October 12, 2007

Judge Ralph K. Winter Jr., Chairman
Judicial Conference Committee on Judicial Conduct and Disability
US Court House, 141 Church Street
New Haven, CT 06510

Dear Judge Winter,

RE: Public Comment on Proposed Rules Governing Judicial Conduct and Disability Proceedings.

TEST CASE TO ASSESS, IN PART, THE ADEQUACY OF THE PROPOSED RULES

The following factual case is offered as a possible test of the adequacy of the proposed new rules. Although the Breyer Committee discussed in general several instances when Circuit Councils did not deal appropriately or adequately with complaints filed against a few Federal Judges, it is not clear if the Committee considered this case. When given the facts which were publicly known, lawyers at the General Services Administration (GSA) and the Administrative Office of the United Stated Courts (AO) and even Chief Justice William H. Rehnquist agreed that at least one felony probably had been committed by a United States Circuit Judge acting in concert with a Circuit Executive. The facts were known by the Circuit Chief Judge, the Circuit Council and indeed by the Judicial Conference of the United States. Yet, no complaint was filed against the Judge by the Circuit Chief Judge or by any member of the Circuit Council or the Judicial Conference. Moreover, although probably outside the purview of your Committee, to my knowledge, no disciplinary action was taken against the Circuit Executive by the Circuit Chief Judge or the Circuit Council, which clearly did have jurisdiction.

It is my strongly held view that this total absence of action is the worst example of failure by those responsible for disciplining Judges that I witnessed during my 21 years as AO Director.

I present this case so that your Committee can determine if disciplinary action was mandated against the offending Judge under the old Rules and Statutes. If not, do the new Rules close what is thus a gaping loophole in the old Rules and mandate disciplinary action, and by whom?

Commendation for Winter and Breyer Committees

First let me commend you and your committee for the draft rules that you have proposed to amend current Judicial Conduct and Disability Rules. My admiration extends also to the report to the Chief Justice by the Judicial Conduct and Disability Act Study Committee entitled "Implementation of the Judicial Conduct and Disability Act of 1980," Chaired by Justice Stephen Breyer with 5 Federal Judges also serving. Taken together, these two reports will do much to maintain and increase public and Congressional confidence in the Federal Judges as your new Rules are applied by the Circuit Councils in considering complaints of misconduct filed against Federal Judges.

As you know, over the years some leaders in Congress and Academe have suggested that in some instances the Judges on Circuit Councils have not been willing to discipline appropriately their colleagues when complaints were filed. Moreover, some Circuit Chief Judges have failed to file complaints against their colleagues even though the facts apparently justified such action.

As you know, I served as Director of the Administrative Office of the United States Courts (AO) for 21 years. Early in my service Representative Robert Kastenmeyer (D. Wisc.) Chaired the House Judiciary Committee. He believed that Circuit Councils may not have been carrying out their duties in some instances when complaints were filed against Federal Judges House hearings were held and although the Judiciary was urged to improve, no legislative action was taken at that time. Then about three years prior to my 2006 retirement, major concerns were expressed by several current Congressional members alleging lack of objectivity by Circuit Councils in handling some complaints particularly by Representative James Sensenbrenner (R. Wisc.) then

Chairman of the House Judiciary Committee. Allegations were made that there was an "old boy network" of Judges who protected and would not act against their colleagues. He was sharply critical of what he perceived to be the failure of certain Circuit Councils to deal appropriately or adequately with complaints against a few Judges. He expressed these views with a high degree of passion both publicly and in two personal appearances before the Judicial Conference of the United States. Of course I had kept Chief Justice William Rehnquist informed of his criticisms well before he presided over the Conference services meeting where Sensenbrenner spoke. Then I met with the Chief Justice after the second Sensenbrenner "lecture" and we agreed that he should visit Sensenbrenner at his House office, a most unusual thing for any Chief Justice to do. But the Chief agreed that this issue was sufficiently important to do so. After talking with Sensenbrenner he told him that he planned to appoint a special committee of Judges to study the issue, to be chaired by Justice Stephen Breyer.

At least two very important results came from that process; first, the Judiciary bought some time because had there been no such actions, Chairman Sensenbrenner made it very clear that he was going to impose an Inspector General on the Judiciary to make sure that the Judges behaved themselves. Second, it has now resulted in the excellent work product from both the Breyer committee and your important Conference committee. If adopted, your proposed Rules will increase the confidence in Judges among Congress, the public, the Bar and the Media.

My comment on the proposed Rules themselves will be confined to posing a factual situation, which in my view should have been considered by the Ninth Circuit Council but never was. In my opinion it is still a dark cloud hanging over the reputation of the Judicial Branch. The current rules could and should have been applied through a formal complaint against the Judge involved either by the Chief Circuit Judge or other Judges. I believe the current rules allow and may require a complaint by the Chief Judge of the Circuit. However such a complaint never was forthcoming from her or from any other Judge.

Factual Case to Test the Proposed New Rules

In 2001, Ninth Circuit Judge Alex Kozinski, in the company of the then Circuit Executive Greg Walters and perhaps one other Ninth Circuit Judge illegally (according to GSA's lawyers and ours) seized and then sabotaged the vital Judiciary Internet Gateway Security System then located in San Francisco. As a result thousands of computer hackers throughout the world were permitted to invade the records of courts, judges and court staff not only in the Ninth Circuit but also in the Eighth and Tenth Circuit, which were similarly served by that Gateway. Moreover, skilled hackers once they broke through the system in San Francisco could penetrate into every Court in the United States. The National Security Agency (NSA) expert who consulted with the Judicial Conference Internet and Technology (IT) Committee said that from a security standpoint this action by Kozinski was "insane."

GSA lawyers who are responsible for computer systems policy in the Federal government said that this action was not only "illegal" but constituted at least one felony. They along with our own internal lawyers cited title 18 USC1361, which states that:

> "whoever willfully injures or commits any depredation against any property of the United States, or of any Department or Agency thereof ... shall be punished by a fine of $1,000 and depending on the circumstances a prison term of 1 to 10 years."

Likewise section 1362 states that:

> "whoever willfully injures or maliciously destroys any ... system, or other means of communications, operated or controlled by the United States ... or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than 10 years or both."

For your Committee to determine the application to this case of either the old or your proposed new rules, it is important to know the facts that led up to this extraordinary unsupportable action by Judge Kozinski and Greg Walters. During 2000 and 2001 there was a major increase in the use of Internet Bandwidth by Federal Courts throughout most of the United States. This greatly elevated the cost and gave rise to the strong suspicion that the court computer systems were being abused. This was of great concern to the Judicial Conference Information Technology (IT) Committee, which had been given considerable responsibility by the Judicial Conference to monitor the costs and management of judicial computer systems throughout the country. The Committee, then Chaired by the late District Judge Ed Nelson, directed my staff at the AO to monitor internet bandwidth use throughout the country to determine why there had been such a major increase in bandwidth use. The Committee also directed that the study must be confined solely to general bandwidth information. The staff was expressly forbidden to examine either e-mail or individual computers used by any Judge or court employees anywhere in the country. This was done to assure privacy.

When this initial bandwidth study was completed, the results were presented to the IT Committee which learned that by far the greatest proportion of the bandwidth increase occurred through the illegal downloading of pornography and some other movies and NAPSTER music on court computers in Federal courts on Federal time throughout the United States. In short there was a wholesale violation of the Federal law and waste of taxpayer funds throughout the country, particularly in 39 courts.

Judges and Court Employee Privacy Fully Protected

It is important to note once again that my staff faithfully followed the direction of the IT Committee and confined their study solely to internet bandwidth use. Thus the computers and e-mail of individual court employees, law clerks and Judges were not examined or studied. The IT Committee then issued instructions which in most instances, I was asked to send to the entire court family so that this systematic breaking of

Federal Law in the Courts would be ended, and the Judiciary avoid serious embarrassment. But Judge Kozinski chose to comment publicly to the New York Times, to at least one National news magazine and wrote a lengthy essay for the Wall Street Journal editorial page on his mistaken version of the study. By doing so, he created considerable media attention and public awareness to the Judiciary's severe problem of illegally using court computers.

The facts described above are indisputable since Judge Kozinski publicly admitted his role in illegally seizing the vital Internet security facility disabling it, and thus opening judicial records up to thousands of computer hackers throughout the world endangering the security of the entire Judicial Branch. Not only did he admit his illegal actions but he also boasted about them in the National press. One National magazine published his picture with an article in which he recounted his sabotage of the security system featuring his comment "What is a Judge to do?" Virtually every other Judge in the United States would have said that what a Judge is to do is obey Federal law, not waste Federal money and not to believe apparently that a Federal Judge is above the law just because of his office. Judge Kozinski was so proud of his sabotage action that he actually filmed a reenactment and made copies of the tape, one of which was sent and viewed at a nationwide Judiciary computer staff meeting in Jacksonville, Florida. On the tape he described triumphantly to all the many court computer experts assembled from throughout the country precisely how he seized the computer security facility and disabled it so it would no longer protect Judge's records. Present, however, was the great Chairman of the Judicial Conference IT Committee which had directed that the bandwidth use study be made. Judge Nelson recognized that the Kozinski tape was intended in part to be a direct attack on him and his committee before the professional staff in order to embarrass him and his fellow committee members. He said he could not understand how Judge Kozinski could possibly justify his illegal action to destroy the security system and endanger Judges records and then reenact the crime on film.

For Judge Nelson and for any objective observer it was impossible to connect the destruction by Kozinski of the security system with a Committee request to study bandwidth which in no way violated the privacy of Judges or court staff but did reveal that some employees in

Federal Courts, at least 39 Courts, were downloading pornography and some even viewing them in the court facilities on court time. Judge Nelson believed that the Kozinski action was designed entirely to cover up this outrageous waste of Federal taxpayer money and equipment in too many of the courts.
Kozinski even volunteered publicly that one of his law clerks had downloaded pornography in his court. He did not mention the extent to which he and his other law clerks also downloaded pornographic movies and NAPSTER music.

Chief Justice Rehnquist was appalled by the Kozinski Security Sabotage

When Chief Justice William Rehnquist learned of Kozinski's actions and then learned that he was boasting in public about his deliberate violation of Federal law he said "Tell Alex to watch pornography at home and not download and watch it in the courts."

Chief Justice Rehnquist was so disturbed by Kozinski's actions and his public boasting that he directed the Judicial Conference Executive Committee immediately "to take firm disciplinary action against all those involved" including, of course, Kozinski and Walters. He also believed that the Kozinski/Walters action might have been taken with the tacit or active endorsement of the Chairman of the Circuit Council, Judge Mary Schroeder, and perhaps the entire Ninth Circuit Council. Thus the minutes for the Executive Committee emergency teleconference of May 31, 2001 show that the Chief Justice "concluded something needs to be done that would get the attention of the Ninth Circuit Council." He said that "more needed to be done than a remonstrance and more than a slap on the wrist." He directed the Committee and me to determine if the Ninth Circuit Council Judges and Circuit staff could be cut off completely from the data communications network (DCN) thus depriving them of their computers and other automated facilities. Indeed he specifically asked us, "Can we cut off computers?"

At the time of the Executive Committee meeting, Associate AO Director Pete Lee was in Alaska attending a gathering of Chief Judges from the Ninth Circuit Chaired by Circuit Chief Judge Mary Schroeder. He

reported on the phone for the Executive Committee and me that she was "now talking to them" (the Chief Judges) and said "she is afraid that the record of the extensive downloading of pornography in the courts will be embarrassing to some of the Judges who are up for Supreme Court or other appointments." According to Lee, she also said that she and a Circuit Executive, Walters, were willing to "put the security system back up" and make it operational "if we (the Executive Committee members and the AO) agree not to measure sex explicit movies that are being down loaded in the courts." Significantly, there was no talk at the Alaska meeting according to Lee about fear of reading Judges e-mail which they knew did not occur. Rather the concern was about possible embarrassment to Judges caused by reports of pornography downloading in the Courts.

No Disciplinary Action Taken

Given the gravity of this situation, coupled with the exceptionally strong views of the Chief Justice, I was truly surprised when a narrow majority of the Executive Committee refused to recommend or take any disciplinary action with respect to Kozinski or Walters or the Ninth Circuit Council. All they agreed to do was to have the Chairman, District Judge Charles Haden (N.D. West VA) call Chief Judge Schroeder to work out an agreement to restore that the security system to working condition. Haden then promised to her that the IT committee would no longer require the monitoring of bandwidth use by the courts. In short, Judges Schroeder and Kozinski and Circuit Executive Greg Walters got precisely what they wanted. There would be no discipline of the offenders. Moreover, no longer would there be any monitoring of the extent to which pornographic movies and NAPSTER music were being illegally downloaded by Federal Courts. Later, the Judicial Conference took what can only be described as cosmetic action essentially leaving it up to each individual court to develop a system of its own in the hope that Federal law is not being violated in that court. The Administrative Office was directed by the Conference to obtain an annual report on the quality and adequacy of the plans developed by each court throughout the country to require legal compliance. Based upon the last report which I say which was for 1995-96 some courts have no plan at all while other courts have

inadequate plans. Fortunately, some have good working plans. In short, even the cosmetic action goals are not being met in too many of the courts throughout the country. If this sorry state of affairs is once again treated in the media and considered by Congress, the Judiciary stands to be held up to ridicule and embarrassment throughout the United States.

Result of the Failure to Discipline

The conclusion reached in this case study is that a Judge and/or a court administrator can violate Federal law and commit felonies but will not be disciplined in any way. Likewise, in too many courts, Judges and court staff appear largely to be free to download pornography and NAPSTER music if they choose without detection and with no discipline built into the system of these courts to assure that Federal law is being obeyed.

Chief Justice orders Removal of an Internet Security Gateway from the Ninth Circuit

To say that Chief Justice Rhenquist was angry about the failure of the Conference Executive Committee to carry out his direction to discipline the Ninth Circuit perpetrators coupled with the limited cosmetic action taken by the Judicial Conference along with the failure of the Ninth Circuit to consider complaints would be a gross understatement. The Chief Justice lectured the Executive Committee sternly about their failure to take appropriate action to discipline Judge Kozinski, Greg Walters and the Ninth Circuit Council.

As stated, Chief Justice Rehnquist was highly disturbed about what he perceived to be the complete failure of the Ninth Circuit Council and Chief Judge Schroeder either to take disciplinary action against Judge Kozinski and/or on Circuit Executive Greg Walters. However there was one action that he could take to further express his displeasure and restore some integrity to the system. He ordered me to remove the Internet Gateway security system from San Francisco taking it entirely out of the Ninth Circuit and relocating it in another Circuit. He did this so that neither Judge Kozinski nor Greg Walters nor the Circuit Council could

again sabotage Judicial Branch security equipment and thus endanger the security of the entire Federal Court system. It is now located near Kansas City, Missouri.

Chief Justice Rehnquist further evidenced his continuing acute displeasure caused by the failure of the Ninth Circuit Council or the Executive Committee to take "stern disciplinary action. When Judge Schroeder recommended appointment to the Conference IT Committee of the other Circuit Judge who reputedly accompanied Judge Kozinski, he turned it down flatly. Instead he appointed a District Judge from Idaho whom I recommended.

Judicial Conference Procedures Ignored by Kozinski

Sabotaging the security system was not the only avenue available to Judge Kozinski if he objected to the policy of the Judicial Conference IT Committee seeking to uncover and forestall possible waste, abuse, and violation of Federal law through examining bandwidth use throughout the Judicial Branch. The IT Committee is a creature of the Judicial Conference and responsible to it. Kozinski could have complained to Chief Judge Schroeder who is a member of the Conference by right of office and to the elected District Judge on the Conference from the Ninth Circuit and to ask for a reconsideration of this policy and if necessary ask that it be done on an emergency basis. He also could have lodged a complaint and request for similar action with the Chief Justice who presides over the Judicial Conference and appoints all Conference Committee members including the IT Committee. Likewise he could have gone to Judge Ed Nelson the Chairman of the IT Committee and to the Committee itself seeking such action. The Ninth Circuit has always had a representative Judge who serves on that Committee but there is no record that Kozinski ever complained to that Judge. Thus, instead of going through the accepted Conference channels, which permit expeditious action when necessary, he chose to take the law into his own hands and constitute himself a judicial vigilante. He decided to defy openly both the Conference Committee and the Conference itself presided over by the Chief Justice and preceded to violate Federal Criminal law, which clearly applies to him. Moreover he and Greg Walters violated the

contract made between the Ninth Circuit Executive and the IT Committee in which the Circuit staff agreed to manage the internet security gateway in San Francisco in behalf not only the Ninth Circuit but also the Eighth and Tenth Circuits. Incidentally neither Judge Kozinski nor Judge Schroeder nor Greg Walters consulted with either of the other two Circuits before summarily shutting down the system thus endangering all Judges and court staff in both of those Circuits.

Kozinski "Privacy" Straw Man

Judge Kozinski obviously decided that he could not prevail in the public relations arena if he tried to justify illegally sabotaging the Judiciary's Internet security system in San Francisco solely in order to assure that Judges and court staff could continue to illegally download pornography and NAPSTER music. Therefore, he created a fictitious straw man in an attempt to explain his extraordinary unilateral vigilante action. He falsely claimed both inside the Judiciary and extensively throughout the public media that the bandwidth survey mandated by the IT Committee somehow resulted in Judge's e-mail being read and their individual computers monitored. He did this even though Judge Nelson told him that it wasn't true! No Judge's e-mail was read or monitored in any way nor were their computers monitored. Unfortunately, Kozinski managed to persuade some uninformed media and indeed some of his fellow Judges who did not know the facts that he was the great defender of their privacy. In fact, he was the defender solely of the unfettered ability of all Judges and court employees to illegally download pornography and view it in Federal courts, an objective with which no Federal Judge or Congress would agree.

To my knowledge, the only time individual computers ever were examined to determine if they were being used for illegal purposes was carried out by the Ninth Circuit Council itself in 1998, not by the IT Committee or the AO. The Council discovered that there was a significant amount of abuse in the Ninth Circuit. But there is no record that the Circuit Council disciplined the offenders however.

COMMENT AND QUESTIONS ON THE APPLICATION OF THE PROPOSED NEW RULES TO THE ABOVE FACTUAL SITUATION

1. The conduct described above was not known to members of the Bar or to litigants. It appears therefore from the Committee commentary on Rule 3 that there are only two ways a "complaint" could be filed against Judge Kozinski. One would be by a knowledgeable Federal Judge. The second is that the "complaint" may be "identified" by the Chief Judge. But in the absence of a complaint by another Judge, is the Chief Circuit Judge required to file a complaint? For example, in the above-described situation Chief Judge Schroeder was fully aware of what Judge Kozinski had done but neither she nor any informed Judge filed a complaint. The comment under Rule 3 seems to say that the Chief Judge is not required to file a complaint but "may" file and "often is expected to trigger the process" by "identifying a complaint". Is this a case when a complaint was "expected" to be filed or where one "must" be filed by the Chief Judge?

In the test case, it is theoretically possible that a Ninth Circuit staff member or someone from the AO who were aware of these facts, as indeed many were, could file a complaint against Judge Kozinski. However as a practical matter this likely would not work because of the probable repercussions against such employees. Thus, if the Circuit Chief who, is aware of such misconduct does not elect to identify a complaint, this creates an important loophole in the regulations, which would allow such illegal conduct to go unchallenged. The proposed rules of the Committee ought to consider the possibility of making such action mandatory for the Circuit Chief Judge.

2. If the Circuit Chief Judge is not only aware of possible misconduct or illegal action by another Judge in the Chief's Circuit and may have actually approved or ratified the misconduct or illegality in advance, it is virtually certain that the Chief Judge would not file a complaint. The new Rules as you have proposed them do not appear to deal with this very real possibility. You may wish to

revise the rules to set up an alternate procedure to make sure that a complaint is filed in such circumstances.

3. It does not appear from the existing Rules or the proposed new Rules that there is a statute of limitations that applies to the filing of a complaint of misconduct against a Federal Judge. If that is the case and if the statute has not run, a complaint could still be filed against Judge Kozinski for the illegal action that he took in 2001. Is the Chief Judge required to file a complaint now under the old rules?

4. Under the new Rules, if Rule 5(a) governs and the requirements of Rule 7 and Rule 3(a) too have been met and no complaint has been filed under Rule 6, a Chief Judge "must identify a complaint" and by written orders stating the reasons, begin the review provided in Rule 11. In your Committee's view, is Judge Schroeder obliged to file such a complaint? If so, this probably means that she may be obliged to file one.

5. Rule 29 of your proposed rules provides that the new rules "will become effective 30 days after promulgation by the Judicial Conference of the United States." Thus Judge Schroeder would have to file a complaint, under the new rules but they may not be in effect by November 8, 2007 when she must step down as Chief Judge. If she refuses, who must file a complaint prior to November 8th if anyone?

6. Under current law Judge Alex Kozinski will become the new Circuit Chief Judge on November 8, 2007 succeeding Judge Mary Schroeder. If approved, the new rules will be in effect after Judge Kozinski becomes the Chief Judge. At the time is Chief Judge Kozinski obliged to issue a complaint against himself? I assume the answer is no. I further assume, however, that he would be disqualified under Rule 25. Therefore the new Rules require that the complaint "must be assigned to the Circuit Judge in regular active service who is the most senior in date of commission of those who are not disqualified." If most or all of the members of the current Circuit Council were members of the Council when

Judge Kozinski took his illegal action in 2001, then I assume that the Rules may require each of those individuals to be disqualified particularly if in 2001 they approved Kozinski's illegal action in advance. However Rule 25(G) provides that notwithstanding any other provision of these rules to the contrary, a member of the Judicial Council who is a subject of the complaint may participate in the disposition thereof if the Judicial Council votes that it is necessary and appropriate and in the interest of sound Judicial administration that such subject Judges should be eligible to act. Does this open the door for Judge Kozinski to participate in the Committee handling of his complaint or one filed against him even though he is disqualified as Chief Circuit Judge because he would be the object of the complaint? That section does appear to open the door to him to participate and for any other members of the Council who in 2001 approved his actions in advance, if that occurred.

7. It is clear that the proposed Rules apply only to Federal Judges. They do not therefore cover a Circuit Executive such as Greg Walters who aided and abetted in the committing of a felony according to the facts and the analysis of various lawyers. There is no record that the Circuit Chief Judge or anyone else disciplined him. This clearly is an embarrassment to the Judicial Branch particularly since Walters currently is working on 'detail' for the Administrative Office, which is supervised and directed by the Judicial Conference whose policies and rules he openly defied. This is a notable loophole and your committee may wish to direct an inquiry to the appropriate Judicial Conference Committee, probably Judicial Resources, suggesting that this loophole should be repaired.

In summation: As a result of the illegal action taken by Judge Kozinski, Greg Walters and perhaps one other Ninth Circuit Judge, coupled with the total failure of the Ninth Circuit Council and the Judicial Conference even to consider disciplining for Judge Kozinski under current law and Rules procedures, the Federal Judiciary could be censured by Congress for permitting its laws to be openly flaunted with no response by the Judiciary. Also, it could be justifiably

criticized by the media. This is particularly true and doubly serious because the disabling of the security system obviously took place for one reason and one reason only namely that Judge Kozinski and his allies wanted to make it possible for Federal Judges and court staff to be totally free of detection when or if they download illegal pornography movies and NAPSTER music on Federal Court computers, on Federal Court time, in Federal Court buildings using Federal taxpayer money. Therefore in the interest both of good government and the reputation of the Judicial Branch the new Rules should require Circuit Chiefs and Circuit Councils or suitable alternative Judicial Branch organizations to initiate and consider complaints in this and similar factual situations. Certainly Chief Justice Rehnquist strongly believed that the system must require "stern discipline" in such a situation, discipline that is totally absent thus far and I agree with him fully.

Summary of Central Questions for Your Committee

- Is it mandatory for the Chief Circuit Judge or any other Judge to file a complaint against Judge Kozinski under the old Rules? If not, does your Committee have authority to mandate the filing and consideration of such a complaint?
- Do the proposed Rules require the Ninth Circuit Chief Judge to initiate a complaint against Kozinski that is then considered by the Circuit Council? If not, is it mandatory upon any other Judicial organization such as your Committee to initiate a complaint? If not, your Committee may wish to revise the Proposed Rules to assure that such disciplinary action is taken to restore integrity to the Rules process while at the same time avoiding serious embarrassment to the Judicial Branch for its failure to act.

CC: William R. Burchill Jr., Associate Director and General Council

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