----------X
PUBLIC HEARING :
:
RE: :
DRAFT RULES GOVERNING JUDICIAL :
CONDUCT AND DISABILITY PROCEEDINGS:
: U.S. Courthouse
: Brooklyn, New York
:
:
: TRANSCRIPT OF PROCEEDINGS
: September 27, 2007
----------X 10:00 a.m.

BEFORE:

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

SPEAKERS:

ARTHUR D. HELLMAN

RICHARD CORDERO

FRANCIS C.P. KNIZE

****

Proceedings recorded by mechanical stenography.
Transcript produced by Computer-Assisted Transcription.

THE COURT: This is a public hearing concerning the draft rules that have been published for public comment, the rules governing judicial conduct in disability proceedings undertaken pursuant to 28 U.S.C. Section 351-364. We have three witnesses scheduled. Professor Friedman originally was scheduled. Professor Monroe Friedman was originally scheduled to testify, but was unable to make it, but he did submit a

prepared statement that will become part of the record of these proceedings.

These proceedings will be published in one form or another, probably on line, and will be available to the other members of the committee as well as myself. We will transmit the prepared statements of each of the witnesses to the committee immediately so you can be assured even though the other members of the committee were unable to make it here today they will be aware of the statements and testimony given.

I want to call first Professor Arthur D. Hellman. I would ask that each of the witnesses give a summary of their views on these rules that last around ten minutes and I will, where appropriate, engage in dialogue with the witnesses. Each of the witnesses' prepared statements -- I may have said this already -- each of the witnesses' prepared statements will be part of the record.

Okay, so I call Professor Hellman.

♀

PROFESSOR HELLMAN: Is this mike working? Yes.

THE COURT: Yes.

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

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

PROFESSOR HELLMAN: Thank you, I appreciate it.

I think it is important that this document be user friendly and I appreciate the -- that the initial document was prepared under some time pressure and it will be perhaps now time for some not just drafting, tweaking, but maybe even a

little bit of reorganization.

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

I must say that I personally am leaning to the view

that the rules ought to be addressed to the people who have to conduct the proceedings pursuant to the act and that the public user friendly material should be put on the web site so each court that is governed by these rules --

PROFESSOR HELLMAN: Well, I think the first audience is, of course, the chief circuit judges, the circuit council and the other people who work on it, but I do think that, as I've said in my prepared statement, and I'll be saying again today, I do think transparency is important in this process and I don't think there's a conflict between those two purposes. I think for either group you want to explain what the rules require, what they don't require, and how they ought to be carried out.

One of the things the Breyer Committee pointed out is that there are changing personnel within the circuit and within the committees, different people have to deal with these rules, and I don't think their interests in having a clear, well organized set of rules are user friendly -- to use that term again -- I don't think those interests are in conflict at all. I think if you write a set of rules that explains to the people who administer the act what they're supposed to do it will also serve the interests of the public. I don't see a conflict there.

Well, in my remarks here this morning and at the risk of giving an unduly negative impression, because I think

overall the committee has done an excellent job, I will concentrate on the relatively few points where I take issue with the proposed rules. I'll address these in the order in which they appear in the draft, starting with Rule 5.

Rule 5 deals with the power of a circuit chief judge to identify a complaint. In conjunction with Rule 3, the rule provides that if a chief judge obtains information from any source that gives reasonable grounds to inquire into possible misconduct by a judge, the chief judge must identify the complaint and initiate the review process under Chapter 16.

That language would seem to make it clear that the threshold for identifying a complaint is very low and that doubts should be resolved in favor of instituting formal proceedings under the act. Well, I endorse that standard which is basically what the Breyer Committee recommended. My concern is that at least some of what the rule gives with one hand it takes away with the other. Section 2(b) relieves the chief judge of the obligation to identify a complaint if it is clear on the basis of a total mix of information that the complaint will be dismissed.

Then, the next sentence provides the chief judge may identify a complaint in such circumstances in order to assure the public that highly visible allegations have been investigated.

Here it seems to me the rule does depart somewhat

from the Breyer Committee recommendation and in my view unwisely. When allegations are highly visible and that isn't going to be very often, the chief judge should be required to identify a complaint even if it is clear that the complaint will be dismissed.

This does at least two things. First, it helps to remove the cloud that would otherwise hang over the judge's reputation and perhaps more important and I'll quote the Breyer Committee here: "The more public and high visibility the matter, the more desirable it will be for the chief judge to identify a complaint in order to assure the public that the allegations have not been ignored."

I'll turn now to Rule 11, which deals with the initial review of complaints by the circuit chief judge. This rule and rather lengthy commentary address what I view as the key operational question in the operation of the administration of the act. Under what circumstances must a chief judge appoint a special committee rather than act summarily to terminate the proceeding?

Proposed Rule 11(b) includes language that emphasizes the limited scope of the inquiry that the chief judge may conduct without turning the matter over to a special committee. The chief judge must not make findings of fact about any matter that's reasonably in dispute -- of course, that's in the statute -- nor may the chief judge make

determinations concerning the credibility of the complainant or putative witness.

That's fine as far as it goes, but I would go a bit further. I would like to see the rule state very explicitly that if the allegations have even the slightest factual foundation or objective evidence leaves some room for crediting them, a special committee must be appointed.

THE COURT: Excuse me.

Wouldn't the appropriate test and one that would be user friendly be the test that's used in motions for summary judgment - that the chief judge has to appoint a special committee where there are material issues in dispute based on public opinion or something else, where a reasonable fact finder could find misconduct or disability, but where a

reasonable fact finder couldn't, then a special committee shouldn't be appointed?

I mean, I'm not using the exact terms of art used in summary judgment proceedings, but wouldn't that be the useful test to incorporate in these rules?

PROFESSOR HELLMAN: I think the summary judgment standard is very close to the one that is in the statute and which the rules propose to implement. What I'm suggesting, though, is that the rules themselves, based on the history that the Breyer Committee lays out, have to be quite emphatic that that is the standard and one particular matter that I

think ought to be in the rules, it is in the commentary, which is -- which I might applaud, is that a chief judge may not dismiss a complaint on the ground of insufficient evidence without communicating with all persons who might reasonably be thought to have knowledge of the matter. It is in the commentary. I would put that in the rule. It is in part to address situations like the one that's in the 8th Circuit complaint that I described in my statement and I won't go into details of that here.

Basically, what it comes down to, I think, and I don't think it is specially different from the summary judgment standard, but it may be useful to use something a little different and closer to the statute, is that if any reasonable observer would think that the matter remains reasonably in doubt, then the special committee should be appointed.

It is a little different, I think, the setting is a little bit different from the summary judgment standard because there the Court is adjudicating a dispute between two private parties, in the ordinary case, be no suspicion at all, there wouldn't be any reason for the court to err one way or the other, but where it is the judiciary itself who is in -- is the subject of the complaint, I think you have to push a

little more, at least in the verbal directions, to make clear that the special committee should be appointed.

Now, I should add, also, and this isn't in my statement and maybe I should have added it there, that it does seem to me, as the view and Breyer committee both emphasize, there can be flexibility into the way special committees operate. They don't have to be a massive operation and if it is a simple kind of question, special committee ought to be able to operate pretty quickly and efficiently, but the statute draws this line between the chief judge role and special committee role and I think the rules should be written in strong terms to preserve and emphasize that line.

Suppose, though, that notwithstanding the rule and all the admonitions you put into it, the chief judge fails to appoint a special committee when the rule requires it and the circuit council ratifies that action, is there anything that your committee, the conduct committee can do? Well, as you well know, in 2006, in one stage of the proceedings against Judge Emanuel Real, the committee said no, there's nothing they can do. The committee now thinks there is something they can do. What that something is is not totally clear.

I'm referring, of course, to Rule 201(b). I've addressed this point at rather great length in my written statement and here I'm just making a couple brief comments.

First, I do agree that there is a gap in the misconduct procedures that probably should be filled. Second, the preferable way to do that would be through a statutory --

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

authority to do this?

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

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

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

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

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

Now, again, what happened, as you know, is that in the end, a special committee was appointed in a related -- on a related complaint and that ended up looking at the same allegations. So, as I suggested in my statement, you could have a kind of collateral review that isn't reviewed technically the way habeas is, not review of the state court judgment, but a separate proceeding that may affect it.

What I would really like to see is a statutory amendment that would be an enabling act type of amendment, something that would authorize the judicial conference to

construct channels of review in the cases that we're talking about. I think to try to write the thing into a statute itself, I think that is hard and you don't need to do it in the statute, but I think the enabling act works well in that --

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

that the way the act is structured it makes almost no sense to have a system in which you can avoid review by not doing what the statute directs you to do and worse than that set up precedent that differ from circuit to circuit, that something might be misconduct in one circuit but not in another.

So, I have to say, in case you want your supplemental comments to say something about that, I have thought at least, I -- I'm not authorized to speak for the rest of the committee, but I thought our deliberations indicated that this was not going to be an advisory opinion, this was going to be an act of the United States Judicial Conference ordering the special committee be appointed.

PROFESSOR HELLMAN: Well, I'm certainly quite willing to rethink my views on that. It does seem to me important, though, that the rules themselves should then explain in a fairly comprehensive fashion where this authority comes from and how do you reconcile it with the seemingly absolute prohibition in what is -- I forget the statutory provision -- 352(c), factual statutory provision that says these particular kinds of orders you propose to review shall be final.

That it seems to me is language that's very difficult

to get around and I agree with you entirely as a policy matter and I agree, also, I suppose, that if Congress had thought this through at the time, they might have done something different. I suspect the assumption was that, as it turned

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

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

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

because, as far as I'm aware, there was no dissent from the

circuit council order that affirms that unfortunate order of the acting chief judge. So, I agree entirely as a policy matter.

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

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

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

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

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

that says that committee decisions reviewing council orders shall be by majority vote of the members of the committee, not from the same circuit as the subject judge. Then sets up a system of rotating lists when someone is disqualified. I was wondering if you would comment on that.

The committee spent actually a fairly large amount of time on that rule. There was a very strong feeling on the part of the committee that we -- at some point in the review process you really had to have a body of people that were not from the same circuit as the subject judge. The review in our

committee is likely to be of a very serious kind and we ought to do our best to get people in that are independent.

Could you comment on that rule?

PROFESSOR HELLMAN: Yeah. I have to say that is not one that I focused on myself and I might want to address that a little bit more, if I have further thoughts in my supplemental statement, but it raises a broader point which I think comes up in another -- in another point I don't address in my statement, namely, in the provisions for transfer. When the 2001 act or 2002 act was under consideration, it was an additional provision that got -- didn't get in because it just was vetted too late for transfer to another circuit when all of the circuit judges were recused and your comment suggests that there may -- that is an area that maybe ought to be looked at a little bit for the very reason you suggest, that

the suspicion that the judge's own colleagues may appear to be unduly favorably disposed and may be that once you get into the sort of adjudicated stage, as distinguished from the very early investigatory stages, it ought to be a little bit easier to send the case to another circuit. I'm not suggesting that. That was one of the legislative proposals some years ago and it never got anywhere, but I think that is something --

THE COURT: We do have provisions for transfer of that kind --

PROFESSOR HELLMAN: Yes.

THE COURT: -- in the rules.

PROFESSOR HELLMAN: Yes, you do and what I'm suggesting -- I think it is mostly for circumstances where everybody is disqualified.

THE COURT: Well, I think the intent was broader than that. There are some cases in which the matter is so serious and the issue is so close that it is very awkward for everybody to have it in the circuit of the subject judge. I

mean, I think there is that kind of case. It might be a very divisive case and the rules provide there can be transfers, but the request has to be made to the chief justice and the chief justice then picks the transfer circuit. We did that rather than just have the chief circuit judges communicate amongst each other, because we thought if you had a highly

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

There was another point. There's nothing that says the other circuit has to accept the case when it gets there, so we thought that the best thing was leave it to the chief justice to pick the circuit and order them to take it.

PROFESSOR HELLMAN: Two quick comments on that. One, I agree with everything you said about the policy considerations and the -- that may be one of the circumstances in which monitoring -- ongoing monitoring by the committee could really be useful, because sometimes the people in the circuit may be too close to see, too close to the situation to see how bad it might look and how things would be improved if the matter were handled by another circuit and again a quiet call from the committee chairman might do that.

The other thing I want to add is this business of selecting the circuit to which the matter goes, that was the main object of the unsuccessful 2002 amendment that I mentioned and we came up -- actually, those working on it came up with a provision. I can't remember where it was drawn from, but basically it says you just go to the next circuit in sequence, but it did not give the chief justice any leeway in that, because it seemed that even picking the chief judge or the circuit that will handle it, that in the kind of situation

you've described, which by definition is highly charged, perhaps some partisan underpinnings or overtones to the matter, that there's much to be said for an automatic rule if it is from the 7th Circuit, it goes to the 8th; from the 8th to the 9th and so forth. You can do it any other way. That was just a simple way of doing it. That's another area where a small fix to the statute might be in order.

THE COURT: What is wrong with the rule as the committee has proposed? It seems to me that is the fairly workable rule. It is 26.

PROFESSOR HELLMAN: Yeah. I think it is a very workable rule. The question is whether it would be better to constrain the discretion of the chief justice and so that everybody knows that it went to circuit X because that's what the law required, not because the chief justice chose a circuit with a Republican chief judge, Democratic chief judge or anything like that. I regret tremendously I even have to talk in those terms here, but that is what some of these complaints involve and I think to the extent that the process can diminish the level of suspicion because it is just all -- all required by statute or rule by that matter, maybe could do this by rule, I think you contribute to the perception that nobody's trying to fix the matter in any way. It is very, very important.

THE COURT: There's another provision for it, for

transfer earlier in the statute that has to do with the rare but occasional case in which the misconduct is alleged to have occurred while a judge was sitting by designation. The rule set up a system in which the first filed or identified complaint determines which circuit. The home circuit is almost always the circuit which the judicial misconduct complaint must be filed. It is the circuit in which all judicial misconduct complaints can be filed, but that where

you have a complaint involving misconduct in a circuit where the judge was sitting by designation, the complaint or -- whether identified or filed could go there, and, then, there is a provision allowing transfers if it appears that it would be better heard in one circuit rather than another.

I don't know whether you care to comment on that.

PROFESSOR HELLMAN: Well, I read over that one and I thought the committee handled that -- the rule handled that very, very well, that it is -- it does make sense because the whole system under the statute is future oriented, it does make sense to have the judge's home circuit as the default circuit, but in the extremely rare situations where there is an episode in some other circuit where the witnesses may be in that circuit or where there may be impact on the practice of law somehow in that other circuit, there's the ability to transfer it there, if it makes sense.

I mean, I would think it would be extremely rare.

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

Let me jump now to Rule 244, which I see as raising two fairly distinct sets of issues. First, there are issues relating to the nature and timing of public disclosure. The basic rule which is continued to the illustrative rules is that orders and memoranda of the chief judge and the judicial council will be made public only when final action on the complaint has been taken and is no longer subject to review.

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

Now, after thinking about that a good deal, I concluded that for the overwhelming majority of complaints,

these rules do no harm and on balance probably make sense for the reasons I include in my statement. I do think a different or at least a somewhat more flexible approach is called for when the substance of a pending complaint has become widely known through reports in main stream media or responsible web sites and in that relatively unusual situation. I would like to see a presumption, no more than that, that orders issued by the chief judge or the circuit council will be made public

when they're issued and the judge will be named.

I emphasize very strongly I'm not suggesting any sort of absolute rule, but when it's no longer possible to achieve the goal that you've stated in the commentary, avoiding public disclosure of the existence of pending proceedings, when that's no longer possible, it would generally make sense for the judiciary to go public in its official actions.

THE COURT: I find your suggestion was interesting, but in drafting rules it has to be made clear who it is that you would have make the judgment as to whether the presumption has been overcome.

PROFESSOR HELLMAN: Well, there are a couple of ways you could do this. It could be the -- most naturally it would be the person or body issuing the order, but for something this sensitive you might say, for example, the chief judge -- it is the chief judge, but only after -- with the approval of a circuit council. You might go to that end. If it is the circuit council, I don't know whether you could build in or at least encourage a consultation with the conduct committee.

In other words, make it a little bit of a complicated process or at least make sure more than the -- decide himself or herself is the person to make that decision. We're talking here about a tiny number of cases, but they are, as the Breyer Committee points out, the cases that shape public perceptions on how this system is working. It does seem to me, I mean, a

question of bound to reality if everybody knows ... Also, it seems to me when the judiciary -- it is true of anybody else, too, but when the judiciary is withholding information for no apparent reason and that's the way it is going to look when people know what is being withheld, the effect is to reinforce that all the concerns about guild favoritism that the Breyer Committee talked about and which you did earlier, Judge Winter, that is what you very appropriately emphasized, so it is -- it is a handful of cases.

I would be happy to see the rules build in procedural safeguards, perhaps, rather than trying to state the criteria in the form of a rule, but to make just for a little bit of flexibility for these circumstances where the -- again, where the purpose that is stated in the commentary can no longer be accomplished.

THE COURT: Since you are one of the leading scholars in this area, I tell you that there is a concern I have heard voiced, I am not sure how much weight I give it, but there is a concern I've heard voiced and that is that sooner or later, if you don't keep the names, the name of the judge confidential, sooner or later people will, whether in a confirmation proceeding or in something else, people will then start saying, Ahh, this judge had 75 misconduct complaints filed against him or her and that will be the big headline in a follow-up story. That all 75 are filed by one or two

prisoners serving life sentences for murder who kept filing complaint after complaint alleging the decision on habeas corpus was wrong, clearly dismissible, that will get lost in the debate.

There are very serious concerns that -- I mean, we're dealing with -- and this ought to be in the record -- minimum

of 600, maximum now of 800 complaints a year. That is, I think, more than one per judge. Certainly one per Article III judge. And some of the complainants are people who file many complaints and many of the complainants are just complaining about a decision which is clearly outside the statute. I think there is a concern there.

In anticipation, not that I share it, some people would say that your rule will encourage people who have access to the press to file complaints and to give them to the press at the time. But, anyway, I just want for your future work to know what the concerns you would hear are if you had talked to judges, as I have, about these problems.

PROFESSOR HELLMAN: Let me address the first point. I share that concern. In fact, I say that in my statement at page 26. I think the very same concern you're talking about, that the -- that routine orders dismissing a complaint, because they address the merits would be misused by people if the judge's name were made public in those routine cases, so that's why I come down in agreement with the committee for the

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

So, as for the second, I recognize that and that's one of the reasons why the -- why I think any modification of the rule should be done very cautiously and giving a great deal of discretion and building in these procedural safeguards that I'm suggesting because there is a possibility. It has not happened yet, even though people can do this. I mean, people can -- I've seen -- when I was researching for my testimony a couple of years ago, I found that few complaints on web sites with unredacted materials identifying the judges, but that has not happened and I'm not sure that the limited flexibility I'm suggesting here would change that 'cause it would be so, so limited.

THE COURT: Assuming we know who the decision-maker would be, would the act of the decision-maker have to be -- to publicize a name be sua sponte or would a complainant or representative of the media or someone have to ask for it?

PROFESSOR HELLMAN: I would think that you ought to have rules that would require the decision-maker or decision-makers to make that judgment when they're thinking about the order, because how you -- how you write something, I think might affect -- might be affected by whether you know it's going to be published, made public at a particular time

and whether it is going to name the judge. I want to give a little bit more thought to that.

THE COURT: I wish you would. Most judicial councils meet -- I think the 2d Circuit judicial council meets usually every six months. If it meets every six months, the number of dismissed complaints that it would be dealing with would be, you know, 50, 100, and I just think as a practical matter it would be very difficult for a judicial council with each complaint to find out how much publicity it may have gotten. I mean, I don't think it is quite as obvious. I mean, usually the complaints that really -- that get the really big publicity are complaints that do get considered at some length, but the fact that a complaint may have been in the paper once may not be something that council is even aware of. I mean, I would think a sua sponte rule would not work well.

PROFESSOR HELLMAN: I think for the overwhelming majority, and, really, overwhelming, you wouldn't have to do anything different and even a single mention in some newspaper somewhere, I don't think that would meet the standard anywhere.

I mean, again, one of the odd things about -- maybe it isn't so odd. One of the recurring features of working on these matters is that you spend an enormous amount of time on

rules and practices that affect only a tiny handful of the

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

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

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

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

tuning pretty minor stuff. I think the rule should require without qualification that all of these orders be posted on court web sites. That is a departure from what I suggested when I testified in 2001. At that time I suggested a few

representative orders or routine orders, but it seems to me after the E Government Act, it is a de minimis burden and it will add a lot to our knowledge and, by the way, it has also occurred to me that it may be if a complainant saw these orders in these typical cases where all they're doing is complaining about the merits of a decision, maybe some of them would not file.

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

THE COURT: That's an interesting suggestion.

PROFESSOR HELLMAN: It would be worth doing, I think, and it would certainly enlighten the public and it would be,

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

In the article that I was sharing with the committee,

I cite at least half a dozen important decisions that are just not available anywhere outside of the Clerk's offices or the Thurgood Marshall Office Building.

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

PROFESSOR HELLMAN: Yes.

THE COURT: Okay, well, I don't have to go on with what I was about to say.

PROFESSOR HELLMAN: Only thing I would just emphasize and I think it is implicit if what you already said is that this compendium ought to be on the public judiciary web site, not just something available to court insiders. These are public documents and there is absolutely no reason why the compendium should not itself be --

THE COURT: If I recall, members of the audience, isn't that where we have our minds on?

UNIDENTIFIED SPEAKER: I don't think we've decided that. What I'm preparing could go on a public web site, no question.

PROFESSOR HELLMAN: I'm very glad to hear that. What makes it so sad about this body of decisions -- I will be closing on this note. What makes it so sad is that the overall picture that the decisions convey is of judges who do take seriously the obligation to investigate allegations of misconduct and to impose appropriate discipline. Not that there aren't occasional lapses, but they really are occasional and yet the habits of nondisclosure are so deeply embedded that the judiciary behaves as though it has something that

it's trying to hide. In the past that might not have mattered quite so much. We live now, as we all know, in an era of mistrust and I think it is very important the judiciary

recognize the importance of transparency.

The very fact you're holding this hearing today and inviting comment on the draft rules, that's a great start and I really do applaud that and I hope you'll make -- take the very modest additional steps that will truly bring visibility to the process, that will strengthen the credibility of the judiciary and ultimately the independence of the judiciary which is at bottom what this whole process is about.

I would be happy to answer other questions and I will be submitting that supplemental statement on organization. Maybe I can say one thing about that organization at this point. I'll be happy --

THE COURT: I have been interrupting you. Why don't you go ahead.

PROFESSOR HELLMAN: The major point that I will be suggesting is that Rule 11, which deals with what the chief does ought to be broken up into two rules with a separate rule that would have the things that the chief does that terminates the proceeding and the statute is written very awkwardly. That's what you're dealing with here. The statute talks about dismissing a complaint on certain grounds and terminating the proceeding on others. I think you do have to follow the statute, but it makes it -- I mean, a lot of the difficult cross-referencing in these rules comes about because of that complexity and it seems to me if you could take the provisions

that deal with dismissals, orders dismissing and concluding proceedings and put them in what I suppose would be Rule 12,

you would have Rule 12 orders and you would have a shorthand that people could use to refer to. Might even use it in the rule.

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

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

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

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

THE COURT: Could you get them to us by October

15th?

PROFESSOR HELLMAN: I would definitely do that.

THE COURT: I want to thank you for your testimony. It is not up to me to direct your scholarship, but if you could find a way so that the judiciary's point of view about some of these problems, namely, that when you have a job in which you have to make decisions favoring one party or another, 50 percent of the people you deal with go away deeply unhappy and a very large percentage of them think a great injustice has been done, but we can't get fairness of justice without an independent judiciary, and no one wants to see this

procedure turn into something that scares judges away from calling them as they see them when they do adjudicate disputes between people and I think it is that that creates the apprehension of the judiciary over the misuse of these rules and the misuse of how many numbers of complaints have been filed against the judge and things like that.

Anyway, thank you very much. You have been very, very helpful.

PROFESSOR HELLMAN: Thank you, Judge Winter. I do appreciate it. I just want to express complete agreement with the last point and to say that I don't think that transparency is at all intentioned with that, but will promote that.

Thank you very much.

THE COURT: Thank you.

Our next witness is Dr. Richard Cordero.

Dr. Cordero, I have read your written testimony. It will become part of the record of this proceeding and will be transmitted to the other members of the committee and if you want to take ten minutes now and summarize your main points or add other points, go ahead.

DR. CORDERO: Thank you, Judge Winter. I would like to add a statement that I have prepared, because it has some graphics and I am going to be making reference to them and it would be useful if you had a copy in front of you.

THE COURT: Fine. That's fine.

DR. CORDERO: Should I bring it to you?

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

DR. CORDERO: Yes.

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

Go ahead, Dr. Cordero.

DR. CORDERO: You started the hearing this morning by asking a pertinent question. You asked whether the rules

should be focused on the chief and circuit judge or on the complainants. It seems that to me that the question is actually irrelevant because the point is whether the rules will be effective as they are now. The rules are as they have been drafted simply identical to the current rules that have

been in place for almost 27 years and these rules have proved to be completely ineffective and --

THE COURT: Well, I'm not sure I agree with that. I think that the rules that went to identify a complaint, the rules about the kind of inquiry chief circuit judges ought to make, the definitional sections, all involve materials that are hardly clear on the face of the statute and hardly clear in what might be called the common law that has developed under the statute.

DR. CORDERO: Well, the fact is that the rules of now, as far as the substance goes of the process of complaining against you, the judges, they are the same as the current rules.

THE COURT: In reviewing your testimony, I was struck by the fact that your main complaint is against the statute. The statute sets up that procedure about filing a complaint and who deals with it. This hearing is not about changing that. This hearing is about rules that have -- are proposed to implement that statutory scheme so that with all due respect the committee has no power to propose rules that would do the kind of thing that you seem to want, which is to get judges out of the misconduct procedure except as defendants.

DR. CORDERO: Well, the fact is that in the statement that I submitted on August the 23rd, my focus was on the rules, it was not the act. I submitted commentary of specific

rules and they were addressed to their ineffectiveness. The rules as they stand now, they do not change the players or the procedure. They do not make the complaints available to complainants and to other people. The complaints are not to render public. They do not require that the complaint about a judge take cognizance of the complaint because the procedure as it stands now is simply for the clerk to receive the complaint, to send it to the chief circuit judge and then to send it to the complaint about judges and to his chief judge. They don't have to do anything whatsoever with the rules.

So, as I'm going to show on the basis of evidence, they can simply ignore that a complaint was ever filed against them because they do not have to take any action because the chief and circuit judge overwhelmingly is not going to do anything whatsoever about the complaint.

In fact, the Breyer report indicated that in some circuits it is the clerks that read the complaint and even prepare an order to be signed by the chief and circuit judge. So, it is not the judge that treats the complaint and that takes action on them. It is relegated to a matter that can be handled by simply clerks.

Now, the rules do not provide any adversarial confrontation between the complainant and the judge so that there is a system completely different from the system that applies to anybody else that complains against anybody else,

that is, aside from complaint. What we have as a system of the courts is a person who is a complainant that complains against another person who is a defendant and everything happens in the open. Why is it in the case of against -- complaining against a judge there must be such secrecy that even the name of the judge must not be known, that the public must not know the name of the judge?

We see in respect to the order, other two branches of government, the Executive and Congress, that all sorts of

complaints are made against the President of the U.S., all sorts of complaints are made against members of Congress. The republic doesn't fall apart because people complain against the President of the United States or against his Secretaries or against other members of the Executive. The republic doesn't fall apart because people complain against a member of Congress. Why is it there should be such secrecy when a complaint is filed against a judge?

You indicated that there should be independence on the part of the judges so that they may not be afraid when deciding on controversies put before them. Why would they be afraid because somebody complains against them? Those are two different things. A person can complain against a judge and he can still decide however he wants, the same way that the President of the United States takes decision and everybody complains against him and he simply goes about his business of

performing the duties of his office. The judge could do the same thing even if a person complained about him and not only his name became public, but, also, the complaint itself, the substance of the complaint. That would eliminate the secrecy that shrouds the procedure right now which leads to the supported complaint that that secrecy is simply a way of supporting what the Breyer report called the gild favoritism, which means the judges are handling complaints against their peers and they are doing nothing about it.

I want to bring now the evidence that I have here because this evidence -- if this evidence is produced by the administrative office of the U.S. Courts this evidence is produced by the reports that the -- reports to make every year to the office of the -- to the Administrative Office of the U.S. Courts. They have to report on the number of complaints that have been filed against judges every year. They are published in the judicial facts and figures. They're also published in the annual report of the director of the

administrative office of the U.S. Courts.

Now, I have examined those statistics that are available on the Internet for the last ten years and I have presented them in the graphics that you have in front of you. You will see that in the last ten years, since October 9th, 1996 to September 2006, 7,472 complaints were filed. They were filed overwhelmingly by complainants. Out of those

complainants, you will see there that only five complainants were filed by the chief circuit judge and nevertheless he's the person who works with all the circuit judges, he attends committees, he attends meetings of the judicial council, he attends annually -- actually twice a year, the meetings of the judicial conference of the United States. He sees what people do when they come into -- what they do and say when they go to judicial junkets and have no more inhibitions and, nevertheless, in spite of all that insider information that he gets, all the 13 circuit chief judges in the last ten years have identified five complaints, five complaints.

Now, we have -- the Professor spent --

THE COURT: As I understand the draft proposed rules, they are intended to meet the criticism that chief judges have been too reluctant to identify complaints and to appoint special committees.

DR. CORDERO: Excellent. So, let's go --

THE COURT: Your problem is that you think the chief circuit judge shouldn't be the one doing that.

DR. CORDERO: That is one of the --

THE COURT: It is really beyond the scope of this hearing.

DR. CORDERO: No, no, Judge.

THE COURT: Statute --

DR. CORDERO: No, Judge Winter, I would like to go

back to the evidence because whatever comment they make, they may be irrelevant, I want to --

THE COURT: The evidence is not only in your document. The evidence is in the Breyer report, too, and I take it the conclusion you're drawing is not an illegitimate conclusion that this should not be a self-regulatory process, but it shouldn't be done through the judiciary itself. I think that's a feeling that you share with others.

All I'm saying is that you are not commenting on the rules; you are making comments suggesting that the statute itself ought to be amended and my committee has no jurisdiction whatsoever to do anything like that.

DR. CORDERO: Well, for one thing, your committee could examine the evidence that is available and say -- state where they're applying the rules as they are drafted now would change in any way the situation that we have right now.

You indicated whether the chief circuit judge should be one identifying complaint. Well, look what happened when they do identify complaints. On page three, on the first graph, you see that for nine years circuit chief judges had identified only five complaints. Then, all of a sudden, in 2006, they identify 88 complaints. That is incredible.

Now, what happened with those 88 complaints? Absolutely nothing. They were dismissed the same way all other complaints were dismissed. You can see, also, something

that is statistically impossible. For nine years the number of complaints filed by complainants over --

THE COURT: I'll ask you once again what is it that you want the rules to do to remedy your perception of what -- of something going wrong?

DR. CORDERO: I will address that question because I think it is a fair question. I would like to simply finish

with the analysis of the statistics because it is --

THE COURT: Well, you've had almost 20 minutes. I'll give you another five minutes, but you certainly have to get to the rules and tell me something, tell the committee something about what rules you think ought to be drafted to implement the statute rather than attacking the statute.

DR. CORDERO: Well, Judge Winter, I am not attacking the statute. I am attacking the usefulness of the rules. You began the hearing by asking whether the rules should be addressed to the chief circuit judge or to the complainant and I am indicating that it doesn't matter. This won't change anything.

Also, I would like to point out that the Professor had 55 minutes to --

THE COURT: You're not going to get 55 minutes, Dr. Cordero. The Professor was engaged in a useful discussion of the draft proposed rules. I have yet to get any concrete suggestion from you as to how the rules ought to be

redrafted.

DR. CORDERO: The rules should be redrafted in such a way that complaints are made public, that the secrecy protecting judges is lifted, that the public know why is it that people are complaining so that one can establish a pattern of conduct on the part of judges, either on one judge because there are several complaints filed against him, or on the part of judges because they engage in coordinated judicial wrongdoing. Why would they not do that if there is no possibility that they will be disciplined?

In this graph that I present on page three, of all the complaints that were filed during ten years, 7,462, how many people, how many judges were disciplined? Nine. Nine judges. That is less than one point one tenth of a percent. That means that however much we discuss here about the rules as they stand now, they're going to be fundamentally use

because they mirror the rules that are now in effect and therefore they're going to have the same effect as the present rules. Based on the principle that they say they are the hallmark of rationality is to do the same thing, what, expecting a different result? Well, that applies here.

THE COURT: One would have to qualify your assessment of the number of judges disciplined by noting that the act allowed informal methods of resolving things and there might well be a complaint that a judge through age or disease or

illness or other infirmity was no longer able to conduct the business of the office and it may well be that the chief circuit judge talked to that judge and the judge resigned and the complaint is dismissed without any evidence of discipline, but, also, would you tell me what is the number of disciplinary actions that one should expect every year under your system?

DR. CORDERO: Judge Winter, I don't think anybody could answer that question because the answer --

THE COURT: If you can't answer that question --

DR. CORDERO: No, the answer --

THE COURT: -- you can't using raw numbers alone say that the act isn't working. The Breyer Committee quite extensively went through the merits of many cases where discipline was not imposed or no special committee was appointed and the Breyer Committee was quite candid in concluding that the act had not been administered well in many of the serious cases. And that's one of the reasons we are now drafting rules that will bind chief circuit judges to doing things, but you're presenting me with nothing but raw numbers and I really can't draw a conclusion. I mean, where do you disagree with the Breyer report?

Also, on confidentiality, I invite you to look at Section 360(a) of the statute. What you're attacking, what you're calling secrecy is in part at least in the statute.

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

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

Okay, why don't you conclude with one or two more sentences and then I will call the next witness.

DR. CORDERO: Judge Winter, I have more specific comments against -- on the rules and I would like to be able to --

THE COURT: I'm asking you --

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

hearing --

THE COURT: The Supreme Court is not governed by the statute. The Supreme Court is beyond the statute. I'm sure that's why it isn't on their web site.

All right, Dr. Cordero, if you would like to file a

supplemental statement with the committee, you are welcome to do so, but thank you, that concludes your presentation.

DR. CORDERO: Thank you.

Next witness is Francis C.P. Knize.

MR. KNIZE: Judge Winter, just let me change the tape.

THE COURT: Okay.

(Pause in proceedings.)

MR. KNIZE: Hello. My name is Francis Knize and I'm a producer and --

THE COURT: I apologize for mispronouncing your name, Mr. Knize.

MR. KNIZE: That's quite all right.

THE COURT: I want to welcome you here today. I have looked over, I've read your statement, and it will be part of the record of these hearings and you'll have ten minutes to summarize your statement to which I will add any interruptions that I make, time for that. Go ahead.

MR. KNIZE: I thank you. I'm a producer, I've taken an interest in these hearings on behalf of the American public

and since we are a trickle up government that supposedly are represented by the people, the people believe that they have an interest in any kind of judicial oversight process.

I start with a definition of constructive fraud and constructive fraud by Bovier's Law Dictionary 1856 Edition is as follows: Constructive fraud: A contract or act, which is -- which, not originating in evil design and contrivance to perpetuate a positive fraud or injury upon other persons, yet, by its necessary tendency to deceive or mislead them, or to violate a public or private confidence, or to impair or injure public interest, is deemed equally reprehensible with positive fraud, and therefore is prohibited by law. And since I only have ten minutes, I will cut out a lot of my presentation here and get to the point.

In sum, in relation to the Ninth Amendment of the Constitution, the Ninth Amendment lends strong support to the view that, quote, unquote, liberty protected by the Fourteenth Amendments -- Fifth and Fourteenth Amendments from infringement by the federal government or states is not restricted to rights specifically mentioned in the first eight amendments. It was said that this category of fundamental rights includes those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. That was in the Palko versus Connecticut case.

I will not state the numbers because there's not enough time, please, I ask the public to refer to the actual testimony on record. These hearings on judicial --

THE COURT: Do you have any comments on the draft rules? I mean --

MR. KNIZE: Absolutely. I agree with Dr. Cordero in that simply the omission of rules or the surrounding facts around -- concerning the rules are basis for a testimony and if the judiciary cares to hear public comment -- now, I'm not a lawyer, but I can tell you what I've heard from the American public at large. So, if I may continue?

THE COURT: Sure, you may continue.

MR. KNIZE: These hearings on judicial conduct stem from the 1980 judicial act which originally wasn't intended for, but did manage to immorally and by definition, fraudulently put judges above the law. For 27 years now, those who look to this branch of government for relief have been disappointed time and time again. They have been exacerbated in many instances by judges who threaten the very lives of those who petition their courts for relief. And our own former U.S. Attorney General John Ashcroft condemned the judicial branch of government by characterizing this branch as organized crime. And you can refer to the document on record

as to his exact quote.

But this is just the very tip of a very large iceberg

which each day gets worse, not better. Americans simply want the judicial conference to do something positive, act responsibly to remedy the harsh criticisms the judiciary has weathered. The judicial conference may have interest that not only has John Ashcroft has opined on such judicial crime, but other judicial officials have, as well, including but not limited to chief judge Edith Jones at the 5th Circuit Court of Appeals as follows:

Corruption in the agencies charged with enforcing our laws not only threatens communities by allowing dangerous criminals to roam free, it also undermines the confidence of our citizens in law enforcement and the criminal justice system. The same is true with respect to judicial corruption. We must all, in our own countries, lead the fight to ensure integrity within our police and judicial systems.

So, concerning these rules today, many in the public have expressed to me on behalf of my television series "In the Interest of Justice," that this document in itself shows an appearance of impropriety. Canon 2 implies judges shall avoid impropriety and the appearance of impropriety in all activities. That would include judicial conference activities concerning complaints against judges. The impropriety exists when judges are judging the judges. People perceive a lack of true oversight when men are the judges of their own causes and seem to form an illegal nobility. The recommendation from the

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

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

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

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

the judicial conference is giving its judges in the judiciary through the Judicial Conduct and Disability Act of 1980.

And it does so by assigning a commission of partial parties to decide in favor of their peers. At least the appearance of that to the public from what I gather from talking to at least -- just hundreds of citizens around the country, due process rights concerning complaints against government agents must fairly be decided by an impartial jury of citizens because that is what is secured by the Constitution.

And I cite some laws on the record that show reinforcement of that concept. Given that we philosophically

are a trickle up government, whereby the government is by the people, rules 11 onward accomplish just the opposite, a nobility. Quote, a sovereignty itself is, of course, not subject to law for it is the author and source of law, but in our system while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom the government exists and acts and that is Justice Matthews of the U.S. Supreme Court in the case of Yick Wo versus Hopkins.

My main point today, if I have to emphasize a point, is that the problem is obvious when 99 percent of all complaints against judges are summarily dismissed. The public perceives a 99 percent dismissal of all complaints as a system

that is broken. The report "Implementation of Judicial Conduct and Disability Act of 1980," a report to the chief justice by the Breyer Commission concluding that the system works well is perceived as nothing more than a farce by the American public in light of such a high statistic for dismissal of complaints or ruling against complaints.

The American Bar Association has shown through its polls that public confidence and trust is at an all time low and it is less than 30 percent. You have to look at different ratings they make that divide the average and it is running about 30 percent, so you can argue 40 percent, but in some areas of law it is starting at 20 percent confidence in the judiciary and the judicial conference must note these very pertinent polls done through the American Bar Association.

There's a problem with the judiciary acknowledging its imperfections. Sooner or later a blow back effect will occur against the judiciary for suppressing the problem of judicial misconduct.

America is demanding constitutionality by all three branches of the government. The Judiciary Act of 1801, Section 31, 6th Congress, Session 2, Chapter 4 is a preemptive

congressional act section that prevents the judiciary from undue rule making. It is a legislative act that prohibits making regulations that are repugnant and repugnant to the Constitution for the public that doesn't know what that means.

Provided and the quote is in the ruling, quote, unquote, provided always that they are not repugnant to the laws of the United States.

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

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

MR. KNIZE: Well, I think the judicial conference is a very powerful agency and that what they do --

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

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

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

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

is apparent to many Americans and when the rules --

THE COURT: I can well understand why there is doubt, why there is skepticism about a process, as there always is by any self-regulatory process, I can understand that, but these rules -- this committee does not have power to depart from the statute and the statute sets up a system that you don't like and I think you're just in the wrong forum. That's all.

MR. KNIZE: I think whatever happens with the judiciary reflects upon the judiciary committees at both the house and the senate and there should be some cross talk.

In fact, if I may, the report "Judicial Independence, Interdependence and Judicial Accountability: Management of the Courts from the Judges, Perspective, Institute for Court Management: Court Executive Development," a very prominent report of May 2006 just a little over a year ago, program phase three says on page 11 to answer your question, Justice Winter, a review of the separation of powers doctrine and the interbranch conflicts created will enhance the understanding of judicial independence. Separation of powers does not specifically mean creation of a barrier that positively prevents any connection or contact between the branches. Preferably it finds expression mainly in the existence of a balance among the branches, powers, in theory and in practice that makes it possible independence in the context of specific reciprocal supervision.

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

THE COURT: Would you wind up, please.

MR. KNIZE: Winding up. Winding up. I -- the

American public from my observation wants the judicial conference to add to the rules the following: Complaints are too often ignored by the judicial conference and it hardly ever gives notice to the movant. The citizens demand that once a complaint is filed an index number must immediately be issued by the ruling authority and that an official hearing must be granted within 30 days. That would be helpful. It would actually resolve a lot of problems that Dr. Cordero has brought up.

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

expect to be the subject of constant public scrutiny. So, that's par for the course that the public expresses its opinion through me today.

And I also want to address one last point before I go that Dr. Cordero alluded to and I would like to say that the rules are dependent on the qualification that the judicial conference has set for misconduct. However, many in the public believe that breaking the law in itself is grounds for misconduct and that there's no discretion to ignore jurisdiction and there's many functions of a judge where discretion does not come to play where the judge must follow the law and time and time again judges are not following the law and when what I have experienced and what other Americans have experienced is that the other judges rally to protect the judge who broke the law and then it becomes a conspiracy, an ever building conspiracy and I have experienced this firsthand.

I'm not here to talk about my case, but I could tell you that I have experienced this firsthand and it goes on and

on and on and my next step is file some complaints with the judicial council and I wonder what's going to happen.

So, on that note, I thank you very much. Thank you.

If you have any other questions, I would be glad to answer them.

THE COURT: Thank you. Thank you very much.

MR. KNIZE: Thank you, Justice winters.

THE COURT: That concludes the hearing.

UNIDENTIFIED SPEAKER: Would you permit further testimony from the public? I requested three-and-a-half weeks ago to be permitted to testify. I wish to address specifically the rules --

THE COURT: I know of no such request.

UNIDENTIFIED SPEAKER: I have it right here, E-mailed from the Administrative Office.

THE COURT: If you will listen to me. Anyone who feels that they asked to testify, I would like to see the documents in which you asked to testify and see that they were filed in a timely fashion.

Thank you.

UNIDENTIFIED SPEAKER: I have it right here.

THE COURT: You can send it to me.

UNIDENTIFIED SPEAKER: I have a draft statement addressed to the rules, specifically the violations of the statute reflected in the rules with respect to merits related --

THE COURT: The comment period on the rules is still open. It is open until October 15th. If you would like to comment on the rules, please, do so.

UNIDENTIFIED SPEAKER: How?

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

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

Thank you. The meeting is concluded.

(Proceedings concluded.)