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PUBLIC HEARING

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RE:

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DRAFT RULES GOVERNING JUDICIAL

:

CONDUCT AND DISABILITY PROCEEDINGS:

5

: U.S. Courthouse

: Brooklyn, New York

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: TRANSCRIPT OF

PROCEEDINGS

: September 27, 2007

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-----X 10:00 a.m.

9

10 BEFORE:

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HONORABLE RALPH K. WINTER, Chair  
Committee on Judicial Conduct and Disability

13

14

15 SPEAKERS:

16

ARTHUR D. HELLMAN

17

RICHARD CORDERO

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FRANCIS C.P. KNIZE

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Proceedings recorded by mechanical stenography.  
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1 THE COURT: This is a public hearing concerning  
the  
2 draft rules that have been published for public comment,  
the  
3 rules governing judicial conduct in disability  
proceedings  
4 undertaken pursuant to 28 U.S.C. Section 351-364. We  
have  
5 three witnesses scheduled. Professor Friedman originally  
was  
6 scheduled. Professor Monroe Friedman was originally  
scheduled  
7 to testify, but was unable to make it, but he did submit  
a  
8 prepared statement that will become part of the record of  
9 these proceedings.  
10 These proceedings will be published in one form  
or  
11 another, probably on line, and will be available to the  
other  
12 members of the committee as well as myself. We will  
transmit  
13 the prepared statements of each of the witnesses to the  
14 committee immediately so you can be assured even though  
the  
15 other members of the committee were unable to make it  
here  
16 today they will be aware of the statements and testimony  
17 given.  
18 I want to call first Professor Arthur D.  
Hellman. I  
19 would ask that each of the witnesses give a summary of  
their  
20 views on these rules that last around ten minutes and I  
will,  
21 where appropriate, engage in dialogue with the witnesses.  
22 Each of the witnesses' prepared statements -- I may have  
said  
23 this already -- each of the witnesses' prepared  
statements  
24 will be part of the record.  
25 Okay, so I call Professor Hellman.

1 PROFESSOR HELLMAN: Is this mike working? Yes.

2 THE COURT: Yes.

3 PROFESSOR HELLMAN: Thank you, Judge Winter, for  
4 inviting me to express my views at this hearing. I'm  
going to  
5 be submitting a supplemental statement that will deal  
with  
6 some matters of drafting primarily involving the  
organization  
7 of the rules.

8 THE COURT: We would be very, very happy to  
receive  
9 that. I think that the rules need a considerable amount  
of  
10 drafting work and style work and perhaps some substantive  
11 work, but we will be happy to receive that.

12 PROFESSOR HELLMAN: Thank you, I appreciate it.  
13 I think it is important that this document be

user  
14 friendly and I appreciate the -- that the initial  
document was  
15 prepared under some time pressure and it will be perhaps  
now  
16 time for some not just drafting, tweaking, but maybe even  
a  
17 little bit of reorganization.

18 THE COURT: Can I ask you a question that has  
been  
19 posed in one of the comments, as we've seen in the  
comment  
20 period? Do you think that these rules should primarily  
be  
21 directed to use by chief circuit judges, special  
committees,  
22 judicial council and the conference committee, or do you  
think  
23 that they should be directed toward people who want to  
file  
24 complaints, to the public who have complaints?

25 I must say that I personally am leaning to the  
view

1 that the rules ought to be addressed to the people who  
have to  
2 conduct the proceedings pursuant to the act and that the  
3 public user friendly material should be put on the web  
site so  
4 each court that is governed by these rules --  
5 PROFESSOR HELLMAN: Well, I think the first  
audience  
6 is, of course, the chief circuit judges, the circuit  
council  
7 and the other people who work on it, but I do think that,  
as  
8 I've said in my prepared statement, and I'll be saying  
again  
9 today, I do think transparency is important in this  
process  
10 and I don't think there's a conflict between those two  
11 purposes. I think for either group you want to explain  
what  
12 the rules require, what they don't require, and how they  
ought  
13 to be carried out.  
14 One of the things the Breyer Committee pointed  
out is  
15 that there are changing personnel within the circuit and  
16 within the committees, different people have to deal with  
17 these rules, and I don't think their interests in having  
a  
18 clear, well organized set of rules are user friendly --  
to use  
19 that term again-- I don't think those interests are in  
20 conflict at all. I think if you write a set of rules  
that  
21 explains to the people who administer the act what  
they're  
22 supposed to do it will also serve the interests of the  
23 public. I don't see a conflict there.  
24 Well, in my remarks here this morning and at the  
risk  
25 of giving an unduly negative impression, because I think

1 overall the committee has done an excellent job, I will  
2 concentrate on the relatively few points where I take  
issue  
3 with the proposed rules. I'll address these in the order  
in  
4 which they appear in the draft, starting with Rule 5.  
5 Rule 5 deals with the power of a circuit chief  
judge  
6 to identify a complaint. In conjunction with Rule 3, the  
rule  
7 provides that if a chief judge obtains information from  
any  
8 source that gives reasonable grounds to inquire into  
possible  
9 misconduct by a judge, the chief judge must identify the  
10 complaint and initiate the review process under Chapter  
16.  
11 That language would seem to make it clear that  
the  
12 threshold for identifying a complaint is very low and  
that  
13 doubts should be resolved in favor of instituting formal  
14 proceedings under the act. Well, I endorse that standard  
15 which is basically what the Breyer Committee recommended.  
My  
16 concern is that at least some of what the rule gives with  
one  
17 hand it takes away with the other. Section 2(b) relieves  
the  
18 chief judge of the obligation to identify a complaint if  
it is  
19 clear on the basis of a total mix of information that the  
20 complaint will be dismissed.  
21 Then, the next sentence provides the chief judge  
may  
22 identify a complaint in such circumstances in order to  
assure  
23 the public that highly visible allegations have been  
24 investigated.  
25 Here it seems to me the rule does depart  
somewhat

1 from the Breyer Committee recommendation and in my view  
2 unwisely. When allegations are highly visible and that  
isn't  
3 going to be very often, the chief judge should be  
required to  
4 identify a complaint even if it is clear that the  
complaint  
5 will be dismissed.  
6           This does at least two things. First, it helps  
to  
7 remove the cloud that would otherwise hang over the  
judge's  
8 reputation and perhaps more important and I'll quote the  
9 Breyer Committee here: "The more public and high  
visibility  
10 the matter, the more desirable it will be for the chief  
judge  
11 to identify a complaint in order to assure the public  
that the  
12 allegations have not been ignored."  
13           I'll turn now to Rule 11, which deals with the  
14 initial review of complaints by the circuit chief judge.  
This  
15 rule and rather lengthy commentary address what I view as  
the  
16 key operational question in the operation of the  
17 administration of the act. Under what circumstances must  
a  
18 chief judge appoint a special committee rather than act  
19 summarily to terminate the proceeding?  
20           Proposed Rule 11(b) includes language that  
emphasizes  
21 the limited scope of the inquiry that the chief judge may  
22 conduct without turning the matter over to a special  
23 committee. The chief judge must not make findings of  
fact  
24 about any matter that's reasonably in dispute -- of  
course,  
25 that's in the statute -- nor may the chief judge make

1 determinations concerning the credibility of the  
complainant  
2 or putative witness.

3 That's fine as far as it goes, but I would go a  
bit

4 further. I would like to see the rule state very  
explicitly  
5 that if the allegations have even the slightest factual  
6 foundation or objective evidence leaves some room for  
7 crediting them, a special committee must be appointed.

8 THE COURT: Excuse me.

9 Wouldn't the appropriate test and one that would  
be

10 user friendly be the test that's used in motions for  
summary

11 judgment - that the chief judge has to appoint a special  
12 committee where there are material issues in dispute  
based on

13 public opinion or something else, where a reasonable fact  
14 finder could find misconduct or disability, but where a  
15 reasonable fact finder couldn't, then a special committee  
16 shouldn't be appointed?

17 I mean, I'm not using the exact terms of art  
used in

18 summary judgment proceedings, but wouldn't that be the  
useful

19 test to incorporate in these rules?

20 PROFESSOR HELLMAN: I think the summary judgment  
21 standard is very close to the one that is in the statute

and  
22 which the rules propose to implement. What I'm

suggesting,  
23 though, is that the rules themselves, based on the

history  
24 that the Breyer Committee lays out, have to be quite

emphatic  
25 that that is the standard and one particular matter that

I

1 think ought to be in the rules, it is in the commentary,  
which  
2 is -- which I might applaud, is that a chief judge may  
not  
3 dismiss a complaint on the ground of insufficient  
evidence  
4 without communicating with all persons who might  
reasonably be  
5 thought to have knowledge of the matter. It is in the  
6 commentary. I would put that in the rule. It is in part  
to  
7 address situations like the one that's in the 8th Circuit  
8 complaint that I described in my statement and I won't go  
into  
9 details of that here.  
10           Basically, what it comes down to, I think, and I  
11 don't think it is specially different from the summary  
12 judgment standard, but it may be useful to use something  
a  
13 little different and closer to the statute, is that if  
any  
14 reasonable observer would think that the matter remains  
15 reasonably in doubt, then the special committee should be  
16 appointed.  
17           It is a little different, I think, the setting  
is a  
18 little bit different from the summary judgment standard  
19 because there the Court is adjudicating a dispute between  
two  
20 private parties, in the ordinary case, be no suspicion at  
all,  
21 there wouldn't be any reason for the court to err one way  
or  
22 the other, but where it is the judiciary itself who is in  
--  
23 is the subject of the complaint, I think you have to push  
a  
24 little more, at least in the verbal directions, to make  
clear  
25 that the special committee should be appointed.

1           Now, I should add, also, and this isn't in my  
2 statement and maybe I should have added it there, that it  
does  
3 seem to me, as the view and Breyer committee both  
emphasize,  
4 there can be flexibility into the way special committees  
5 operate. They don't have to be a massive operation and  
if it  
6 is a simple kind of question, special committee ought to  
be  
7 able to operate pretty quickly and efficiently, but the  
8 statute draws this line between the chief judge role and  
9 special committee role and I think the rules should be  
written  
10 in strong terms to preserve and emphasize that line.  
11           Suppose, though, that notwithstanding the rule  
and  
12 all the admonitions you put into it, the chief judge  
fails to  
13 appoint a special committee when the rule requires it and  
the  
14 circuit council ratifies that action, is there anything  
that  
15 your committee, the conduct committee can do? Well, as  
you  
16 well know, in 2006, in one stage of the proceedings  
against  
17 Judge Emanuel Real, the committee said no, there's  
nothing  
18 they can do. The committee now thinks there is something  
they  
19 can do. What that something is is not totally clear.  
20           I'm referring, of course, to Rule 201(b). I've  
21 addressed this point at rather great length in my written  
22 statement and here I'm just making a couple brief  
comments.  
23           First, I do agree that there is a gap in the  
24 misconduct procedures that probably should be filled.  
Second,  
25 the preferable way to do that would be through a  
statutory --

1 THE COURT: Your statement did raise some doubt  
as to  
2 whether the committee was authorized by the statute to do  
3 this, but I take it you're concluding that it does have  
4 authority to do this?

5 PROFESSOR HELLMAN: I think it is a very close  
6 question and I have to say I'm troubled by the prospect  
of the  
7 committee's pursuing review with -- with the language of  
the  
8 statute saying the order of the circuit council affirming  
a  
9 dismissal is final. What it does seem to me you could  
do,  
10 though, is in combination with the monitoring which is  
11 contemplated there could be a provision for committee  
12 scrutiny, preferably before the order has been made  
public,  
13 and then perhaps a quiet talk between the committee chair  
and  
14 the circuit council presiding judge to say, in effect,  
you  
15 know, I understand your position that they don't need a  
16 special committee here, but it seems to us that from a  
17 national perspective the interests of the judiciary would  
be  
18 better served by appointing one.

19 I do think you would have to make it clear that  
you  
20 can't issue orders. I see no basis in the statute for  
that.  
21 You might have ultimately decided that --

22 THE COURT: Then you really agree with what was  
then  
23 the majority of the committee in the misconduct case in  
which  
24 by three two vote the committees have no jurisdiction.

25 PROFESSOR HELLMAN: I don't see how you get  
around

11

1 the language, in review preclusive language as far as any  
2 order from your committee to the circuit council would  
go.

3 Now, again, what happened, as you know, is that  
in  
4 the end, a special committee was appointed in a related  
-- on  
5 a related complaint and that ended up looking at the same  
6 allegations. So, as I suggested in my statement, you  
could  
7 have a kind of collateral review that isn't reviewed  
8 technically the way habeas is, not review of the state  
court

9 judgment, but a separate proceeding that may affect it.  
10 What I would really like to see is a statutory  
11 amendment that would be an enabling act type of  
amendment,  
12 something that would authorize the judicial conference to  
13 construct channels of review in the cases that we're  
talking  
14 about. I think to try to write the thing into a statute  
15 itself, I think that is hard and you don't need to do it  
in  
16 the statute, but I think the enabling act works well in  
17 that --

18 THE COURT: You have pointed out a gap in the  
rule,  
19 the proposed rule, but I think the intent of the  
committee was  
20 that it would issue orders that special committees be  
21 appointed and the view of the committee which I have to  
say is  
22 now unanimous, this rule was proposed unanimously,  
including  
23 two of the three members of the committee who had joined  
in  
24 the earlier jurisdictional ruling, the majority there,  
but I  
25 think we think interstitially there is authority that  
that --

1 that the way the act is structured it makes almost no  
sense to  
2 have a system in which you can avoid review by not doing  
what  
3 the statute directs you to do and worse than that set up  
4 precedent that differ from circuit to circuit, that  
something  
5 might be misconduct in one circuit but not in another.  
6 So, I have to say, in case you want your  
supplemental  
7 comments to say something about that, I have thought at  
least,  
8 I -- I'm not authorized to speak for the rest of the  
9 committee, but I thought our deliberations indicated that  
this  
10 was not going to be an advisory opinion, this was going  
to be  
11 an act of the United States Judicial Conference ordering  
the  
12 special committee be appointed.  
13 PROFESSOR HELLMAN: Well, I'm certainly quite  
willing  
14 to rethink my views on that. It does seem to me  
important,  
15 though, that the rules themselves should then explain in  
a  
16 fairly comprehensive fashion where this authority comes  
from  
17 and how do you reconcile it with the seemingly absolute  
18 prohibition in what is -- I forget the statutory  
provision --  
19 352(c), factual statutory provision that says these  
particular  
20 kinds of orders you propose to review shall be final.  
21 That it seems to me is language that's very  
difficult  
22 to get around and I agree with you entirely as a policy  
matter  
23 and I agree, also, I suppose, that if Congress had  
thought  
24 this through at the time, they might have done something  
25 different. I suspect the assumption was that, as it  
turned

1 out to be true, virtually all of these dismissals would  
be  
2 clearly correct and Congress did not want to build in  
channels  
3 of review that would burden the judicial conference of  
the  
4 United States with reviewing what could be a very large  
number  
5 of petitions to find the one or two, maybe three every  
three  
6 years that would warrant a second look at the national  
level.

7 I think that is not totally unreasonable judgment.  
8 THE COURT: I mean, I think the judgment of  
Congress  
9 -- I thought the Breyer Committee rather uncovered the  
fact  
10 that perhaps the most frequent error that was made was in  
not  
11 appointing a special committee, and I ought to add  
because  
12 there is some concern on the part of other witnesses  
we'll  
13 hear from that any system in which judges judge judges is  
14 going to be loaded against judges. At least one of the  
15 misconduct proceedings in which a special committee was  
not  
16 appointed, the findings favored -- the findings were that  
the  
17 Judge had engaged in misconduct, an acting chief circuit  
judge  
18 found that the chief circuit judge had engaged in  
misconduct,  
19 but no committee was appointed. That would have cut off  
20 national review.

21 PROFESSOR HELLMAN: Yes. I discussed this in my  
22 article that I'll be making available to the committee. I  
23 thought that was maybe the most egregious case in the  
Breyer  
24 Committee report. Although, interestingly, it would not  
have  
25 been caught by the mandatory review provision in your  
rule,

1 because, as far as I'm aware, there was no dissent from  
the  
2 circuit council order that affirms that unfortunate order  
of  
3 the acting chief judge. So, I agree entirely as a policy  
4 matter.

5 THE COURT: It would not have been shielded,  
though,  
6 in the review, because the rules as drafted -- you  
mentioned  
7 in your statement the rules as drafted vest the committee  
with  
8 discretion to review any council order that didn't  
involve a  
9 special committee, although we expect that review to be  
rare  
10 indeed.

11 PROFESSOR HELLMAN: Yeah, it seems to me that  
that's  
12 a somewhat awkward procedure that perhaps should be  
clarified  
13 a little bit more in the rule, especially, as I think I  
14 indicated in my statement, the relationship between that  
and  
15 the timing provisions about public disclosure that your  
16 committee is going to want to do whatever it does before  
that  
17 order goes out to the public.

18 THE COURT: I thought that was a very cogent  
19 criticism of the rules. You're going to turn to that  
now?

20 PROFESSOR HELLMAN: I wasn't going to address  
the  
21 specific point here today. I would be happy to talk  
about  
22 it. I wasn't expecting to get into that level of  
detail.

23 THE COURT: I was wondering whether you had any  
24 thoughts -- I don't think you mentioned it in your  
statement  
25 -- on Rule 12(c). I'm sorry 21(c). Rule 21(c) is the  
rule

1 that says that committee decisions reviewing council orders  
2 shall be by majority vote of the members of the  
committee, not

3 from the same circuit as the subject judge. Then sets up  
a  
4 system of rotating lists when someone is disqualified. I  
was  
5 wondering if you would comment on that.

6 The committee spent actually a fairly large  
amount of  
7 time on that rule. There was a very strong feeling on  
the  
8 part of the committee that we -- at some point in the  
review  
9 process you really had to have a body of people that were  
not

10 from the same circuit as the subject judge. The review  
in our  
11 committee is likely to be of a very serious kind and we  
ought

12 to do our best to get people in that are independent.

13 Could you comment on that rule?

14 PROFESSOR HELLMAN: Yeah. I have to say that is  
not  
15 one that I focused on myself and I might want to address  
that

16 a little bit more, if I have further thoughts in my  
17 supplemental statement, but it raises a broader point

which I  
18 think comes up in another -- in another point I don't

address  
19 in my statement, namely, in the provisions for transfer.

When  
20 the 2001 act or 2002 act was under consideration, it was  
an  
21 additional provision that got -- didn't get in because it  
just

22 was vetted too late for transfer to another circuit when all  
23 of the circuit judges were recused and your comment

suggests  
24 that there may -- that is an area that maybe ought to be  
25 looked at a little bit for the very reason you suggest,

that

1 the suspicion that the judge's own colleagues may appear  
to be  
2 unduly favorably disposed and may be that once you get  
into  
3 the sort of adjudicated stage, as distinguished from the  
very  
4 early investigatory stages, it ought to be a little bit  
easier  
5 to send the case to another circuit. I'm not suggesting  
6 that. That was one of the legislative proposals some  
years  
7 ago and it never got anywhere, but I think that is  
8 something --  
9 THE COURT: We do have provisions for transfer  
of  
10 that kind --  
11 PROFESSOR HELLMAN: Yes.  
12 THE COURT: -- in the rules.  
13 PROFESSOR HELLMAN: Yes, you do and what I'm  
14 suggesting -- I think it is mostly for circumstances  
where  
15 everybody is disqualified.  
16 THE COURT: Well, I think the intent was broader  
than  
17 that. There are some cases in which the matter is so  
serious  
18 and the issue is so close that it is very awkward for  
19 everybody to have it in the circuit of the subject judge.  
I  
20 mean, I think there is that kind of case. It might be a  
very  
21 divisive case and the rules provide there can be  
transfers,  
22 but the request has to be made to the chief justice and  
the  
23 chief justice then picks the transfer circuit. We did  
that  
24 rather than just have the chief circuit judges  
communicate  
25 amongst each other, because we thought if you had a  
highly

1 controversial, highly sensitive case and you wanted to  
2 transfer it, there might be a very divisive argument over  
3 where the transfer.

4           There was another point. There's nothing that  
says

5 the other circuit has to accept the case when it gets  
there,

6 so we thought that the best thing was leave it to the  
chief

7 justice to pick the circuit and order them to take it.

8           PROFESSOR HELLMAN: Two quick comments on that.

One,

9 I agree with everything you said about the policy  
10 considerations and the -- that may be one of the  
circumstances

11 in which monitoring -- ongoing monitoring by the  
committee

12 could really be useful, because sometimes the people in  
the

13 circuit may be too close to see, too close to the  
situation to

14 see how bad it might look and how things would be  
improved if

15 the matter were handled by another circuit and again a  
quiet

16 call from the committee chairman might do that.

17           The other thing I want to add is this business  
of

18 selecting the circuit to which the matter goes, that was  
the

19 main object of the unsuccessful 2002 amendment that I  
20 mentioned and we came up -- actually, those working on it

came  
21 up with a provision. I can't remember where it was drawn

22 from, but basically it says you just go to the next  
circuit in

23 sequence, but it did not give the chief justice any  
leeway in

24 that, because it seemed that even picking the chief judge  
or

25 the circuit that will handle it, that in the kind of  
situation

1 you've described, which by definition is highly charged,  
2 perhaps some partisan underpinnings or overtones to the  
3 matter, that there's much to be said for an automatic  
rule if  
4 it is from the 7th Circuit, it goes to the 8th; from the  
8th  
5 to the 9th and so forth. You can do it any other way.  
That  
6 was just a simple way of doing it. That's another area  
where  
7 a small fix to the statute might be in order.  
8 THE COURT: What is wrong with the rule as the  
9 committee has proposed? It seems to me that is the  
fairly  
10 workable rule. It is 26.  
11 PROFESSOR HELLMAN: Yeah. I think it is a very  
12 workable rule. The question is whether it would be  
better to  
13 constrain the discretion of the chief justice and so that  
14 everybody knows that it went to circuit X because that's  
what  
15 the law required, not because the chief justice chose a  
16 circuit with a Republican chief judge, Democratic chief  
judge  
17 or anything like that. I regret tremendously I even have  
to  
18 talk in those terms here, but that is what some of these  
19 complaints involve and I think to the extent that the  
process  
20 can diminish the level of suspicion because it is just  
all --  
21 all required by statute or rule by that matter, maybe  
could do  
22 this by rule, I think you contribute to the perception  
that  
23 nobody's trying to fix the matter in any way. It is  
very,  
24 very important.  
25 THE COURT: There's another provision for it,  
for

1 transfer earlier in the statute that has to do with the  
rare  
2 but occasional case in which the misconduct is alleged to  
have  
3 occurred while a judge was sitting by designation. The  
rule  
4 set up a system in which the first filed or identified  
5 complaint determines which circuit. The home circuit is  
6 almost always the circuit which the judicial misconduct  
7 complaint must be filed. It is the circuit in which all  
8 judicial misconduct complaints can be filed, but that  
where  
9 you have a complaint involving misconduct in a circuit  
where  
10 the judge was sitting by designation, the complaint or --  
11 whether identified or filed could go there, and, then,  
there  
12 is a provision allowing transfers if it appears that it  
would  
13 be better heard in one circuit rather than another.  
14 I don't know whether you care to comment on  
that.  
15 PROFESSOR HELLMAN: Well, I read over that one  
and I  
16 thought the committee handled that -- the rule handled  
that  
17 very, very well, that it is -- it does make sense because  
the  
18 whole system under the statute is future oriented, it  
does  
19 make sense to have the judge's home circuit as the  
default  
20 circuit, but in the extremely rare situations where there  
is  
21 an episode in some other circuit where the witnesses may  
be in  
22 that circuit or where there may be impact on the practice  
of  
23 law somehow in that other circuit, there's the ability to  
24 transfer it there, if it makes sense.  
25 I mean, I would think it would be extremely  
rare.

1 You would have the adjudication -- not quite the right word,  
2 but the consideration of the matter in any but the  
judge's  
3 home circuit, but I think you've handled that in a very  
good  
4 way and making it possible for those rare situations  
where it  
5 does make sense.

6 Let me jump now to Rule 244, which I see as  
raising  
7 two fairly distinct sets of issues. First, there are  
issues  
8 relating to the nature and timing of public disclosure.

The  
9 basic rule which is continued to the illustrative rules is  
judicial  
10 that orders and memoranda of the chief judge and the  
11 council will be made public only when final action on the  
12 complaint has been taken and is no longer subject to  
review.

13 Moreover, in the ordinary case, where the  
complaint  
14 is dismissed, the publicly available materials will not  
15 disclose the name of the judge without his or her  
consent.

16 Now, after thinking about that a good deal, I  
17 concluded that for the overwhelming majority of  
complaints,  
18 these rules do no harm and on balance probably make sense  
for  
19 the reasons I include in my statement. I do think a  
different  
20 or at least a somewhat more flexible approach is called  
for  
21 when the substance of a pending complaint has become  
widely  
22 known through reports in main stream media or responsible  
web  
23 sites and in that relatively unusual situation. I would  
like  
24 to see a presumption, no more than that, that orders  
issued by  
25 the chief judge or the circuit council will be made public

1 when they're issued and the judge will be named.  
2 I emphasize very strongly I'm not suggesting any  
sort  
3 of absolute rule, but when it's no longer possible to  
achieve  
4 the goal that you've stated in the commentary, avoiding  
public  
5 disclosure of the existence of pending proceedings, when  
6 that's no longer possible, it would generally make sense for  
7 the judiciary to go public in its official actions.  
8 THE COURT: I find your suggestion was  
interesting,  
9 but in drafting rules it has to be made clear who it is  
that  
10 you would have make the judgment as to whether the presumption  
11 has been overcome.  
12 PROFESSOR HELLMAN: Well, there are a couple of  
ways  
13 you could do this. It could be the -- most naturally it  
would  
14 be the person or body issuing the order, but for  
something  
15 this sensitive you might say, for example, the chief  
judge --  
16 it is the chief judge, but only after -- with the  
approval of  
17 a circuit council. You might go to that end. If it is the  
18 circuit council, I don't know whether you could build in  
or at  
19 least encourage a consultation with the conduct  
committee.  
20 In other words, make it a little bit of a  
complicated  
21 process or at least make sure more than the -- decide  
himself  
22 or herself is the person to make that decision. We're  
talking  
23 here about a tiny number of cases, but they are, as the  
Breyer  
24 Committee points out, the cases that shape public  
perceptions  
25 on how this system is working. It does seem to me, I  
mean, a

1 question of bound to reality if everybody knows ... Also,  
it  
2 seems to me when the judiciary -- it is true of anybody  
else,  
3 too, but when the judiciary is withholding information  
for no  
4 apparent reason and that's the way it is going to look  
when  
5 people know what is being withheld, the effect is to  
reinforce  
6 that all the concerns about guild favoritism that the  
Breyer  
7 Committee talked about and which you did earlier, Judge  
8 Winter, that is what you very appropriately emphasized,  
so it  
9 is -- it is a handful of cases.  
10 I would be happy to see the rules build in  
procedural  
11 safeguards, perhaps, rather than trying to state the  
criteria  
12 in the form of a rule, but to make just for a little bit  
of  
13 flexibility for these circumstances where the -- again,  
where  
14 the purpose that is stated in the commentary can no  
longer be  
15 accomplished.  
16 THE COURT: Since you are one of the leading  
scholars  
17 in this area, I tell you that there is a concern I have  
heard  
18 voiced, I am not sure how much weight I give it, but there is  
19 a concern I've heard voiced and that is that sooner or  
later,  
20 if you don't keep the names, the name of the judge  
21 confidential, sooner or later people will, whether in a  
22 confirmation proceeding or in something else, people will  
then  
23 start saying, Ahh, this judge had 75 misconduct  
complaints  
24 filed against him or her and that will be the big  
headline in  
25 a follow-up story. That all 75 are filed by one or two

1 prisoners serving life sentences for murder who kept  
filing  
2 complaint after complaint alleging the decision on habeas  
3 corpus was wrong, clearly dismissible, that will get lost  
in  
4 the debate.  
5           There are very serious concerns that -- I mean,  
we're  
6 dealing with -- and this ought to be in the record --  
minimum  
7 of 600, maximum now of 800 complaints a year. That is, I  
8 think, more than one per judge. Certainly one per  
Article III  
9 judge. And some of the complainants are people who file  
many  
10 complaints and many of the complainants are just  
complaining  
11 about a decision which is clearly outside the statute. I  
12 think there is a concern there.  
13           In anticipation, not that I share it, some  
people  
14 would say that your rule will encourage people who have  
access  
15 to the press to file complaints and to give them to the  
press  
16 at the time. But, anyway, I just want for your future  
work to  
17 know what the concerns you would hear are if you had  
talked to  
18 judges, as I have, about these problems.  
19           PROFESSOR HELLMAN: Let me address the first  
point.  
20 I share that concern. In fact, I say that in my  
statement at  
21 page 26. I think the very same concern you're talking  
about,  
22 that the -- that routine orders dismissing a complaint,  
23 because they address the merits would be misused by  
people if  
24 the judge's name were made public in those routine cases,  
so  
25 that's why I come down in agreement with the committee  
for the

1 routine cases which, of course, are the overwhelming  
majority  
2 of them. I agree with your rule, the publicly issued  
3 materials should not disclose the judge's name.

4 So, as for the second, I recognize that and  
that's

5 one of the reasons why the -- why I think any  
modification of

6 the rule should be done very cautiously and giving a  
great

7 deal of discretion and building in these procedural  
safeguards

8 that I'm suggesting because there is a possibility. It  
has

9 not happened yet, even though people can do this. I  
mean,

10 people can -- I've seen -- when I was researching for my  
11 testimony a couple of years ago, I found that few

complaints  
12 on web sites with unredacted materials identifying the

judges,  
13 but that has not happened and I'm not sure that the

limited  
14 flexibility I'm suggesting here would change that 'cause

it  
15 would be so, so limited.

16 THE COURT: Assuming we know who the  
decision-maker

17 would be, would the act of the decision-maker have to be  
-- to

18 publicize a name be sua sponte or would a complainant or  
19 representative of the media or someone have to ask for

it?  
20 PROFESSOR HELLMAN: I would think that you ought to

21 have rules that would require the decision-maker or  
22 decision-makers to make that judgment when they're

thinking  
23 about the order, because how you -- how you write

something, I  
24 think might affect -- might be affected by whether you

know  
25 it's going to be published, made public at a particular

time

1 and whether it is going to name the judge. I want to  
give a  
2 little bit more thought to that.  
3 THE COURT: I wish you would. Most judicial  
councils  
4 meet -- I think the 2d Circuit judicial council meets  
usually  
5 every six months. If it meets every six months, the  
number of  
6 dismissed complaints that it would be dealing with would  
be,  
7 you know, 50, 100, and I just think as a practical matter  
it  
8 would be very difficult for a judicial council with each  
9 complaint to find out how much publicity it may have  
gotten.  
10 I mean, I don't think it is quite as obvious. I mean,  
usually  
11 the complaints that really -- that get the really big  
12 publicity are complaints that do get considered at some  
13 length, but the fact that a complaint may have been in  
the  
14 paper once may not be something that council is even  
aware  
15 of. I mean, I would think a sua sponte rule would not  
work  
16 well.  
17 PROFESSOR HELLMAN: I think for the overwhelming  
18 majority, and, really, overwhelming, you wouldn't have to  
do  
19 anything different and even a single mention in some  
newspaper  
20 somewhere, I don't think that would meet the standard  
21 anywhere.  
22 I mean, again, one of the odd things about --  
maybe  
23 it isn't so odd. One of the recurring features of  
working on  
24 these matters is that you spend an enormous amount of  
time on  
25 rules and practices that affect only a tiny handful of  
the

1 cases. If you look at the statute itself, it has a huge  
2 section devoted to the special committee which is one or  
two a  
3 year is what it has been, maybe half a dozen, if you have  
a  
4 very big year, but that's in some ways the largest.

5 THE COURT: At present there is doubt as to how  
many  
6 special committees there are. The official statistics  
for one  
7 year were one, but several others were known to exist. I  
8 mean, there are statistics that are received by my  
committee,  
9 may or may not be correct, there is reasons to believe  
they  
10 aren't correct, and I must say I agree with your proposal  
that  
11 the rules be amended to make sure every order  
establishing a  
12 special committee be sent to my committee, if we're going  
to  
13 monitor it.

14 PROFESSOR HELLMAN: Yes, but even if it is five  
15 rather than one, it's still a tiny fraction, but that is  
where  
16 the attention goes for good reasons and it is the same in  
this  
17 matter of what is going to be disclosed, that the -- the  
18 attention we're giving here and the attention I've given  
in my  
19 statement is disproportionate to the number of occasions  
on  
20 which there would be -- it would be -- there would be any  
need  
21 even to think about the question, but again those are the  
22 cases that shape public perceptions and, so, of necessity  
23 that's where our attention goes to.

24 Rule 24 also deals with the manner of making  
orders  
25 public and here my suggestions are more in the nature of  
fine

1 tuning pretty minor stuff. I think the rule should  
require  
2 without qualification that all of these orders be posted  
on  
3 court web sites. That is a departure from what I  
suggested  
4 when I testified in 2001. At that time I suggested a few  
5 representative orders or routine orders, but it seems to  
me  
6 after the E Government Act, it is a de minimis burden and  
it  
7 will add a lot to our knowledge and, by the way, it has  
also  
8 occurred to me that it may be if a complainant saw these  
9 orders in these typical cases where all they're doing is  
10 complaining about the merits of a decision, maybe some of  
them  
11 would not file.

12 I mean, it is very -- it is just about  
impossible for  
13 anybody to see those orders in the ordinary course so  
that you  
14 can have all the exhortations and admonitions and  
warnings on  
15 the web sites and in the rules and everywhere that people  
look  
16 for it saying the purpose of it is -- of this process is  
not  
17 to challenge decisions and you should not try to simply  
18 reargue your case or say that the judge made a wrong  
decision  
19 or even a very wrong decision. Instead, all of those  
things  
20 maybe would have a little bit more impact if people saw  
some  
21 of the complaints that had been filed and dismissed on  
those  
22 grounds. Maybe not.

23 THE COURT: That's an interesting suggestion.

24 PROFESSOR HELLMAN: It would be worth doing, I

think,

25 and it would certainly enlighten the public and it would  
be,

1 as I say -- it is six or 700 orders, as I pointed out in  
my  
2 statement. There are going to be that many orders from  
the  
3 5th Circuit in Almendar Torres cases this year. They are  
4 boilerplate orders published now in Fed appendix. Some  
people  
5 I think now pay money for that and they're posted on the  
Court  
6 web sites. Compared with that it is really not adding a  
lot  
7 of posting or work for court staff. I also think the  
8 committee should be more aggressive in promoting  
publication  
9 practices that will lead to the development of a readily  
10 available body of published precedent on what constitutes  
11 misconduct and how it ought to be appropriately dealt  
with  
12 under the act.

13 In the article that I was sharing with the  
committee,  
14 I cite at least half a dozen important decisions that are  
just  
15 not available anywhere outside of the Clerk's offices or  
the  
16 Thurgood Marshall Office Building.

17 THE COURT: Well, we have recommended to the  
judicial  
18 conference and I believe it is Emil Famed (ph.), the  
creation  
19 of a compendium of decisions for that purpose in the  
Federal  
20 Judicial Center. Mr. Willging who's here today is  
working on  
21 that and we hope to have cross-references between the  
rules  
22 when finally promulgated in this compendium and I would  
23 suggest you -- when your testimony is concluded you might  
want  
24 to get Mr. -- I don't know, do you know Mr. Willging?  
25 PROFESSOR HELLMAN: Yes.

1           THE COURT: Okay, well, I don't have to go on  
with  
2 what I was about to say.  
3           PROFESSOR HELLMAN: Only thing I would just  
emphasize  
4 and I think it is implicit if what you already said is  
that  
5 this compendium ought to be on the public judiciary web  
site,  
6 not just something available to court insiders. These  
are  
7 public documents and there is absolutely no reason why  
the  
8 compendium should not itself be --  
9           THE COURT: If I recall, members of the  
audience,  
10 isn't that where we have our minds on?  
11           UNIDENTIFIED SPEAKER: I don't think we've  
decided  
12 that. What I'm preparing could go on a public web site,  
no  
13 question.  
14           PROFESSOR HELLMAN: I'm very glad to hear that.  
What  
15 makes it so sad about this body of decisions -- I will be  
16 closing on this note. What makes it so sad is that the  
17 overall picture that the decisions convey is of judges  
who do  
18 take seriously the obligation to investigate allegations  
of  
19 misconduct and to impose appropriate discipline. Not  
that  
20 there aren't occasional lapses, but they really are  
occasional  
21 and yet the habits of nondisclosure are so deeply  
embedded  
22 that the judiciary behaves as though it has something  
that  
23 it's trying to hide. In the past that might not have  
mattered  
24 quite so much. We live now, as we all know, in an era of  
25 mistrust and I think it is very important the judiciary

1 recognize the importance of transparency.  
2           The very fact you're holding this hearing today  
and  
3 inviting comment on the draft rules, that's a great start  
and  
4 I really do applaud that and I hope you'll make -- take  
the  
5 very modest additional steps that will truly bring  
visibility  
6 to the process, that will strengthen the credibility of  
the  
7 judiciary and ultimately the independence of the  
judiciary  
8 which is at bottom what this whole process is about.  
9           I would be happy to answer other questions and I  
will  
10 be submitting that supplemental statement on  
organization.  
11 Maybe I can say one thing about that organization at this  
12 point. I'll be happy --  
13           THE COURT: I have been interrupting you. Why  
don't  
14 you go ahead.  
15           PROFESSOR HELLMAN: The major point that I will  
be  
16 suggesting is that Rule 11, which deals with what the  
chief  
17 does ought to be broken up into two rules with a separate  
rule  
18 that would have the things that the chief does that  
terminates  
19 the proceeding and the statute is written very awkwardly.  
20 That's what you're dealing with here. The statute talks  
about  
21 dismissing a complaint on certain grounds and terminating  
the  
22 proceeding on others. I think you do have to follow the  
23 statute, but it makes it -- I mean, a lot of the  
difficult  
24 cross-referencing in these rules comes about because of  
that  
25 complexity and it seems to me if you could take the  
provisions

1 that deal with dismissals, orders dismissing and  
concluding  
2 proceedings and put them in what I suppose would be Rule  
12,  
3 you would have Rule 12 orders and you would have a  
shorthand  
4 that people could use to refer to. Might even use it in  
the  
5 rule.

6 Rule 12 orders would be orders the chief does  
and  
7 finally disposed of a complaint, whether by dismissing it  
on  
8 the grounds in which dismissal is authorized or  
concluding the  
9 proceedings, if that is done. I think you would find a  
lot of  
10 the later provisions would be easier to write if you  
could  
11 simply refer to Rule 12 orders, rather than ACDE,  
whatever it  
12 is that you have to do now.

13 I am fairly experienced at this stuff and I find  
it  
14 pretty hard to navigate. That's my principal  
organizational  
15 suggestion. The other is I think there's some real  
misplacing  
16 between rules three and five. Some of the team in three  
17 describing when a chief judge ought to identify a  
complaint,  
18 belongs in five so that you have one rule that deals --  
that  
19 gives everything the chief judge needs to know about when  
to  
20 identify a complaint.

21 THE COURT: I would be very pleased to receive  
22 detailed comments of that nature from you.

23 PROFESSOR HELLMAN: Sure, sure. I just wanted  
to  
24 sketch the kind of thing --

25 THE COURT: Could you get them to us by October

1 15th?  
2 PROFESSOR HELLMAN: I would definitely do that.  
3 THE COURT: I want to thank you for your  
testimony.  
4 It is not up to me to direct your scholarship, but if you  
5 could find a way so that the judiciary's point of view  
about  
6 some of these problems, namely, that when you have a job  
in  
7 which you have to make decisions favoring one party or  
8 another, 50 percent of the people you deal with go away  
deeply  
9 unhappy and a very large percentage of them think a great  
10 injustice has been done, but we can't get fairness of  
justice  
11 without an independent judiciary, and no one wants to see  
this  
12 procedure turn into something that scares judges away  
from  
13 calling them as they see them when they do adjudicate  
disputes  
14 between people and I think it is that that creates the  
15 apprehension of the judiciary over the misuse of these  
rules  
16 and the misuse of how many numbers of complaints have  
been  
17 filed against the judge and things like that.  
18 Anyway, thank you very much. You have been  
very,  
19 very helpful.  
20 PROFESSOR HELLMAN: Thank you, Judge Winter. I  
do  
21 appreciate it. I just want to express complete agreement  
with  
22 the last point and to say that I don't think that  
transparency  
23 is at all intentioned with that, but will promote that.  
24 Thank you very much.  
25 THE COURT: Thank you.

1           Our next witness is Dr. Richard Cordero.  
2           Dr. Cordero, I have read your written testimony.

It

3 will become part of the record of this proceeding and  
will be 4 transmitted to the other members of the committee and if  
you 5 want to take ten minutes now and summarize your main  
points or 6 add other points, go ahead.

7           DR. CORDERO: Thank you, Judge Winter. I would  
like 8 to add a statement that I have prepared, because it has  
some 9 graphics and I am going to be making reference to them  
and it

10 would be useful if you had a copy in front of you.

11           THE COURT: Fine. That's fine.

12           DR. CORDERO: Should I bring it to you?

13           THE COURT: Yes. We will make that part of the  
14 record, also. Do you have an extra copy of it?

15           DR. CORDERO: Yes.

16           THE COURT: Would you give a copy to Mr. Saxe,  
17 please.

18           Go ahead, Dr. Cordero.

19           DR. CORDERO: You started the hearing this  
morning by 20 asking a pertinent question. You asked whether the rules  
21 should be focused on the chief and circuit judge or on  
the 22 complainants. It seems that to me that the question is  
23 actually irrelevant because the point is whether the  
rules 24 will be effective as they are now. The rules are as they  
have 25 been drafted simply identical to the current rules that  
have

1 been in place for almost 27 years and these rules have  
proved

2 to be completely ineffective and --

3 THE COURT: Well, I'm not sure I agree with  
that. I

4 think that the rules that went to identify a complaint,  
the

5 rules about the kind of inquiry chief circuit judges  
ought to

6 make, the definitional sections, all involve materials  
that

7 are hardly clear on the face of the statute and hardly  
clear

8 in what might be called the common law that has developed  
9 under the statute.

10 DR. CORDERO: Well, the fact is that the rules  
of

11 now, as far as the substance goes of the process of  
12 complaining against you, the judges, they are the same as  
the

13 current rules.

14 THE COURT: In reviewing your testimony, I was  
struck

15 by the fact that your main complaint is against the  
statute.

16 The statute sets up that procedure about filing a  
complaint

17 and who deals with it. This hearing is not about  
changing

18 that. This hearing is about rules that have -- are  
proposed

19 to implement that statutory scheme so that with all due  
20 respect the committee has no power to propose rules that  
would

21 do the kind of thing that you seem to want, which is to  
get

22 judges out of the misconduct procedure except as  
defendants.

23 DR. CORDERO: Well, the fact is that in the  
statement

24 that I submitted on August the 23rd, my focus was on the  
25 rules, it was not the act. I submitted commentary of  
specific

1 rules and they were addressed to their ineffectiveness.  
The  
2 rules as they stand now, they do not change the players  
or the  
3 procedure. They do not make the complaints available to  
4 complainants and to other people. The complaints are not  
to  
5 render public. They do not require that the complaint  
about a  
6 judge take cognizance of the complaint because the  
procedure  
7 as it stands now is simply for the clerk to receive the  
8 complaint, to send it to the chief circuit judge and then  
to  
9 send it to the complaint about judges and to his chief  
judge.  
10 They don't have to do anything whatsoever with the rules.  
11 So, as I'm going to show on the basis of  
evidence,  
12 they can simply ignore that a complaint was ever filed  
against  
13 them because they do not have to take any action because  
the  
14 chief and circuit judge overwhelmingly is not going to do  
15 anything whatsoever about the complaint.  
16 In fact, the Breyer report indicated that in  
some  
17 circuits it is the clerks that read the complaint and  
even  
18 prepare an order to be signed by the chief and circuit  
judge.  
19 So, it is not the judge that treats the complaint and  
that  
20 takes action on them. It is relegated to a matter that  
can be  
21 handled by simply clerks.  
22 Now, the rules do not provide any adversarial  
23 confrontation between the complainant and the judge so  
that  
24 there is a system completely different from the system  
that  
25 applies to anybody else that complains against anybody  
else,

1 that is, aside from complaint. What we have as a system  
of  
2 the courts is a person who is a complainant that  
complains  
3 against another person who is a defendant and everything  
4 happens in the open. Why is it in the case of against --  
5 complaining against a judge there must be such secrecy  
that  
6 even the name of the judge must not be known, that the  
public  
7 must not know the name of the judge?  
8 We see in respect to the order, other two  
branches of  
9 government, the Executive and Congress, that all sorts of  
10 complaints are made against the President of the U.S.,  
all  
11 sorts of complaints are made against members of Congress.  
The  
12 republic doesn't fall apart because people complain  
against  
13 the President of the United States or against his  
Secretaries  
14 or against other members of the Executive. The republic  
15 doesn't fall apart because people complain against a  
member of  
16 Congress. Why is it there should be such secrecy when a  
17 complaint is filed against a judge?  
18 You indicated that there should be independence  
on  
19 the part of the judges so that they may not be afraid  
when  
20 deciding on controversies put before them. Why would  
they be  
21 afraid because somebody complains against them? Those  
are two  
22 different things. A person can complain against a judge  
and  
23 he can still decide however he wants, the same way that  
the  
24 President of the United States takes decision and  
everybody  
25 complains against him and he simply goes about his  
business of

1 performing the duties of his office. The judge could do  
the  
2 same thing even if a person complained about him and not  
only  
3 his name became public, but, also, the complaint itself,  
the  
4 substance of the complaint. That would eliminate the  
secrecy  
5 that shrouds the procedure right now which leads to the  
6 supported complaint that that secrecy is simply a way of  
7 supporting what the Breyer report called the gild  
favoritism,  
8 which means the judges are handling complaints against  
their  
9 peers and they are doing nothing about it.  
10 I want to bring now the evidence that I have  
here  
11 because this evidence -- if this evidence is produced by  
the  
12 administrative office of the U.S. Courts this evidence is  
13 produced by the reports that the -- reports to make every  
year  
14 to the office of the -- to the Administrative Office of  
the  
15 U.S. Courts. They have to report on the number of  
complaints  
16 that have been filed against judges every year. They are  
17 published in the judicial facts and figures. They're  
also  
18 published in the annual report of the director of the  
19 administrative office of the U.S. Courts.  
20 Now, I have examined those statistics that are  
21 available on the Internet for the last ten years and I  
have  
22 presented them in the graphics that you have in front of  
you.  
23 You will see that in the last ten years, since October  
9th,  
24 1996 to September 2006, 7,472 complaints were filed.  
They  
25 were filed overwhelmingly by complainants. Out of those

1 complainants, you will see there that only five  
complainants  
2 were filed by the chief circuit judge and nevertheless  
he's  
3 the person who works with all the circuit judges, he  
attends  
4 committees, he attends meetings of the judicial council,  
he  
5 attends annually -- actually twice a year, the meetings  
of the  
6 judicial conference of the United States. He sees what  
people  
7 do when they come into -- what they do and say when they  
go to  
8 judicial junkets and have no more inhibitions and,  
9 nevertheless, in spite of all that insider information  
that he  
10 gets, all the 13 circuit chief judges in the last ten  
years  
11 have identified five complaints, five complaints.  
12 Now, we have -- the Professor spent --  
13 THE COURT: As I understand the draft proposed  
rules,  
14 they are intended to meet the criticism that chief judges  
have  
15 been too reluctant to identify complaints and to appoint  
16 special committees.  
17 DR. CORDERO: Excellent. So, let's go --  
18 THE COURT: Your problem is that you think the  
chief  
19 circuit judge shouldn't be the one doing that.  
20 DR. CORDERO: That is one of the --  
21 THE COURT: It is really beyond the scope of  
this  
22 hearing.  
23 DR. CORDERO: No, no, Judge.  
24 THE COURT: Statute --  
25 DR. CORDERO: No, Judge Winter, I would like to  
go

1 back to the evidence because whatever comment they make,  
they

2 may be irrelevant, I want to --

3 THE COURT: The evidence is not only in your  
4 document. The evidence is in the Breyer report, too, and

I

5 take it the conclusion you're drawing is not an  
illegitimate

6 conclusion that this should not be a self-regulatory  
process,

7 but it shouldn't be done through the judiciary itself. I  
8 think that's a feeling that you share with others.

9 All I'm saying is that you are not commenting on  
the

10 rules; you are making comments suggesting that the  
statute

11 itself ought to be amended and my committee has no  
12 jurisdiction whatsoever to do anything like that.

13 DR. CORDERO: Well, for one thing, your  
committee

14 could examine the evidence that is available and say --  
state

15 where they're applying the rules as they are drafted now  
would

16 change in any way the situation that we have right now.

17 You indicated whether the chief circuit judge  
should

18 be one identifying complaint. Well, look what happened  
when

19 they do identify complaints. On page three, on the first  
20 graph, you see that for nine years circuit chief judges

had

21 identified only five complaints. Then, all of a sudden,

in

22 2006, they identify 88 complaints. That is incredible.

23 Now, what happened with those 88 complaints?

24 Absolutely nothing. They were dismissed the same way all  
25 other complaints were dismissed. You can see, also,

something

1 that is statistically impossible. For nine years the  
number

2 of complaints filed by complainants over --

3 THE COURT: I'll ask you once again what is it  
that

4 you want the rules to do to remedy your perception of  
what --

5 of something going wrong?

6 DR. CORDERO: I will address that question  
because I

7 think it is a fair question. I would like to simply  
finish

8 with the analysis of the statistics because it is --

9 THE COURT: Well, you've had almost 20 minutes.  
I'll

10 give you another five minutes, but you certainly have to  
get

11 to the rules and tell me something, tell the committee

12 something about what rules you think ought to be drafted  
to

13 implement the statute rather than attacking the statute.

14 DR. CORDERO: Well, Judge Winter, I am not  
attacking

15 the statute. I am attacking the usefulness of the rules.

You

16 began the hearing by asking whether the rules should be

17 addressed to the chief circuit judge or to the  
complainant and

18 I am indicating that it doesn't matter. This won't  
change

19 anything.

20 Also, I would like to point out that the  
Professor

21 had 55 minutes to --

22 THE COURT: You're not going to get 55 minutes,  
23 Dr. Cordero. The Professor was engaged in a useful  
discussion

24 of the draft proposed rules. I have yet to get any  
concrete

25 suggestion from you as to how the rules ought to be

1 redrafted.  
2 DR. CORDERO: The rules should be redrafted in  
such a  
3 way that complaints are made public, that the secrecy  
4 protecting judges is lifted, that the public know why is  
it  
5 that people are complaining so that one can establish a  
6 pattern of conduct on the part of judges, either on one  
judge  
7 because there are several complaints filed against him,  
or on  
8 the part of judges because they engage in coordinated  
judicial  
9 wrongdoing. Why would they not do that if there is no  
10 possibility that they will be disciplined?  
11 In this graph that I present on page three, of  
all  
12 the complaints that were filed during ten years, 7,462,  
how  
13 many people, how many judges were disciplined? Nine.  
Nine  
14 judges. That is less than one point one tenth of a  
percent.  
15 That means that however much we discuss here about the  
rules  
16 as they stand now, they're going to be fundamentally use  
17 because they mirror the rules that are now in effect and  
18 therefore they're going to have the same effect as the  
present  
19 rules. Based on the principle that they say they are the  
20 hallmark of rationality is to do the same thing, what,  
21 expecting a different result? Well, that applies here.  
22 THE COURT: One would have to qualify your  
assessment  
23 of the number of judges disciplined by noting that the  
act  
24 allowed informal methods of resolving things and there  
might  
25 well be a complaint that a judge through age or disease  
or

1 illness or other infirmity was no longer able to conduct  
the  
2 business of the office and it may well be that the chief  
3 circuit judge talked to that judge and the judge resigned  
and  
4 the complaint is dismissed without any evidence of  
discipline,  
5 but, also, would you tell me what is the number of  
6 disciplinary actions that one should expect every year  
under  
7 your system?  
8 DR. CORDERO: Judge Winter, I don't think  
anybody  
9 could answer that question because the answer --  
10 THE COURT: If you can't answer that question --  
11 DR. CORDERO: No, the answer --  
12 THE COURT: -- you can't using raw numbers alone  
say  
13 that the act isn't working. The Breyer Committee quite  
14 extensively went through the merits of many cases where  
15 discipline was not imposed or no special committee was  
16 appointed and the Breyer Committee was quite candid in  
17 concluding that the act had not been administered well in  
many  
18 of the serious cases. And that's one of the reasons we  
are  
19 now drafting rules that will bind chief circuit judges to  
20 doing things, but you're presenting me with nothing but  
raw  
21 numbers and I really can't draw a conclusion. I mean,  
where  
22 do you disagree with the Breyer report?  
23 Also, on confidentiality, I invite you to look  
at  
24 Section 360(a) of the statute. What you're attacking,  
what  
25 you're calling secrecy is in part at least in the  
statute.

1 DR. CORDERO: You talk about the Breyer report  
and  
2 the description of the members of the Breyer report.  
What was  
3 highlighted was that they had a lot of experience dealing  
with  
4 compliance. It is obvious that if people were assessing  
their  
5 own handling of those complaints, the outcome was going  
to be  
6 positive. So, the Breyer report was inherently bound to  
find  
7 that the handling of the complaints was appropriate  
because it  
8 was written by people that had a vested interest in  
reaching  
9 that finding.

10 THE COURT: I think most people who have read  
the  
11 Breyer report have not come to the conclusion that it  
approves  
12 the implementation, that it regarded the implementation  
of the  
13 act as having been anywhere near perfection. I think  
most  
14 people who read the Breyer report find it to be quite  
critical  
15 of the judiciary.

16 Okay, why don't you conclude with one or two  
more  
17 sentences and then I will call the next witness.  
18 DR. CORDERO: Judge Winter, I have more specific  
19 comments against -- on the rules and I would like to be  
able  
20 to --

21 THE COURT: I'm asking you --

22 DR. CORDERO: You see how many people are here.  
It  
23 is because the committee put the announcement of the  
hearing  
24 on only one single web site. Even the web site of the  
Supreme  
25 Court does not contain a notice of this hearing. This

1 hearing --  
2 THE COURT: The Supreme Court is not governed by  
the  
3 statute. The Supreme Court is beyond the statute. I'm  
sure  
4 that's why it isn't on their web site.  
5 All right, Dr. Cordero, if you would like to  
file a  
6 supplemental statement with the committee, you are  
welcome to  
7 do so, but thank you, that concludes your presentation.  
8 DR. CORDERO: Thank you.  
9 Next witness is Francis C.P. Knize.  
10 MR. KNIZE: Judge Winter, just let me change the  
11 tape.  
12 THE COURT: Okay.  
13 (Pause in proceedings.)  
14 MR. KNIZE: Hello. My name is Francis Knize and  
I'm  
15 a producer and --  
16 THE COURT: I apologize for mispronouncing your  
name,  
17 Mr. Knize.  
18 MR. KNIZE: That's quite all right.  
19 THE COURT: I want to welcome you here today. I  
have  
20 looked over, I've read your statement, and it will be  
part of  
21 the record of these hearings and you'll have ten minutes  
to  
22 summarize your statement to which I will add any  
interruptions  
23 that I make, time for that. Go ahead.  
24 MR. KNIZE: I thank you. I'm a producer, I've  
taken  
25 an interest in these hearings on behalf of the American  
public

1 and since we are a trickle up government that supposedly  
are  
2 represented by the people, the people believe that they  
have  
3 an interest in any kind of judicial oversight process.  
4 I start with a definition of constructive fraud  
and  
5 constructive fraud by Bovier's Law Dictionary 1856  
Edition is  
6 as follows: Constructive fraud: A contract or act,  
which is  
7 -- which, not originating in evil design and contrivance  
to  
8 perpetuate a positive fraud or injury upon other persons,  
yet,  
9 by its necessary tendency to deceive or mislead them, or  
to  
10 violate a public or private confidence, or to impair or  
injure  
11 public interest, is deemed equally reprehensible with  
positive  
12 fraud, and therefore is prohibited by law. And since I  
only  
13 have ten minutes, I will cut out a lot of my presentation  
here  
14 and get to the point.  
15 In sum, in relation to the Ninth Amendment of the  
16 Constitution, the Ninth Amendment lends strong support to  
the  
17 view that, quote, unquote, liberty protected by the  
Fourteenth  
18 Amendments -- Fifth and Fourteenth Amendments from  
19 infringement by the federal government or states is not  
20 restricted to rights specifically mentioned in the first  
eight  
21 amendments. It was said that this category of  
fundamental  
22 rights includes those fundamental liberties that are  
implicit  
23 in the concept of ordered liberty, such that neither  
liberty  
24 nor justice would exist if they were sacrificed. That was in  
25 the Palko versus Connecticut case.

1 I will not state the numbers because there's not  
2 enough time, please, I ask the public to refer to the  
actual  
3 testimony on record. These hearings on judicial --  
4 THE COURT: Do you have any comments on the  
draft  
5 rules? I mean --  
6 MR. KNIZE: Absolutely. I agree with Dr.  
Cordero in  
7 that simply the omission of rules or the surrounding  
facts  
8 around -- concerning the rules are basis for a testimony  
and  
9 if the judiciary cares to hear public comment -- now, I'm  
not  
10 a lawyer, but I can tell you what I've heard from the  
American  
11 public at large. So, if I may continue?  
12 THE COURT: Sure, you may continue.  
13 MR. KNIZE: These hearings on judicial conduct  
stem  
14 from the 1980 judicial act which originally wasn't  
intended  
15 for, but did manage to immorally and by definition,  
16 fraudulently put judges above the law. For 27 years now,  
17 those who look to this branch of government for relief  
have  
18 been disappointed time and time again. They have been  
19 exacerbated in many instances by judges who threaten the  
very  
20 lives of those who petition their courts for relief. And  
our  
21 own former U.S. Attorney General John Ashcroft condemned  
the  
22 judicial branch of government by characterizing this  
branch as  
23 organized crime. And you can refer to the document on  
record  
24 as to his exact quote.  
25 But this is just the very tip of a very large  
iceberg

1 which each day gets worse, not better. Americans simply  
want  
2 the judicial conference to do something positive, act  
3 responsibly to remedy the harsh criticisms the judiciary  
has  
4 weathered. The judicial conference may have interest  
that not  
5 only has John Ashcroft has opined on such judicial crime,  
but  
6 other judicial officials have, as well, including but not  
7 limited to chief judge Edith Jones at the 5th Circuit  
Court of  
8 Appeals as follows:  
9           Corruption in the agencies charged with  
enforcing our  
10 laws not only threatens communities by allowing dangerous  
11 criminals to roam free, it also undermines the confidence  
of  
12 our citizens in law enforcement and the criminal justice  
13 system. The same is true with respect to judicial  
14 corruption. We must all, in our own countries, lead the  
fight  
15 to ensure integrity within our police and judicial  
systems.  
16           So, concerning these rules today, many in the  
public  
17 have expressed to me on behalf of my television series  
"In the  
18 Interest of Justice," that this document in itself shows  
an  
19 appearance of impropriety. Canon 2 implies judges shall  
avoid  
20 impropriety and the appearance of impropriety in all  
21 activities. That would include judicial conference  
activities  
22 concerning complaints against judges. The impropriety  
exists  
23 when judges are judging the judges. People perceive a  
lack of  
24 true oversight when men are the judges of their own  
causes and  
25 seem to form an illegal nobility. The recommendation  
from the

1 general public is that a fair and impartial tribunal of  
2 citizens should be the judges of misconduct accused of a  
3 judicial officer.

4           And I go on, skipping some paragraphs. The  
illegal  
5 statement: Shocking to the universal sense of justice.  
6 Judges should not adjudicate hearings on complaints  
against a  
7 judge because it creates a quid pro quo situation where  
judges  
8 would tend to keep other judges off the hook for  
9 accountability. The judicial conference must  
incorporate,  
10 quote, unquote, the doctrine of judicial restraint and  
11 therefore accept restrictions on their conduct that might  
be  
12 viewed as burdensome by ordinary citizens and should do  
so  
13 freely and willingly, and that's out of Canon 2, as you  
well

14 know.

15           Having the gumption to produce a document as the  
one  
16 above shows the willingness of the judicial conference to  
17 forego the black letter of judicial ethics in order to  
18 maintain control over the rules and keep involvement by  
the  
19 public out of the process.

20           The Constitution, in Article 1, Section 9,  
paragraph  
21 3, states no bill of attainder or ex post facto law shall  
be  
22 passed. The fact is it is perceivable that the rules  
23 governing judicial conduct are, in all practical effect,  
a  
24 bill of attainder or ex post facto law, and what I mean  
by  
25 that, the Constitution does not grant the kind of secrecy  
that

1 the judicial conference is giving its judges in the  
judiciary  
2 through the Judicial Conduct and Disability Act of 1980.  
3 And it does so by assigning a commission of  
partial  
4 parties to decide in favor of their peers. At least the  
5 appearance of that to the public from what I gather from  
6 talking to at least -- just hundreds of citizens around  
the  
7 country, due process rights concerning complaints against  
8 government agents must fairly be decided by an impartial  
jury  
9 of citizens because that is what is secured by the  
10 Constitution.  
11 And I cite some laws on the record that show  
12 reinforcement of that concept. Given that we  
philosophically  
13 are a trickle up government, whereby the government is by  
the  
14 people, rules 11 onward accomplish just the opposite, a  
15 nobility. Quote, a sovereignty itself is, of course, not  
16 subject to law for it is the author and source of law,  
but in  
17 our system while sovereign powers are delegated to the  
18 agencies of government, sovereignty itself remains with  
the  
19 people by whom and for whom the government exists and  
acts and  
20 that is Justice Matthews of the U.S. Supreme Court in the  
case  
21 of Yick Wo versus Hopkins.  
22 My main point today, if I have to emphasize a  
point,  
23 is that the problem is obvious when 99 percent of all  
24 complaints against judges are summarily dismissed. The  
public  
25 perceives a 99 percent dismissal of all complaints as a  
system

1 that is broken. The report "Implementation of Judicial  
2 Conduct and Disability Act of 1980," a report to the  
chief  
3 justice by the Breyer Commission concluding that the  
system  
4 works well is perceived as nothing more than a farce by  
the  
5 American public in light of such a high statistic for  
6 dismissal of complaints or ruling against complaints.  
7 The American Bar Association has shown through  
its  
8 polls that public confidence and trust is at an all time  
low  
9 and it is less than 30 percent. You have to look at  
different  
10 ratings they make that divide the average and it is  
running  
11 about 30 percent, so you can argue 40 percent, but in  
some  
12 areas of law it is starting at 20 percent confidence in  
the  
13 judiciary and the judicial conference must note these  
very  
14 pertinent polls done through the American Bar  
Association.  
15 There's a problem with the judiciary  
acknowledging  
16 its imperfections. Sooner or later a blow back effect  
will  
17 occur against the judiciary for suppressing the problem of  
18 judicial misconduct.  
19 America is demanding constitutionality by all  
three  
20 branches of the government. The Judiciary Act of 1801,  
21 Section 31, 6th Congress, Session 2, Chapter 4 is a  
preemptive  
22 congressional act section that prevents the judiciary  
from  
23 undue rule making. It is a legislative act that prohibits  
24 making regulations that are repugnant and repugnant to  
the  
25 Constitution for the public that doesn't know what that  
means.

1            Provided and the quote is in the ruling, quote,  
2 unquote, provided always that they are not repugnant to  
the

3 laws of the United States.

4            The draft rules of 19 -- of the 1980 Act are  
5 repugnant in that they don't afford an impartial hearing  
6 concerning complaints against judges and I'm going to cut  
7 through a lot of this, again, because I know I'm  
impinging

8 upon --

9            THE COURT: Are you suggesting that the  
committee had  
10 power to provide decision-makers other than judges in its  
11 rules?

12           MR. KNIZE: Well, I think the judicial  
conference is

13 a very powerful agency and that what they do --

14           THE COURT: It would require action by the  
Congress  
15 of the United States, wouldn't it?

16           MR. KNIZE: Obviously, the act has to go through  
the  
17 Congress. There has to be oversight, because it is a  
18 congressional act.

19           THE COURT: What you're suggesting is something  
that  
20 simply -- you may be right, but what you're suggesting is  
21 something that would require legislation. It is totally  
22 beyond the jurisdiction of this committee.

23           MR. KNIZE: Yes, but rule making should not be  
24 repugnant to the Constitution of the United States and  
that's  
25 how -- the appearance of impropriety for some of these  
rules

1 is apparent to many Americans and when the rules --  
2 THE COURT: I can well understand why there is  
doubt,  
3 why there is skepticism about a process, as there always  
is by  
4 any self-regulatory process, I can understand that, but  
these  
5 rules -- this committee does not have power to depart  
from the  
6 statute and the statute sets up a system that you don't  
like  
7 and I think you're just in the wrong forum. That's all.  
8 MR. KNIZE: I think whatever happens with the  
9 judiciary reflects upon the judiciary committees at both  
the  
10 house and the senate and there should be some cross talk.  
11 In fact, if I may, the report "Judicial  
Independence,  
12 Interdependence and Judicial Accountability: Management  
of  
13 the Courts from the Judges, Perspective, Institute for  
Court  
14 Management: Court Executive Development," a very  
prominent  
15 report of May 2006 just a little over a year ago, program  
16 phase three says on page 11 to answer your question,  
Justice  
17 Winter, a review of the separation of powers doctrine and  
the  
18 interbranch conflicts created will enhance the  
understanding  
19 of judicial independence. Separation of powers does not  
20 specifically mean creation of a barrier that positively  
21 prevents any connection or contact between the branches.  
22 Preferably it finds expression mainly in the existence of  
a  
23 balance among the branches, powers, in theory and in  
practice  
24 that makes it possible independence in the context of  
specific  
25 reciprocal supervision.

1           Although the judiciary is a independent coequal  
2 branch of government, the constitutional doctrine of  
3 separation of powers allows some overlap in the exercise  
of  
4 governmental functions. This overlap is sometimes  
referred to  
5 as the doctrine of overlapping functions. So, I think  
that  
6 pretty much explains that the judiciary itself by its  
highest  
7 judges through this report communicates to the world that  
8 there should be some sort of interbranch communication.

Are.

9           THE COURT: Would you wind up, please.

10           MR. KNIZE: Winding up. Winding up. I -- the  
11 American public from my observation wants the judicial  
12 conference to add to the rules the following: Complaints  
are  
13 too often ignored by the judicial conference and it  
hardly  
14 ever gives notice to the movant. The citizens demand  
that  
15 once a complaint is filed an index number must  
immediately be  
16 issued by the ruling authority and that an official  
hearing  
17 must be granted within 30 days. That would be helpful.

It  
18 would actually resolve a lot of problems that Dr. Cordero  
has  
19 brought up.

20           I will conclude now with -- that the finding  
must  
21 address each of the specific allegations and be released  
22 publicly and put on the record. Canon 2 states public  
23 confidence in the judiciary is eroded by irresponsible or  
24 improper conduct by judges. A judge must avoid all  
25 impropriety and appearance of impropriety. A judge must

1 expect to be the subject of constant public scrutiny.  
So,  
2 that's par for the course that the public expresses its  
3 opinion through me today.  
4 And I also want to address one last point before  
I go  
5 that Dr. Cordero alluded to and I would like to say that  
the  
6 rules are dependent on the qualification that the  
judicial  
7 conference has set for misconduct. However, many in the  
8 public believe that breaking the law in itself is grounds  
for  
9 misconduct and that there's no discretion to ignore  
10 jurisdiction and there's many functions of a judge where  
11 discretion does not come to play where the judge must  
follow  
12 the law and time and time again judges are not following  
the  
13 law and when what I have experienced and what other  
Americans  
14 have experienced is that the other judges rally to  
protect the  
15 judge who broke the law and then it becomes a conspiracy,  
an  
16 ever building conspiracy and I have experienced this  
17 firsthand.  
18 I'm not here to talk about my case, but I could  
tell  
19 you that I have experienced this firsthand and it goes on  
and  
20 on and on and my next step is file some complaints with  
the  
21 judicial council and I wonder what's going to happen.  
22 So, on that note, I thank you very much. Thank  
you.  
23 If you have any other questions, I would be glad  
to  
24 answer them.  
25 THE COURT: Thank you. Thank you very much.

1 MR. KNIZE: Thank you, Justice winters.

2 THE COURT: That concludes the hearing.

3 UNIDENTIFIED SPEAKER: Would you permit further

4 testimony from the public? I requested three-and-a-half  
weeks

5 ago to be permitted to testify. I wish to address

6 specifically the rules --

7 THE COURT: I know of no such request.

8 UNIDENTIFIED SPEAKER: I have it right here,  
E-mailed

9 from the Administrative Office.

10 THE COURT: If you will listen to me. Anyone  
who

11 feels that they asked to testify, I would like to see the

12 documents in which you asked to testify and see that they  
were

13 filed in a timely fashion.

14 Thank you.

15 UNIDENTIFIED SPEAKER: I have it right here.

16 THE COURT: You can send it to me.

17 UNIDENTIFIED SPEAKER: I have a draft statement  
18 addressed to the rules, specifically the violations of  
the

19 statute reflected in the rules with respect to merits

20 related --

21 THE COURT: The comment period on the rules is  
still

22 open. It is open until October 15th. If you would like

23 comment on the rules, please, do so.  
24 UNIDENTIFIED SPEAKER: How?

25 THE COURT: I'm not here to get in an argument

1 with the audience. I will have the room cleared if it  
2 starts.

3 Thank you. The meeting is concluded.

4 (Proceedings concluded.)

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