democracy and Rule of Law Project of the Carnegie Endowment for International Peace; and Amnesty International USA join it in requesting the House and Senate Judiciary Committee for the 111th Congress of the United States of America:

1. for a hearing on the need to nationalize regulation of speech for America's lawyers and judicial officers;

2. to enact federal legislation protecting judicial whistleblowers such as footnoted below[29];

3. to thoroughly investigate and determine whether POPULAR's founders were subjected to retaliatory discipline for criticizing a judicial and/or quasi-judicial officer and/or any other First Amendment activity; and

4. to help ensure they receive any and all related relief to which they are entitled.

POPULAR further requests that by February 16, 2009, the U.N. High Commissioner for Human Rights; Transparency International; the Democracy and Rule of Law Project of the Carnegie Endowment for International Peace; and Amnesty International USA join it in requesting the United Nations to establish an international body to investigate and conclude, as best as it can determine, whether any lawyer(s) and/or judicial officer(s) petitioning it has/have been subjected to retaliatory discipline for what would be First Amendment activity under the U. S. Constitution had it been properly applied, even when it is otherwise inapplicable.

In addition to above stated premises, POPULAR submits the following in support of its present requests:

- Recorded interview of former constitutional law professor and renown civil rights activist, attorney Thomas N. Todd, calling for congressional hearings on national regulation of court officers' free speech; and
- Profile of POPULAR founders, listed as signatories below.

Respectfully Submitted,

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Dr. Glen Vickers Bey
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Dr. Andrew D. Jackson
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[1] *Global Corruption Report 2007* – Corruption in Judicial Systems*,* Transparency International, p xxi.
[2] *Id at Part One, p 3.*
[3] *Corruption and Poverty:* A Review of Recent Literature, p 6, (Chetwynd, Chetwynd, and Spector 2003).
[4] *Id at 6.* (emphasis in original text).
[5] *The Bulging Pocket and the Rule of Law:* Corruption, Inequality, and Trust, p 22, (Uslaner – Dept. of Gov. and Politics, Univ. of Md – College Park 2005).
[6] *Judicial Integrity and Human Rights*, online statement of Transparency International.
[7] *Id.*
[8] *Judicial Accountability and Discipline,* Policy Position #02/2007, Transparency International; Global Corruption Report 2007 – *Corruption in Judicial Systems,* Transparency International, p xxvi.
[9] *Implementation of the Judicial Conduct and Disability Act of 1980* – A Report to the Chief Justice, pp 103-104, The Judicial Conduct and Disability Act Study Committee – September 2006.
[10] *Global Corruption Report 2007* – Corruption in Judicial Systems*,* Transparency International, Part One, p 110.
[11] *Id at Part One, p 111.*
[12] "(S)ome judges forget about the First Amendment when free speech is directed at them and take disciplinary action against the lawyer." *The Threat to Judicial Independence by Criticism of Judges – A Proposed Solution to the Real Problem,* Monroe H. Freedman, p 730, Hofstra Univ. School of Law, Law Review (internal footnote omitted).
[13] *Waters v. Churchill ,* 511 U.S. 661 at 666 (1994).
[14] *The Matter of Cobb,* 838 N.E.2d 1197 (12/08/2005).
[15] *Id at 1212.*
[16] *Id at 1212.*
[17] *See, Gentile v. State Bar of Nevada,* 501 U. S. 1030 at 1069 (1991). (emphasis added).
[18] *Id.* (emphasis added).
[19] *See, The Matter of Cobb.*
[20] *See, The Two Faces of Multi-Jurisdictional Practice,* 29 N. Ky. L. Rev. 251 (2002).
[21] *See, Courts as Forums for Protest,* 52 UCLA L. Rev. 477 (2004).
[22] *Freedman at 738.*
[23] According to TI, exposing judicial corruption ". . . takes lawyers of integrity – often members of independent bar associations – to alert journalists to improper behaviour, which would otherwise go unnoticed by outsiders." *See,* TI's *Global Corruption Report 2007*, Part One, p 110.
[24] *Gentile v. State Bar of Nevada ,* 501 U.S. 1030 at 1051 (1991). (internal citations omitted).
[25] *See, Judicial Independence and Judicial Accountability in the 110th Congress and Beyond,* Issues in Governance Studies by Russell Wheeler, Number 7, April 2007, p 2.
[26] *See, Issues in Governance Studies,* p 7; and TI's *Global Corruption Report 2007*, Part One, pp 67-77.
[27] *See,* TI's statement on Judicial Corruption in describing *Judiciary Advocacy in the TI Global Movement*.
[28] *See,* TI's *Global Corruption Report 2007*, Part One, p xxi.
[29]

WHEREAS it is a lawyer's duty to, when necessary, challenge the rectitude of official action while upholding legal process; and

WHEREAS as a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession; and

WHEREAS a lawyer should cultivate knowledge of the law beyond its use for clients and employ that knowledge in reform of the law; and

WHEREAS a judge and some lesser judicial officials are uniquely poised to improve the law, the legal profession, the legal system and the administration of justice; and

WHEREAS lawyers, judges and some lesser judicial officials are usually regulated by some if not all of the same courts, judicial officers, and quasi-judicial officials they may be ethically bound to critique and/or criticize; and

WHEREAS through such regulation said lawyers, judges and lesser judicial officials may suffer a loss of liberty, including but not limited to the loss of their learned profession or position and a corresponding loss of reputation, stature and/or livelihood; and

WHEREAS " . . . history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030 at 1051 (1991). (internal citations omitted); and

WHEREAS ". . . it is important . . . to ensure not only that . . . substantive First Amendment standards are sound, but also that they are applied through reliable procedures." *Waters v. Churchill*, 511 U.S. 661 at 666 (1994); and

WHEREAS federal whistleblower protection is afforded by statute to employees of federally regulated businesses and occupations and to various employees of the executive branch for the United States of America; and

WHEREAS the present legislation provides for evidentiary trial or hearing by jury as an appropriate check on the judicial branch of America and its states, reducing the risk that some of their most effective critics will be unduly silenced through disciplinary action or the threat thereof or forced to undertake a debilitating crusade for vindication; and

WHEREAS this legislative action is taken in the interest of preserving those rights accorded by the First and Fifth Amendment of the U.S. Constitution, also as they are applied to the various states of this country under the Fourteenth Amendment of the U.S. Constitution;

Be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled; That this Public Law shall be commonly known as "The ---------- Act":

- No attorney or lawyer licensed to practice the profession of law and to represent clients before any court of the United States, a state, territory,
commonwealth, trust territory, any extraterritorial jurisdiction under Article I of the Constitution, or the District of Columbia as well as any other judicial body, quasi-judicial body, or administrative agency having quasi-judicial authority; shall be disbarred or suspended thirty (30) days or more, with or without automatic reinstatement or less than thirty (30) days without automatic reinstatement or assessed a fine, costs or other monetary penalty exceeding one thousand dollars ($1,000.00); for reason of any grievance, charge, complaint, show cause order or other such
charging or accusatory instrument having been filed, docketed or otherwise processed based on the accused attorney or lawyer having made or allegedly having made one (1) or more false or reckless statement(s) about the qualifications, integrity and/or competence of any court, tribunal, judge, magistrate, referee, judge pro-tem, associate judge, special judge, appointed master or any other judicial officer or candidate for said office as well as any arm, branch, or extension of any such court or tribunal, or any member thereof acting in a judicial, quasi-judicial, or appointed or delegated investigative capacity unless:

1. the date, time, place, content, and any alleged falsity of the targeted statement(s) as well as any corresponding malice, intent, knowledge, recklessness and other relevant conditions of mind be specifically averred by that charging or accusatory instrument and any amendment thereof;

2. that charging or accusatory instrument is appropriately served on the subject attorney or lawyer within sixty (60) days of its underlying statement(s);

3. at an appropriate time for pleading or otherwise responding to that charging or accusatory instrument or an amendment thereof, the subject attorney or lawyer may request an evidentiary trial or hearing of the matter before a regularly sitting, federal or state grand jury;

4. said evidentiary trial or hearing takes place within thirty (30) days of it being requested unless the same is continued for good cause shown;

5. the responding attorney or lawyer may make a limited offer of proof in the hearing of the jury, if any, thereby showing the character of evidence excluded by the presiding judge or officer, the form in which it was offered by the attorney or lawyer, the objection made to it and the ruling thereon. Such offer of proof is to be made in succinct, narrative form and not in question and answer form;

6. in the case of evidentiary trial or hearing before a jury, the question of whether an attorney or lawyer is guilty of any or all violation(s) averred by that charging or accusatory instrument or any amendment thereof is resolved by unanimous verdict;

7. that charging or accusatory instrument and any amendment thereof specifically advises the subject attorney or lawyer of his or her rights and obligations under this Act.

- In no event may an attorney or lawyer, so determined not guilty by unanimous jury verdict, be fined, taxed costs or otherwise subjected to monetary penalty or suffer a suspension or other exclusion from the bar for more than thirty (30) days upon appeal of the underlying matter;

- In no event shall any portion of costs for a sitting grand jury be imposed upon an attorney or lawyer subject to discipline triggering application of this Act;

- To the extent this Act relates to the discipline, taxation or fining of an attorney or lawyer, it correspondingly relates to the discipline, taxation or fining of a judge or lesser judicial official.

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