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JUDICIAL CONFERENCE AND COUNCILS  
IN THE SUNSHINE ACT, S. 2045

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HEARING

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2045

Serial No. 96-60

MARCH 7, 1980

Printed for the use of the Committee on the Judiciary



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# JUDICIAL CONFERENCE AND COUNCILS IN THE SUNSHINE ACT, S. 2045

FRIDAY, MARCH 7, 1980

U.S. SENATE,  
SUBCOMMITTEE ON IMPROVEMENTS  
IN JUDICIAL MACHINERY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 6226, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Staff present: Romano Romani, staff director; Michael Altier, counsel; Mark Rubin, staff assistant; Pamela Phillips, chief clerk; and Phyllis Gibbs, secretary.

## OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeConcini. The Subcommittee on Improvements in Judicial Machinery will come to order.

This morning we will be hearing testimony on S. 2045, the Judicial Conference and Councils in the Sunshine Act.

Democracy does not prosper in darkness. In a free and open society, secrecy should be the exception, not the rule. It has been only within the last decade that Congress has opened the doors of the Federal agencies as well as its own to public scrutiny.

At the time these important steps were taken, there were the forecasters of doom who told us that government could not possibly or effectively function without the closed door. Nonetheless, both Congress and the executive branch have appeared to survive this public scrutiny intact, and the integrity of the decisionmaking process has been unaffected. Rather, I believe that the growing openness in government has contributed to a far better understanding within the public and the media of the processes by which policies are formulated. Knowledge can only strengthen the institutions of our government.

The legislation we are discussing this morning seeks to apply some of the lessons we have thus far learned and apply them to the judicial branch of government. At the outset, let me be absolutely clear and unambiguous about one point. The legislation I introduced in no way contemplates opening the process by which judges reach individual decisions—at the trial or appellate court levels—to public inspection. I do not believe that any responsible individuals or groups would advocate such a radical position.

Rather, what I am proposing is that those aspects of the judicial branch that involve policymaking be open to public observation. The

focus of the legislation is on the Judicial Conference and the Judicial Councils. At their respective levels, these two bodies represent the policymaking organizations of the Federal judiciary. Since its establishment in 1922, the Judicial Conference has taken the lead in modernizing and adapting the Federal judiciary to changing conditions. I might add a personal note at this point—that I have the utmost respect for the work they have done and this subcommittee has enjoyed a close working relationship with representatives of the Conference during the last 3 years.

However, the work of the Judicial Conference is not per se judicial; rather, it is more accurately quasi-legislative and quasi-administrative. For example, the Judicial Conference issues position statements on matters of general policy, including legislation pending in Congress; it enacts regulations governing the behavior and conduct of judges; and, most significant, it proposes and makes procedural rules that are binding on the Nation's courts.

The Judicial Councils can, for the sake of convenience, be regarded as miniature versions of the Conference in terms of their overall functions. In other words, they address the general management of the courts within their jurisdiction but do not involve themselves in the substance of specific judicial decisions.

It seems to me that there is no more justification in maintaining a veil of secrecy around the discussions and processes of the Judicial Conference and the Judicial Councils than there is in forbidding the public to witness the give-and-take associated with a House-Senate conference. Indeed, until recently, those conferences were generally held behind closed doors. Today, however, they are conducted in full view of all citizens unless there is some overwhelming need for secrecy, as in the case of classified national security materials.

The point is that when judges are acting in their capacity as members of the Judicial Conference or the Judicial Councils, they are playing a role which is not purely judicial. The decisions they reach in proposing a new rule or changing an old one that affect, for example, class action cases, may have as much ultimate effect on the Nation as an act of Congress. And the issues involved in no way touch the guilt or innocence of specific parties or the outcome of a specific civil case; rather, they are matters of broad policy which affect us all as citizens.

As always, the issue was probably best articulated by former Senator and member of the committee, Sam Ervin. Let me quote him on this point:

They certainly do not act as judges when they vote to approve or disapprove of pending legislation, or adopt rules of financial disclosure for their colleagues. Why, then, should the Conference meet in secret? I believe that when judges act as policymakers and lobbyists, it follows that their discussions should be public. If the Conference supports or opposes a bill, the Congress and the public should have free access to the Conference's debate on that proposal. The Congress should know how carefully the Judicial Conference researches its position so that it can attach relative weights to them.

The essence of our judicial system is the impartiality of judges. Thus, it is important to protect judges from external influences when they act in their judicial capacity. For example, the deliberations of an appellate panel or of the Supreme Court should, in my view, be protected and shielded from the public. Even though these decisions

potentially affect other persons beyond the immediate parties involved, the primary function of our judicial system is to impartially decide individual cases or controversies.

However, the legislation we have before us this morning in no way violates that principle. It is concerned solely with the nonjudicial policymaking and administrative functions of the Conference and the Councils. While it would open those proceedings to the public and the press, it also creates a mechanism by which the meeting can be closed under certain conditions.

While I firmly believe in the concept of the public's right to have access to the deliberations of those who make public policy, I am not necessarily wedded to the specific language of S. 2045. I look forward to hearing the views and suggestions of the distinguished witnesses that have agreed to join us this morning.

Our first witness, the Honorable Collins J. Seitz, chief judge of the Third Circuit Court of Appeals, will provide us with his views on the proposed legislation.

The Honorable Elmo B. Hunter, judge of the U.S. District Court for Western Missouri, will follow and present us with the views of the Judicial Conference. Judge Hunter is chairman of the Judicial Conference's Committee on Court Administration. I might add that the Judicial Conference's position on this legislation was formulated late yesterday afternoon during the course of the Conference's biannual meeting.

Following Judge Hunter, we will hear from Charles Halpern and Diana Tanaka of the Institute for Public Representation.

We are also looking forward to hearing from a panel of two prominent members of both the press and the broadcast media. Jim Mann, reporter for the Los Angeles Times, and Fred Graham, law correspondent for CBS News, will give us insight into the effects of sunshine legislation on the media.

Our final witness today will be Douglas Q. Wickham, professor of law at the University of Tennessee.

Before we begin, if there is no objection, I would like to have placed in the record a comprehensive analysis regarding the constitutional issues that would be raised relating to S. 2045. The analysis, which was initiated at the request of the committee staff, was prepared by Mr. Johnny H. Killian, specialist in American public law of the Library of Congress. Mr. Killian's paper develop a well-reasoned argument in favor of the constitutionality of the bill.

[Mr. Killian's analysis referred to above appears in the appendix:]

The hearing record will remain open until close of business on March 21, 1980. A copy of S. 2045, the proposed Judicial Conference and Councils in the Sunshine Act will appear in the appendix to these hearings.

Our first witness, the Honorable Collins J. Seitz, chief judge, U.S. Court of Appeals for the Third Circuit.

We appreciate your taking time from your busy schedule to join us in these hearings.

If you will please highlight your statement, it will appear in the record in full following your oral testimony.

STATEMENT OF HON. COLLINS J. SEITZ, CHIEF JUDGE, U.S.  
COURT OF APPEALS FOR THE THIRD CIRCUIT, WILMINGTON,  
DEL.

Judge SEITZ. Thank you, Mr. Chairman.

Let me commence by saying that I have had a losing bout with the bug for about 2 weeks which prevented my filing a statement in advance. I think you might have some sympathy for that position, Mr. Chairman.

Senator DECONCINI. I certainly understand.

Judge SEITZ. I just brought along about 10 copies of what I intend to say, which will not be too long. However, I have not had the time to analyze the matter in detail.

I am Collins J. Seitz, chief judge of the U.S. Court of Appeals for the Third Circuit. That circuit consists of the States of Delaware, New Jersey, Pennsylvania, and the territory of the Virgin Islands.

There are 50 district judges and 10 active circuit judges and the court meets in Philadelphia except for two sessions a year in the Virgin Islands.

I am from Wilmington, Del., and before coming to the court of appeals in 1966, I served as a State trial judge for over 20 years. I also served for a time on the Delaware Supreme Court.

I am happy to be here at the invitation of the Subcommittee on Improvements in Judicial Machinery to speak in support of the substance of S. 2045, known as the Judicial Conference and Councils in the Sunshine Act.

First off, since both the Judicial Conference of the United States and the Judicial Councils are creations of Congress, the Congress certainly has the power within constitutional limitations to tailor their operations to reflect the congressional will.

Next, I stress that this bill deals exclusively with the administrative operations of Federal courts. I cannot overemphasize that it is not designed to encroach in any way on the process of deciding cases. I know this subcommittee would be as vigilant as the judiciary to avoid the slightest impingement on the decisionmaking process itself.

Denial of reasonable public access to the functions of public institutions, without purpose, breeds suspicion that some of its business cannot withstand public scrutiny. In consequence, respect for such institutions is lowered and their credibility lessened.

It is important then, in this period of lessening public respect for our public institutions, that we in responsible positions convey a reasonable sense of openness in the discharge of our responsibilities, that we let the sunshine in.

Indeed, it is in the interest of the judiciary in discharging its administrative and policy roles that the public be made aware of the depth and the scope of the work done and the care given to the administrative process in the Federal courts. Thus, rather than viewing S. 2045 in the negative, I view it as a vehicle to enhance the public image of the Federal court system, both nationally and at the circuit level.

What are the principal objections to sunshine legislation with respect to the Conference and Council proceedings? It seems to me that there may be three: First, a fear that public pressure might chill discussion or impede decisions; second, some delicate, for example, per-

sonnel, matters should not be public; and third, that implementing procedures are much too elaborate.

I will speak on the basis of my 9 years experience as a member of the Judicial Conference of the United States and almost 14 years on a circuit council, for almost 9 of which I have served as the chairman. Both at the Conference and Council levels, consideration is given to elaborate committee reports and recommendations.

In my experience the agendas of the Conference and our Council are primarily concerned with the "nuts and bolts" of judicial administration. We consider, for example, as we did in the last 2 days, changes in the rules of court, the need for more judicial and supporting personnel, the operation of the jury system, the impact of proposed legislation and so on.

A public presence during the discussion of nearly all agenda items would in no way, in my view, chill discussion or otherwise impede a determination of the merits of any committee recommendation. On the contrary, as I have indicated, the proceedings would demonstrate the care and consideration given to the business and policy ends of our Federal courts.

To assure that untrammelled discussion is fully guaranteed, I would suggest that the subcommittee might want to add to S. 2045 a provision that no member of the Conference or Council and no one officially participating in the proceedings may be sued officially or privately in any forum on account of anything said or written or action taken except as otherwise Congress might want to provide.

What other objection can be raised to open administrative meetings? I believe there is a concern that delicate matters involving personnel conduct may arise which should not be a matter of public consumption. Problems of drinking and examples of that sort are those which come to mind.

I fully understand this concern, but I believe it is adequately met in the proposed bill. If there is any doubt about it, I would heartily support additional language which would make perfectly clear that such subjects may be considered in executive session. But I emphasize that in my experience such subject matter is infinitesimal in comparison with the total time spent in any Conference or Council meeting.

Next, are the implementing procedures of the bill much too elaborate? I think so. For example, in my experience, many Council matters are handled by mail or conference call because of time or other constraints. They are later ratified. The filling of a magistrate vacancy would be an example which happened in our circuit the other day. I think it would be most undesirable to cast a doubt on the validity of this practice. The bill may well breed unnecessary litigation because of its highly structured procedural requirements.

It seems to me that it reflects a fundamental concern that the Conference and the Councils would evade the spirit of the legislation. I am not prepared to make that assumption. If the subcommittee desires I will be happy at a later time to submit my suggestions for simplification of the procedure.

I do not support the principle of S. 2045 merely because I believe it is part of the wave of the future, though trends are not necessarily unimportant. I support S. 2045 because I think it will further strengthen the Federal judicial system by defusing the inevitable public dis-

trust generated by apparent lack of access to its basic administrative proceedings. Affirmatively, its observance will demonstrate the care and consideration which go into the process of administering the courts in the public interest.

Anything that generates increased respect for any branch of our Government is in the interest of all who are concerned about the importance of enhancing respect for government generally. The thrust of Senate bill 2045, in my view, furthers that objective.

As an addendum I would say that I would be happy to have the staff attend a third circuit council meeting at any time to see how we operate. I would be happy to answer any questions you might have, Mr. Chairman.

Senator DECONCINI. Judge, we are most appreciative of your constructive suggestions. Indeed, I think you make some that we must include, especially as they relate to personnel matters, and consideration of some kind of immunity so that judges are not inhibited from speaking. I am glad you brought those matters to our attention.

Your kind offer to give us further suggestions is gratefully accepted. If your time permits so that you can correspond with us or communicate with us in some manner—

Judge SEITZ. I would be happy to do that as soon as I finish getting this bug out of my system.

Senator DECONCINI. I hope you have better success than I have had.

The subcommittee has been provided with comments suggesting that S. 2045 not apply to the Judicial Councils of the circuits. The concerns which are expressed are several.

One, that most matters discussed and acted upon are not quasi-legislative but rather mundane and trivial; second, that informally acting upon these matters is more effective; and, third, if formal meetings were required it would not benefit anyone.

Based on your experience, how would you react to these concerns?

Judge SEITZ. I will say that most of the business considered by circuit councils is mundane. I cannot imagine a reporter who would come in and stay more than a few seconds, based on my experience.

I think the thing about it is that the availability of access is almost as important as the fact of access to these meetings. I cannot conceive of anybody really being interested, but I do think it is important that the Circuit Council not be circumscribed so they cannot handle a lot of mundane work by informal meeting, as we frequently do when we have by Conference calls or by electronic mail which we have available to us, so that if we need an emergency action on a certain matter we can get it immediately. We then ratify it at the next meeting of the Council.

I would have to say that it is obvious that the Council work is much less important than the Conference work in terms of policy as opposed to the "nuts and bolts" of judicial administration.

Senator DECONCINI. Thank you, Judge.

Mr. Altier?

Mr. ALTIER. I know you have a conflict at 9 or 9:30, so I will ask only one question. If we have further questions we shall forward them to you.

Several interested parties, one of whom is testifying later this morning, have suggested that S. 2045 be expanded to include notice and comment provisions as well as provisions for access to relevant docu-

ments of the Judicial Conference and of the Circuit Judicial Councils. These provisions are felt necessary if the Conference and the Council are to conduct their policymaking functions in accordance with democratic principles.

What are your comments with regard to this proposed expansion to the legislation which we have before us today?

Judge SEITZ. Sitting here at this moment I cannot imagine the dimensions of that in terms of the subject matter of a typical Council meeting. That is first off. I cannot visualize how it would apply to 99 percent of the business of a Council meeting.

Mr. ALTIER. How about the Judicial Conference level?

Judge SEITZ. At that level?

Mr. ALTIER. Giving notice and opportunity to comment on various subjects and also the possibility of releasing certain documents to the public regarding the subject matter on the various agendas. It really goes beyond sunshine.

Judge SEITZ. Yes. I am not prepared to take a position on something such as that. I think that would materially change the way the Judicial Conference operates with that procedure. Of course, I have been talking about access to see how the proceedings go, but this would be participation in the proceedings.

Mr. ALTIER. This would go beyond that; is that correct?

Judge SEITZ. I am not prepared to say how I would react to that today. I would like to think about that.

Mr. ALTIER. Very well, Judge.

Thank you very much.

Judge SEITZ. Thank you, Mr. Chairman.

Senator DECONCINI. Judge, we thank you for your time.

Judge SEITZ. My pleasure.

[The prepared statement of Chief Judge Seitz follows:]

PREPARED STATEMENT OF HON. COLLINS J. SEITZ

I am Collins J. Seitz, Chief Judge of the U.S. Court of Appeals for the Third Circuit. That circuit consists of the States of Delaware, New Jersey, and Pennsylvania and the Territory of the Virgin Islands.

There are 50 district judges and 10 active circuit judges and the court meets in Philadelphia except for two sessions a year in the Virgin Islands.

I am from Wilmington, Del., and before coming to the court of appeals in 1966, I served as a State trial judge for over 20 years. I also served for time on the Delaware Supreme Court.

I am happy to be here at the invitation of the Subcommittee on Improvements in Judicial Machinery to speak in support of the substance of S. 2045. I stress that I am expressing only my own views.

I have been intensely interested in judicial administration and the public perception of the courts for all of my 34 years on the bench. As a State judge I helped initiate the creation of the Delaware Court on the Judiciary which examines claims of judicial misconduct. I have therefore fully supported the pending legislation to create a more adequate mechanism to review charges of judicial aberrations within the Federal courts.

I am therefore most happy to appear today to speak in support of the fundamental objective of Senate bill 2045, known as the "Judicial Conference and Councils in the Sunshine Act."

First off, since both the Judicial Conference of the United States and the Judicial Councils are creations of Congress, the Congress certainly has the power within constitutional limitations to tailor their operations to reflect the congressional will.

Next, I stress that this bill deals exclusively with the administrative operations of Federal courts. I cannot overemphasize that it is not designed to encroach in any way on the process of deciding cases. I know this subcommittee would be

as vigilant as the judiciary to avoid the slightest impingement on the decision-making process itself.

Denial of reasonable public access to the functions of public institutions, without purpose, breeds suspicion that some of its business cannot withstand public scrutiny. In consequence, respect for such institutions is lowered and their credibility lessened.

It is important then, in this period of lessening public respect for our public institutions, that we in responsible positions convey a reasonable sense of openness in the discharge of our responsibilities, that we let the sunshine in.

Indeed, it is in the interest of the judiciary in discharging its administrative and policy roles that the public be made aware of the depth and the scope of the work done and the care given to the administrative process in the Federal courts. Thus, rather than viewing S. 2045 in the negative, I view it as a vehicle to enhance the public image of the Federal court system, both nationally and at the circuit level.

What are the principal objections to sunshine legislation with respect to the Conference and Council proceedings? It seems to me that there may be three: First, a fear that public pressure might chill discussion or impede decisions; second, some delicate, for example, personnel, matters should not be public; and third, that implementing procedures are much too elaborate.

I will speak on the basis of my 9 years experience as a member of the Judicial Conference of the United States and almost 14 years on a circuit council, for almost 9 of which I have served as the chairman. Both at the Conference and Council levels, consideration is given to elaborate committee reports and recommendations.

In my experience the agendas of the Conference and our Council are primarily concerned with the nuts and bolts of judicial administration. We consider, for example, as we did in the last 2 days, changes in the rules of court, the need for more judicial and supporting personnel, the operation of the jury system, the impact of proposed legislation and so on.

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To assure that untrammelled discussion is fully guaranteed, I would suggest that the subcommittee might want to add to S. 2045 a provision that no member of the Conference or Council and no one officially participating in the proceedings may be sued officially or privately in any forum on account of anything said or written or action taken except as otherwise Congress might want to provide.

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It seems to me that it reflects a fundamental concern that the Conference and the Councils would evade the spirit of the legislation. I am not prepared to make that assumption. If the subcommittee desires I will be happy at a later time to submit my suggestions for simplification of the procedure.

I do not support the principle of S. 2045 merely because I believe it is part of the wave of the future, though trends are not necessarily unimportant. I support S. 2045 because I think it will further strengthen the Federal judicial system by defusing the inevitable public distrust generated by apparent lack of access to its basic administrative proceedings. Affirmatively, its observance will demonstrate the care and consideration which go into the process of administering the courts in the public interest.

Anything that generates increased respect for any branch of our Government is in the interest of all who are concerned about the importance of enhancing respect for Government generally. The thrust of Senate bill 2045, in my view, furthers that objective.

Senator DeCONCINI. The next witness will be Judge Elmo Hunter. We are very pleased to have you, Judge Hunter. As usual you are very kind to assist us on matters regarding the Federal judiciary.

Your statement will be received and it will appear in the record with attachments in full following your oral testimony.

If you would highlight it for us.

**STATEMENT OF HON. ELMO B. HUNTER, CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES, AND JUDGE, U.S. DISTRICT COURT FOR WESTERN MISSOURI, KANSAS CITY, MO.**

Judge HUNTER. Thank you, Mr. Chairman.

Again I have the pleasure of appearing before you in response to your request for the views of the Judicial Conference of the United States on a legislative proposal pending before you which directly affects the Federal judiciary.

I appear today in the same capacity as in my former appearances; that is, as Chairman of the Judicial Conference's Committee on Court Administration.

Also I appear in response to your invitation and at the direction of the Conference.

First, I want to convey to you the Conference's and my appreciation for this opportunity to appear here today. I assure you that the Conference and I are most grateful for the dedication and the time that you and the subcommittee devote to the improvement of justice.

We know that you are capable and dedicated servants of the public, ever striving to improve the quality of justice and to assist the judiciary with its problems. We desire to cooperate with you in that process.

Second, I ask you take note of the fact, as you have already, that the Judicial Conference only yesterday afternoon completed its consideration of the bill before you, and my prepared statement is only now available for filing, with your consent. I believe it was delivered late last evening, and I ask now for permission to have it filed.

Senator DeCONCINI. Without objection, it will appear in the record in full.

Judge HUNTER. Thank you, sir.

In other appearances I have related my experience and positions with the Committee on Court Administration covering some 11-plus years that I have served on that committee and on one or more of its subcommittees.

In January of 1978 I became Chairman of the Committee on Court Administration. This prior experience has given me excellent opportunity to become thoroughly familiar with that committee's working structure, including that of its subcommittees whose meetings I often attend.

My regular attendance at meetings of the Judicial Conference of the United States gives me considerable acquaintance with its operat-

ing procedures, and to some extent I am familiar with the functions of the circuit council of my own circuit, the eighth, although I am not a member of it.

I impose on you to restate my experience only because it becomes so very relevant to any discussion of the bill now before you, S. 2045.

In requesting the views of the Judicial Conference this subcommittee mentioned two things in particular for comment; first, the purpose; second, the provisions of S. 2045.

Mr. Chairman, you have stated the purpose of this legislation to be that, and I undertake to quote you:

That open meetings of the Judicial Conference and the circuit councils and the committees and subcommittees will in no way hinder proper functioning of those bodies. They will instead foster greater public understanding of and respect for the institutions and the men and women who conduct the affairs of government.

Mr. Chairman, S. 2045 does not accomplish that stated purpose, and in the short time that I am permitted I will undertake to show why S. 2045 does greatly hinder the proper function of these judicial bodies and is counterproductive to providing a balanced public understanding of and a respect for the Federal courts and their management of the internal affairs of the judiciary.

Before I undertake this, I state to you that the Judicial Conference of the United States recommends against the enactment of S. 2045. Its reasons for that recommendation will become more apparent as I discuss the bill and as you have opportunity to read the prepared statement which was filed late last evening.

Mr. Chairman, the basic reason for a Federal judiciary and for Federal judges is for the purpose of having them try and decide cases. That is their primary function. And administration is incidental to that primary function.

Looking to that primary or fundamental function, the trials conducted by the judge are public. If it is a case tried to the court, not only is the trial public but at the close of the trial a judge using the customary tools for deciding legal matters reaches a decision which is publicly disclosed, ordinarily published, and as part of that decision writes an opinion in which he sets out his findings and the reasons which support his judgment.

That opinion, including those written findings and written reasons, are public.

Jury trials are also public trials. The court's instructions to the jury are publicly given. The jury deliberations, of course, are private. However, the jury's verdict is public.

Other than the deliberations of the jury and the research and writing of decisions and trials to the court, the entire matter is a public matter. Of course, the research and writing of decisions by the judge is a process which simply does not lend itself to the public or political process, just as jury deliberations do not lend themselves to public observation. The aggrieved party has the right of appeal, and upon the exercise of that right the case reaches the appellate court where it is docketed and set for public argument to be made to the court by the attorneys. Briefs are filed by the attorneys in support of their arguments, and these briefs are also open and available to the public.

The deliberation of the judges in reaching decisions is not public, and, as you have commented earlier, I do not know of anyone who contends that that part of the judicial process should be public.

However, the decision reached and the reasons therefore are carefully articulated in writing and are published publicly.

A careful consideration of the court's primary function, the trial and disposition of cases, should convince that it is truly a public process and that it is inaccurate to say that with regard to the primary function and the primary activities of courts that they act in secret or secretly.

Turning to the incidental work of the courts, the administration of their internal affairs, including ordinary housekeeping matters and the establishment of administrative guidelines—it is there that S. 2045 by its terms is intended to apply.

Mr. Chairman, I have been directed by the Judicial Conference to make known to you that there is deep concern that regulation of the court's right to administer its own administrative affairs may call for serious consideration of possible violation of the separation of powers doctrine. I note that you have already undertaken to secure legal advice on that question.

Aside and beyond that consideration remains the question of whether S. 2045 and its provisions hinder the ability of the judiciary to carry out its proper function. To answer that question it is necessary to have an understanding of the way the Judicial Conference of the United States and its committees and subcommittees operate.

It is also necessary to have an understanding of the operation of each of the 11 circuit councils and how each of them operates, because each operates somewhat differently from the others.

For example, the Circuit Council of the First Circuit, a very small circuit, operates quite differently from the Circuit Council of the Fifth and Ninth Circuits which are very large.

In this short statement I will try to give you a brief overview of the operations of the Judicial Conference and its committees and subcommittees. I hope that in your consideration of S. 2045 you will invite the chief judges of each of the 11 circuits to appear before you and discuss with you what the effect of S. 2045 will be as applied to their particular circuit.

With the exception of one chief judge, one whom you have invited and heard this morning, all of the other chief judges have expressed the view that S. 2045 will substantially hinder and cripple the ability of their particular circuit council to carry out its legitimate function.

I might also say that all of the other judges who attended the Judicial Conference are of the same view.

The Judicial Conference of the United States operates with the assistance of many committees. A list of them has been filed with you. These many committees often have subcommittees. The Committee on Court Administration presently has five subcommittees and at least one ad hoc committee.

All in all, the committees and subcommittees of the Judicial Conference engage in more than 50 meetings a year, and membership is widely scattered over the United States. They are not located in any one place.

Generally speaking, the procedures of the Judicial Conference and its committees and subcommittees are highly flexible and somewhat informal. There is consistent use of the telephone and of the mail to exchange ideas and information regarding matters within the internal administration of the system. This flexibility has proven throughout the years of use to be necessary and sound. We have an example before us today.

Let us start with the request by the chairman of the Subcommittee to the Judicial Conference for an evaluation and recommendation concerning S. 2045. That request was in turn referred to the Court Administration Committee which immediately assigned it to the Subcommittee on Judicial Improvements. Copies of the bill, together with the request, were distributed to the members of the subcommittee.

The Administrative Office was tasked with providing some background research and discussion of the bill. Each judge on the subcommittee on his own was to study in depth the impact and consequences of the bill.

In this process there was considerable exchange among the subcommittee members themselves and with the Administrative Office. This exchange occurred by telephone and through the use of the mails as well as an occasional exchange between one or more of the judges who happened to be at a meeting together on some other matter.

All of this input and the exchange was on a completely informal basis. As the time approached for the regular meeting of the subcommittee, and it meets twice a year, the topic was put on the agenda for that meeting. At that meeting the five members of the subcommittee studied the material provided by the Administrative Office, exchanged material and data which they had produced during their own research, and on an informal basis thoroughly and frankly talked out the subject.

In accordance with the subcommittee's function of being a research and recommending body, the subcommittee determined upon a recommendation to be made by it to the parent Committee on Court Administration. That recommendation and material upon which it was based in somewhat consolidated form was forwarded to all of the members of the Committee on Court Administration for its study and appropriate action.

The Committee on Court Administration, members, of course, were free on an informal basis, again primarily through the use of telephone and mail, to exchange views and to obtain additional research as desired.

At the time of the meeting of the Committee on Court Administration, S. 2045 was on the docket for that meeting and the matter was presented to the parent committee by the chairman of the subcommittee who is a member of the parent committee.

The discussion which followed was totally informal and all members frankly and openly stated their views and reactions.

At the close of the discussion the court administration meeting, which also is simply a research and recommending body to serve the Judicial Conference, arrived at its conclusions and determined what report and recommendations it would make to the Judicial Conference.

In regular course that recommendation, with the material considered, by again in somewhat abbreviated form, was forwarded to each and every member of the Judicial Conference of the United States.

The Judicial Conference at its regular meeting, and it also meets twice yearly, when it reached that subject as part of its large agenda, considered a report and recommendation of the Committee on Court Administration and discussed it fully and frankly with the other members present.

The input included an exchange of experience among the members of the Judicial Conference as it might relate to provisions of S. 2045. It was in that exchange that it developed, as I said, that all but the judge who testified here earlier today were of the opinion that S. 2045 would cripple their ability to have their particular judicial council carry out its proper functions.

The input included not only this exchange of merits among the members as it might relate to provisions of S. 2045. It included, also, the experience of the others who were present. It immediately became apparent to the Judicial Conference that S. 2045 should not be approved by the Conference.

Keeping in mind that the Judicial Conference was simply responding to a request from this subcommittee of the Congress for an evaluation of the bill, S. 2045, it is inaccurate to say that the process that I have described is really a secret one. Quite the contrary, at least 45 or more judges participated directly in that evaluation. Additional people in substantial numbers also were involved, such as certain of the personnel from the Administrative Office, and many other judges who were contacted by the subcommittee members or by the Committee on Court Administration, or by the Judicial Conference itself for advice and for discussion.

The conclusion reached by the Judicial Conference and its requested report to the Congress are part of the official minutes of the Judicial Conference. In due turn, as required, they will be published in the official manual report of the Judicial Conference which is widely circulated and available to the Congress as well as to the possibly interested public.

Additionally, at the request of this subcommittee I appear today to advise you in more detail of the actions of the Judicial Conference and to answer questions on the subject which may be asked by members of this subcommittee. Again I say, this is far from a secret process.

The action taken by the Judicial Conference is subject to the careful oversight of Congress through such means as are now being used by this subcommittee in this hearing. While the Judicial Conference itself is open to nonmembers only by invitation, the invitational process is used to obtain the attendance of those who on an objective basis can provide direct and needed assistance to the particular subcommittee, committee, or to the Judicial Conference itself.

We have had present at our subcommittee meetings, our Court Administration Committee meetings, and the Judicial Conference meetings themselves, as well as the meetings of other numerous committees as listed in the document which you have which shows all of the committees and subcommittees of the Conference, scholars, lawyers, legislators, and legislative staff.

I do not wish to be misunderstood. We do not say that this is widely done, but we do say that the invitation process is used where in the sound wisdom of the particular judicial entity it is believed to be of direct or substantial help to that particular entity and its work at hand.

Also to be stressed is the fact that the Judicial Conference itself has no legislative authority as we generally understand that term, and when it makes a recommendation to Congress, Congress, of course, is free to evaluate that recommendation and to totally disregard it if it wishes to do so.

Therefore, Mr. Chairman, I again say that it is not accurate to say that the Federal courts are not publicly accountable through these processes that I have described and through oversight processes of the Congress. The Judicial Conference has always responded to the requests of Congress, just as I am responding on its behalf here today.

Now with regard to the housekeeping types of matters which make up the great bulk of the items which are handled by the Judicial Conference of the United States and the various circuit councils, committees, and subcommittee, it is the opinion of those judicial entities that it would serve no useful purpose to conduct the open, highly formalized type of meeting and procedures mandated by S. 2045. Where help is needed it is obtained through the Administrative Office, the Federal Judicial Center, the expertise of the various members of the various committees, and through appropriate use of the invitational process.

The Judicial Conference and the Judicial Councils, in occasionally making policy-type decisions in administering their internal affairs, are not legislating in the true sense. Its need for flexibility and for frank discussion of sensitive matters is as real as the need of the President when he consults with his Cabinet, or of the Congress when it holds its party caucuses.

The Judicial Conference of the United States is the highest administrative body of the third branch of Government. Its ability to handle its sensitive internal matters should not be impaired by requiring compliance with the provisions of S. 2045.

I turn again more specifically to some of those provisions. Some of those provisions simply are not tailored to the judiciary, and they do seriously hinder and greatly impair the function of the Judicial Conference or circuit councils and its committees and subcommittees. First is the requirement that with two narrow exceptions all meetings of the Judicial Conference, circuit councils, committees, and subcommittees are prohibited from the joint conduct or disposition of business of the judiciary entity other than in accordance with S. 2045. It is mandated that every portion of every meeting of each judicial entity shall be open to public observation.

This raises with us many questions, Mr. Chairman. Does public observation include the use of cameras, television, the right to speak out at the meetings and participate in them, that type of thing?

Other provisions make it clear that these judicial entities are prohibited from conducting business through the use of the mails or telephone, although that has been an accepted and time-honored practice, particularly in the larger circuits such as the ninth which runs from Alaska to old Mexico.

The old flexibility used is prohibited or chilled. The members simply are not free as they are now to engage in the informal and completely frank exchange and discussions needed to dispose of the business at hand. Every meeting, no matter how large or small, no matter what its agenda, is required to be either electronically recorded or

stenographically reported as to everything said and done by any and all present.

Anyone, for a small charge, can cause the particular judicial entity to provide them with a transcript of the meeting from the electronic recording or the stenographic notes. No longer will the careful minutes of meetings which we now engage in be acceptable.

The notice requirements contained in S. 2045 make it extremely difficult, and in some cases impossible as a practical matter, for the particular judicial entity to comply with them. Each judicial entity is required to publicly announce at least 1 week before the meeting the time, place, and subject matter of each meeting, whether it is to be open or closed to the public, and the name or phone number of the official designated to respond with regard to requests about the meeting. Such announcements shall be made unless a majority of the members determine by recorded vote that business requires that such meetings be called at an earlier date, in which case the judicial entity shall make public announcement of the time, place, and subject matter of such meetings, whether open or closed to the public, at the earliest practicable time.

Does this mean that we must have a meeting with everyone present in order to change the date of a meeting? It is a serious question.

Other sections of the bill require that the agenda for the meeting receive the same type of treatment. Apparently the agenda cannot be enlarged, decreased, modified, or changed in any respect without going through the same type of highly formalized procedure and publication; that is, without calling a meeting of the committee for the purpose of taking up that matter and going through the rigid attendance, voting, and announcement requirements.

The requirements which apply to the agenda and the notice of the meetings place a hindrance on the judicial entity and its ability to meet emergencies, to make needed last-minute changes, or to take many other necessary actions.

Not only must there be a public announcement of the time, place, and subject matter of the meeting, but that announcement, together with the name and telephone number of the official designated to respond to requests for information about the meeting, must be submitted for publication in the Federal Register. These are all strange and new procedures to the Judicial Conference, the circuit councils, and the subcommittees.

This entire procedure, totally foreign to the present methods of procedure of these judicial entities, obviously is going to slow them up and give them problems in carrying out their functions.

The present methods developed over a period of time by the judges are time tested, are the results of the careful thinking of many capable judges who have become experienced in such matters and these procedures are working reasonably well. We do not wish to exchange them for a more bureaucratic type of procedure, highly formalized, apparently unnecessary, which will cause waste of time and needless expense.

In saying that we make no claim, Mr. Chairman, that the present procedures work perfectly because we are well aware that nothing in life is perfect. However, they do work with reasonable satisfaction. In exchange for that time-tested flexible procedure which is working, S. 2045 mandates a procedure which takes away needed flexibility,

creates unneeded formalization, tends to chill open and frank-discussions, promotes unnecessary bureaucratization, causes unnecessary losses of time and money, and substitutes a new system untried by the judiciary.

Mr. Chairman, S. 2045 in many respects appears to have been lifted from the Government in the Sunshine Act, which many refer to as GISA, without a careful consideration as to whether it can be appropriately applied to an entirely different branch of government with an entirely different function to perform. It is noteworthy that GISA was never intended to be applied to the judiciary and does not apply to the legislative branch. There is no statutory sunshine act which applies to the legislative branch, as I understand it.

True, through the rulemaking process and by consent, the legislative branch has taken on voluntarily procedures tailored to apply appropriately to that branch and its functions in Government. GISA has 10 or more exceptions in its requirement for open meetings in the executive branch.

I am not familiar with the exceptions which the legislative branch places on itself, but certainly in the lifting process of GISA to S. 2045 there has not been adequate consideration of the need for additional exemptions beyond those now permitted in S. 2045.

Another quick example of the results of endeavoring to lift provisions which apply to one branch of government and make them apply to an entirely different branch of government with different functions. Under S. 2045, the particular judicial entity involved must make the decision as to whether or not the particular subject matter on its agenda comes within either of the two narrow exceptions to the requirement that meetings be open to public observation. Those decisions are not easy to make because many of the subjects addressed by the particular judicial entity are a necessary mixture of housekeeping or administrative matters combined with discussions and considerations of the law and decisions which might bear on that subject matter.

We note that judges should never be forced to discuss their legal decisions in public. Aside from that, any person, according to S. 2045, who wishes to do so may bring a proceeding in a U.S. District Court of the District of Columbia or in the district in which the meeting is held or in which the judicial entity in question has its headquarters to test the decision of that judicial entity as to whether or not it may hold a meeting not open to public observation.

When such an action is brought, contrary to the usual burden of proof, under S. 2045 the burden is on the defendant, that is, the judicial entity, to sustain its action.

If the judicial entity has come to the wrong conclusion in the judgment of the district court judge, even though the judicial entity has acted in total good faith, costs may be assessed against it and other appropriate action apparently may be taken to prevent the closing of the meeting or to enjoin the defendant for failure to comply with S. 2045.

Now let's test this. Let us assume that the fifth circuit meeting in New Orleans determines that when a particular subject is reached on its agenda it has the right to exercise the closed meeting procedure under one of the two exceptions to the open meeting procedure contained in S. 2045.

Someone who may have had no particular interest in the subject matter at all brings a suit in the U.S. District Court in New Orleans, and the single judge who handles that suit decides that although the question is a close one, the fifth circuit has simply made a mistake in its judgment that it need not open that meeting.

What then occurs? That single judge may subject the fifth circuit council to the injunctive process. S. 2045 does not provide any appeal from that single judge decision.

Mr. Chairman, this is the only instance that I have been able to think of in the 28 years I have been on the bench where a single Federal district court judge can in effect reverse a determination of his judicial council, consisting in this example of 26 Federal appellate court judges.

Even if we assume, and certainly the act does not appear to provide it, that there is an implied right to appeal, the district court judge's decision that is appealed would go to the Fifth Circuit Court of Appeals, and the judges who are also the ones who comprise the Judicial Council, surely would have to recuse themselves because they were the named defendants below.

Mr. Chairman, in the time permitted I simply have been able to address several of the problems presented by S. 2045. Many of them are addressed in the prepared statement which I filed today with your consent.

Obviously, S. 2045 is a bill which needs a great deal of further study and consideration. I invite you to, and I hope that you will, take up the suggestion of having each and every chief judge of the 11 circuits appear before this subcommittee and tell you why S. 2045, as applied to their councils' operations, will hinder the proper function of those bodies and will not lead to a greater public understanding and respect for the institutions and the men and women who conduct the affairs of government.

Finally, Mr. Chairman, I hope that you and this subcommittee will understand that the Judicial Conference of the United States is not against the better understanding of the courts and their operations but it does strongly believe that S. 2045 and its provisions do not accomplish nor aid the accomplishment of that objective. That is why the Judicial Conference of the United States has instructed me to appear here today to tell you why it opposes the enactment of S. 2045.

Mr. Chairman, I hesitate to tell you, but I feel I must. Under the pressure of having to prepare for this meeting in the short time after the close of the Judicial Conference yesterday afternoon, I, too, have left a number of matters unattended which need attention, so I will ask permission when you have completed your questions to be excused so that I may return to do those things.

Also, if you have questions which I cannot readily answer here, and that certainly can easily occur, I would invite you, if you would, to submit them to me in writing so that I may respond in writing. The Judicial Conference wishes to meet every question you wish us to meet.

Senator DECONCINI. I can appreciate your time constraints and your suggestions. One of your suggestions, that we hold hearings and have each and every chief judge of the Judicial Conference appear, is a little bit beyond our capability. However, based on that suggestion we will contact each chief judge and ask them to submit material in

addition to what you have submitted in behalf of the Judicial Conference for inclusion here.

You mentioned a number of specifics, Judge. I honor and respect your ability and your experience with the Conference. Indeed, I think the legislation before us must take into account, if we proceed with the legislation, some of the overkill or overscrutinizing of notices and the technical means as to how they are to be noticed and preserved.

From the standpoint of coming to grips with the public image which I perceive needs to be enhanced for the Federal judiciary, let me give you an example. In the 95th Congress, when a constitutional amendment came before the full Judiciary Committee which would have provided for election of district judges and the election of appellate court judges for 8-year terms, that constitutional amendment failed in the Judiciary Committee—I voted against it—by a vote of 9 to 7. I was quite shocked that there was that feeling within the Senate Judiciary Committee that there is an unresponsive image, at least to the public, of the Federal judiciary.

In my observation, the court system is like any other branch of government. It cannot ignore what the public perceives it to be. Obviously it cannot just respond to public whims, but in light of that vote, in light of what appears to be a declining image which the court has, along with the other institutions of government, what do you think can be done in lieu of S. 2045 to help build that image and confidence so that the people of this great country will feel more confident about the Federal judiciary?

Judge HUNTER. Senator, I must make a rather full answer to that because obviously it is a serious question and a current question.

The Judicial Conference has not given me any guidance as to what I should say in response to that question because it was not asked of us. However, let me say this:

The judiciary has as its primary function the trial and disposition of cases. It is in that aspect—not in these minor housekeeping matters—that it must stand before the public.

I am sure you appreciate, indeed your vote on that constitutional amendment indicates, that you recognize that the task of the judiciary in deciding cases is a very difficult task. Indeed, it must decide a case, perhaps on constitutional grounds, against the Congress; indeed, it is called upon to do so if the Constitution mandates. It must decide a case against the President or the executive branch of government. Indeed, if the Constitution mandates, it must decide a case perhaps against the press or against other friends. It is a difficult and a very sensitive duty which has been cast on the judiciary by our forefathers in setting up the Constitution with its three branches of government.

Now, it is in that decisional process, deciding and ruling cases, where the judiciary is experiencing its public concern problems.

When it applies the fifth amendment of the U.S. Constitution in such a way that a defendant who otherwise appears guilty walks free from the courtroom, there is great public concern and misunderstanding. That is the kind of thing—when the Speedy Trial Act comes on and someone is turned free because of the technical constraints of that act which cannot be met, and hopefully that will never occur—that will cause great public concern and misunderstanding. The public is not really concerned in any substantial degree with the housekeeping matters and the internal management matters of the judiciary.

Perhaps some scholars, but certainly we will exercise our free invitation process to let scholars, people who have a legitimate interest, attend those meetings. They are not secret in that sense.

Mr. Chairman, if you desire at any time to attend a meeting of the Court Administration Committee, or any of its subcommittees, and I dare say of the Judicial Conference itself, you would be most welcome. There is no secret for somebody who has a legitimate concern with the subject matter.

Senator DECONCINI. Let me interrupt you on that matter. Let us suppose that Senator DeConcini wanted to be involved in the decision and present during the decisionmaking process when the Judicial Conference took its position on the Judicial Conduct and Disability Act that was before the Senate.

Judge HUNTER. Yes, sir.

Senator DECONCINI. Do you think I would have been welcomed to sit there while they discussed that bill at great length?

Judge HUNTER. Senator, I will put it this way—if you could have taken the heat, we could have taken it. Yes, sir, you would have been welcome in my judgment.

Let me say this to you: The procedure of S. 2045 really gives two or three bites to that apple. Congress is the place where the judgment should be made as to the merits of a particular proposition, and it is in Congress where you hear the views of all of the interested people. Some of them have self-interest. Some of them have highly specialized interests.

You have the process and the means available to hear all of those people and make that ultimate judgment. We do not, and it is not an appropriate part of our—

Senator DECONCINI. Would you welcome Mr. Graham, the law correspondent of CBS News, to such a meeting?

Judge HUNTER. If he has a legitimate interest in a particular subject other than just getting a news story, we certainly would give him serious consideration.

Senator DECONCINI. I suspect that would be his interest, a news story.

Judge HUNTER. If you want us to act solely in the interest of the press we will all have to make a different start. We do not think that was the purpose of this bill.

Senator DECONCINI. No; it is not. The objective of this bill is clear in my statement, to open up the process and to dispel the cloak which has covered the judiciary on nonjudicial decisions.

Let me go to one other area. Do you agree that the Judicial Conference is involved in what might be termed to be lobbying, or at least bringing to the Congress certain information in order to persuade them that certain laws should be changed as they relate to the court?

Judge HUNTER. Senator, I give a qualified yes to that. We do not ask you or tell you or advise you how to pass on bills unless you invite our comments. We are very careful.

My committee simply will not respond concerning legislation unless the invitation originates with one or the other of the bodies of the Congress.

You have in your statute, in setting up the Judicial Conference of the United States, charged that Conference with the duty in some

instances of calling matters to your attention which affect the judiciary or affect the ability of the judiciary to carry out its function. We respond to that statutory duty which you have placed upon us.

If you want to remove that statutory duty, you will hear no more from us on that subject.

Senator DECONCINI. You are saying, Judge, you respond only when asked?

Judge HUNTER. That is our policy, sir.

Senator DECONCINI. You see, when we had the matter of the judicial conduct and disability we didn't ask but every member of the committee received a lengthy letter in the Senate explaining the opposition to it. We did not ask you to do that.

I do not object to your doing it. My point is only that I do not think that it is quite correct when you say that the Judicial Conference responds only to requests. I think they are, and properly so, interested in bringing the proper information before the Congress.

Judge HUNTER. Senator, I am glad you raised that problem because between the two of us I hope there is utter frankness.

Senator DECONCINI. Indeed there is.

Judge HUNTER. I wish to respond fully. If there was any violation of our policy that we respond only at the request of Congress, you can lay that blame on me. The policy is firm and intact. Perhaps I misjudged the application of it.

I attended the seminar which was held in Virginia in which Members of the House and Senate were invited and attended, together with members of the judiciary, together with the Attorney General, and it was a very helpful seminar. Out of that seminar I thought that I heard an invitation to advise the Congress at any time of any pressing need or problem of the judiciary. Perhaps I misunderstood that message.

In other appearances before other subcommittees of the Congress I thought that I heard the message that Congress wanted us to reply more directly, more to the point, and really to express ourselves fully on legislative matters which directly impacted on the judiciary.

If I misread those things, I of course apologize.

Senator DECONCINI. I am not asking for an apology.

Judge HUNTER. It is the policy of the Judicial Conference—

Senator DECONCINI. Apologies are not necessary. My point is only this: It seems to me that the Judicial Conference, and rightfully so, is equivalent to many other interested groups in improving government, or whatever affects their particular interest. I do not think there should be any apologies for that. I think it is the proper course for the Judicial Conference to offer suggestions so as to improve the machinery, whether asked or not. I encourage you to do it.

My point is that I think you do do it, and I see nothing wrong with it except the fact that by doing it you are, for all intents and purposes, attempting to influence the Congress in one manner or another.

That being the case, I think it is healthy and good. That also being the case, I question why should you not be subject at least to having your meetings open?

Judge HUNTER. If you want to consider opening any meeting which results in lobbying, if the gun will be centered on that subject, perhaps there is fertile ground. Frankly, Senator, the judges are poor lobbyists, ill equipped for it.

Senator DECONCINI. They do pretty well.

Judge HUNTER. Their atmosphere is just totally different. I am example "A."

Senator DECONCINI. Judge, you are very convincing. Many of your colleagues are also very good. I won't use the term "lobbyists" but they are good promoters of the Judicial Conference positions. In your conclusion you questioned the need for the statutory provision in any event, not only these specifics.

Since your last appearance, when you were gracious enough to testify on the several bills relating to the Judicial Conduct and Disability Act, it is my understanding and recollection that you made the same kind of statement there, that statutory provisions were not necessary.

That being the case, I am also advised that all of the circuit councils have promulgated administrative regulations on judicial conduct. Under those regulations a committee was established in each circuit and no statute was necessary, based, I suspect, on the fact that the Judicial Conduct and Disability Act did pass the Senate.

If a bill like S. 2045, modified perhaps, passed the Senate this Congress and subsequently died in the House, do you think that the Judicial Conference and the circuit councils might seriously consider opening their meetings under some kind of sunshine internal rule or regulation?

Judge HUNTER. Senator, that is a difficult question for me to answer. I have to remind myself I am here only at the direction of the Judicial Conference.

Senator DECONCINI. Your personal view.

Judge HUNTER. If you are asking for a personal view, I think that the introduction of this legislation, and its very careful consideration by the Judicial Conference, will inevitably result in a very careful re-appraisal of the policies of all of those bodies—the Judicial Conference, the judicial councils—and I think it might result in something by way of a self-imposed new set of attitudes, guidelines, and procedures. However, this is a matter up to the Judicial Conference.

It is simply my opinion, but the Judicial Conference is a responsive and responsible group. It is not going to get into a subject like this in-depth without self-reexamination.

Senator DECONCINI. Judge Hunter, I thank you sincerely. Let me tell you, as a Member of Congress, I have the greatest respect for you and the Conference. Certainly your ability to come forward and articulate the position of the Conference time and time again, sometimes in agreement and sometimes in disagreement, with members of this committee only demonstrates that the members of the Conference are indeed interested in improving the machinery of the judiciary.

I thank you sincerely for being available and giving us your in-depth analysis of this bill.

Judge HUNTER. Thank you, sir. On behalf of the Conference and myself, I thank you.

[The prepared statement of Judge Hunter follows:]

PREPARED STATEMENT OF HON. ELMO B. HUNTER

INTRODUCTION

Mr. Chairman, members of the subcommittee, once again I am appearing before this panel in response to your request for the views of the Judicial Conference of the United States on a legislative proposal pending before you. I am here

today in the same capacity in which I have testified before this panel on several occasions in the past few years—as chairman of the Conference's Committee on Court Administration.

In past appearances I have provided for the record a brief summary of the service I have performed within the Conference's committee structure since 1969. For purposes of the record you are beginning to develop today, there may be some value in reiterating the extent to which I have been involved in the Conference's work—if only to place in perspective the degree of personal association I have had with an institution originally created by the Congress 58 years ago. I first joined the Court Administration Committee as a member 11 years ago. Between 1976 and 1978 I chaired its Subcommittee on Judicial Improvements. In January of 1978, I succeeded Judge Robert A. Ainsworth, Jr., of the Court of Appeals for the Fifth Circuit, as chairman of the Court Administration Committee.

On at least one occasion in recent years a witness appearing before you on behalf of the Judicial Conference has provided a graphic presentation of the Conference's committee structure. While I realize that that structure is familiar to this panel, it may be especially relevant to this hearing record. I have attached a copy of the chart to this statement as an appendix (Appendix A) and I would ask that it be included in the printed record which is made of these proceedings.

Before directly addressing the two general matters referred to in this subcommittee's request for views—the purpose and provisions of S. 2045—I would like to describe the procedure followed by the Conference in responding to that request. It is the procedure which is usually followed whenever Congress, through one of its committees, requests the views of the Conference on a pending bill. Upon receipt of Senator DeConcini's letter of September 11, 1979, transmitting a copy of a preliminary draft of the bill which was subsequently introduced as S. 2045, the Director of the Administrative Office asked me if the Court Administration Committee would be able to evaluate the proposal and formulate recommended comments for consideration by the full Judicial Conference at its next scheduled meeting. I advised him that the committee would attempt to do so. The Administrative Office notified the Senator of the development by letter. I, in turn, asked the chairman of the Court Administration Committee's subcommittee on Judicial Improvements, Judge Bailey Brown, to schedule consideration of the matter for his subcommittee's next meeting and to report to the Court Administration Committee, which would be meeting only a few weeks later. Supporting personnel in the Administrative Office were asked to begin work on a preliminary analysis of the "draft bill."

Shortly after introduction of S. 2045, the text of the bill, the introductory statement which had appeared in the Congressional Record, and analytical materials were forwarded to the members of Judge Brown's subcommittee for review before their meeting. On January 7-8, 1980, Judge Brown's subcommittee met, and acted upon the request related to S. 2045 as one of many items on the agenda. Supporting staff in the Administrative Office circulated a report of the subcommittee's action including the materials provided to subcommittee members in relation to S. 2045—to all members of the Court Administration Committee's meeting on January 28 and 29, 1980, recommended views on S. 2045 were formulated for the consideration of the Judicial Conference. A report from the committee, including its recommendations, background materials related to S. 2045, the bill itself, and the related introductory remarks, were forwarded to all Conference members 2 weeks later. Two days ago the Judicial Conference commenced its Spring 1980 Proceedings in the Supreme Court building.

Following discussion of the recommendations contained in the Court Administration Committee's Report concerning S. 2045, the Judicial Conference of the United States concluded that the bill raises serious separation of powers questions, that implementation of the processes and procedures mandated in the bill would seriously impair the efficient functioning of the Judicial Conference, its committees, and the judicial councils of the circuits, and that the bill should therefore not be enacted.

#### THE PURPOSE OF THIS BILL

The "introductory remarks" which were filed with S. 2045 on November 26, 1979, very clearly explain the purpose the chairman of this subcommittee intended to serve by having the bill's provisions reach the Proceedings of the Judicial Conference of the United States, meetings held by its committees and subcommittees, and meetings held by the judicial councils of the circuits:

"Open meetings will in no way hinder [the] proper function of these bodies. They will instead foster greater public understanding and respect for the institutions and the men and women who conduct the affairs of Government."

Obviously a "greater public understanding and respect for" the Conference, its committees, the councils—and the Federal judicial structure which they serve—is a purpose, an objective, which every Federal judge predictably supports.

S. 2045 will not guarantee realization of that objective; it will simply mandate an elaborate set of requirements which will have to be met by the Conference, each one of its committees, and every judicial council in order to conduct business. In other words, S. 2045 will merely mandate a means—not an end.

Having reviewed the bill—in the context of our tripartite Federal Governmental structure, and the concepts of separation of powers which have always preserved that structure—the Judicial Conference has concluded that the "means" mandated by S. 2045 will not facilitate the stated objective—they will impede progress in achieving it. The bill deserves widespread study and consideration. In the brief 3 to 4 months that this bill has been under review by the Conference, it has generated many more questions than have been answered.

THE PURPOSE OF THE GOVERNMENT IN THE SUNSHINE ACT IS NOT COMPATIBLE WITH  
THE CONSTITUTIONAL ROLE OF THE JUDICIAL BRANCH

S. 2045 is obviously modeled upon the Government in the Sunshine Act<sup>1</sup> which Congress passed in the 94th Congress after 4 years of study. The objectives Congress intended to achieve, in what has become known as "GISA" were clearly delineated: " \* \* \* the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."<sup>2</sup> Implicit in that statement of purpose—and explicit in the act's legislative history—is a belief that public observation of governmental processes fosters a fuller public knowledge, which assures an electorate more qualified to assess the performance of public officials—and more able to hold them accountable for their performance.

GISA applies to the executive branch of the Government only, and it is premised upon a need to main a balance between the public's "need to know" and the executive branch's ability to function efficiently. In a very real sense GISA was carefully designed to complement and facilitate a concept of direct accountability to the people, which the Founding Fathers envisioned for the executive branch, in light of the functions performed by that branch today.

The legislative branch is, of course, also directly accountable to the public today—perhaps more directly accountable. During development of GISA in 1975, however, the Senate's Committee on Rules and Administration recommended that GISA be limited to the executive branch.<sup>3</sup> On November 5, 1975, title I of S. 5, 94th Congress, which would have included congressional committees within the scope of GISA, was deleted by the Senate.<sup>4</sup> While rules in both the Senate and the House are today intended to serve a purpose similar to that which GISA serves, they are, of course, "means" to that "end" which are designed in consideration of the legislative branch's "ability to function efficiently." Presumptively they are "compatible" with the legislative branch's role in our form of government and, realistically, they are subject to necessary adjustment and revision with much less difficulty than they would be if embodied in a statute.

In both cases, GISA's applicability to the executive branch and the rules applicability to activities in the Congress there is a recognition of the fundamental role performed by each branch of government in the tripartite arrangement dictated by our concepts of separation of powers, and a recognition of each branch's "ability to function efficiently." In attempting to convert provisions in GISA to directly apply to the Judicial Conference, its committees, and the Judicial Councils, S. 2045 is lacking in that recognition. In its present form S. 2045 may well be less applicable to the judiciary than it would be to the Congress.

The judicial branch, unlike the executive and legislative branches, was not only not intended to be directly accountable to the public at large, it was speci-

<sup>1</sup> Public Law 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)).

<sup>2</sup> *Id.*, § 2, reprinted in 5 U.S.C. § 552b note (1976).

<sup>3</sup> See S. Rept. 94-381, 94th Congress, 1st session, 1975.

<sup>4</sup> See 121 Congressional Record 35218 et. seq.

cally insulated from that accountability. The Founding Fathers went to great lengths to guarantee a Federal judiciary which could not be influenced or controlled by any public faction—representative of either majority or militant minority views. Federalist Paper No. 51 states:

"It is of great importance in a republic not only to guard society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."<sup>5</sup>

Hamilton envisioned a concept of judicial independence founded not just upon a balance of power with the other branches of the Federal Government, but also upon insulation from a potentially "unrepresentative" or "tyrannical" public. Life tenure during good behavior, removal from office only by impeachment under the Constitution, and a prohibition against diminution in salary are expressly embodied in the Constitution to insulate the judiciary's members from political passions which may arise as a result of unpopular case decisions. The Founding Fathers were well aware of the extent to which integrity and moderation are often called upon to lean against strongly blowing political winds, and integrity and moderation lie at the heart of the judicial function in our form of government:

"Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."<sup>6</sup>

Recognizing that the judiciary is not directly accountable to the public is not equivalent to arguing that it is not accountable at all. In introducing S. 2045, the chairman of the subcommittee very clearly stipulated that this bill was only intended to reach the judiciary's administrative activities:

"In maintaining the delicate balance of power between the Congress and the judiciary, it is important that Congress recognize that its creations, the Judicial Conference and the councils, are not courts—that their judges do not sit as judges. They sit in a sense as administrators and legislators in their area of competence." (Emphasis added.)<sup>7</sup>

Will that distinction between adjudicatory functions and administrative functions support the argument that, in administrative activities, the judiciary should be directly accountable to the public? In the same text the chairman of this subcommittee observed that:

"The Founding Fathers wisely circumscribed [the judiciary's] broad power by limiting the jurisdiction of the courts, and by vesting the power to organize the lower courts in the Congress. (Emphasis added.)"<sup>8</sup>

"The Congress created the judicial Conference and councils in furtherance of its duties to provide for the administration of the Federal courts." (Emphasis added.)<sup>9</sup>

In fact the judiciary is fully accountable in all administrative matters to the public through the Congress. The Conference and the councils are "its creations," and their work is often an extension of Congress duty "to provide for the administration of the Federal courts." A few examples of the degree to which the judiciary routinely "accounts to Congress" adequately demonstrate the scope of Congress "administrative control," and the extent to which it exercises its oversight responsibilities.

In every session of Congress, judges appear before the Appropriations Committees in both houses to explain the judiciary's budget in detail. Places of holding court are designated by Congress, and judges are called before committees in both houses to explain why GSA should build a courthouse or lease space to provide the facilities which will enable judges to serve the public at those locations. Congress determines the number of judges a court shall have—and the public has waited years for the creation of additional judicial positions to meet the public's needs. Many committees other than the Judiciary Committees process legislation creating new causes of action. Every year, in response to requests from Congress, judges appear before the Judiciary Committees of both houses to comment upon legislation having an effect on the court or the third branch—just as I am here today.

Through such appearances every aspect of court administration appropriately comes under congressional review. That is exactly the way the separation of

<sup>5</sup> Federalist Papers No. 51 (A. Hamilton), at 508 (Mentor Books ed. 1961).

<sup>6</sup> Federalist Papers No. 78 (A. Hamilton), at 464 (Mentor Books ed. 1961).

<sup>7</sup> See 126 Congressional Record, daily ed., at S17218-9.

<sup>8</sup> See 126 Congressional Record, daily ed., at S17218.

<sup>9</sup> Id.

powers concept was intended to work. The administration of the courts is essentially the responsibility of the judicial branch, which must, of course, rely upon the legislative branch to the extent that Congress has delineated the jurisdiction of the courts. The judiciary's exercise of administrative authority within the judicial branch, with appropriate oversight by the Congress, is in complete conformity with separation of powers concepts. Realistically, administrative functions are essential to the judiciary's fundamental role—the adjudication of cases and controversies.

S. 2045, however, is premised upon the assumption that administrative and adjudicatory activities can be distinguished from each other—that they constitute separate exercises of authority. That assumption is simply invalid. It would be impossible to craft a statute which would precisely distinguish one exercise of authority from the other. S. 2045 assumes that all activities of the Conference and the councils are “administrative.” That approach raises serious questions about administrative activities which have an indirect impact upon adjudicatory activity.

In the Fifth Circuit, the judicial council requires that the same panel of judges hear arguments arising from a desegregation case each time that case before the Court. That administrative policy promotes case management efficiency and continuity in the determination of issues under litigation. Clearly an “administrative action,” it nevertheless indirectly impacts upon case law development, and therefore influences the determination of the “law of the circuit.” Under the Magistrates Act which this subcommittee processed earlier in this Congress, every circuit council is now reviewing the performance of present serving magistrates in order to certify them as competent to exercise the new jurisdiction conferred upon them. When the members of the Fifth Circuit council discussed their policy before implementing it, were they merely exercising administrative ability? Did the experience gained sitting as judges in such cases influence their discussion? Did they discuss particular cases? Could they have properly done so in “open session”? When circuit council members evaluate a magistrate's competence, they do so candidly and openly, and they discuss his performance in particular cases. Are they acting only as administrators? Can a statute be fashioned which will realistically permit the ready identification of “administrative” and “judicial” activity when one role must inevitably influence the performance of another?

Fundamentally, the business of the courts is the adjudication of cases. Administration may be incidental to that fundamental activity, but is also inseparable from it. If “greater public understanding and respect” for the judiciary is the “end” to be served—by “means” of sunshine which falls only on administrative activities—that “end” cannot be achieved. One commentator has described adjudication in the following language:

“As a model of social adjustment adjudication is a process for resolving particular conflicts between individuals through principled elaboration of authoritative norms, typically embodied in rules and precedents \* \* \* Courts as adjudicators act neither to promote any set of interest within society nor to find strategic solutions to social problems but rather to vindicate individual legal rights.”<sup>10</sup> Administrative activity frequently reflects a different mode of resolving issues, and the same commentator has described it as follows:

“Increasingly, students of government have come to view policymaking \* \* \* as essentially a bargaining process. Rather than using authoritative norms as guides, the participants rely on the principle of exchange. Policy decisions \* \* \* result not so much from formal structures \* \* \* as from mutual accommodation of conflicting interests, none of which a priori enjoys a higher status than the others. Outcomes depend on the intensity of the participants' interest, the skill with which they play, and the power at their disposal.”<sup>11</sup>

Judges meeting at the Judicial Conference, its committees, and judges serving on circuit councils often do “accommodate conflicting interests” on administrative matters. If sunshine could be focused on “policymaking” activity only, however, would that really promote a “greater public understanding and respect for” the judiciary and the fundamental duty its members perform—adjudication?

That question arises directly from our constitutional concept of separation of powers. In contrasting the judiciary to the executive and the legislative branches, Hamilton, noting the power of the sword and of the purse in the latter two, concluded that the judicial branch had only the “power” of judgment. If the public perception of the responsibility judges exercise is equated with the manner in

<sup>10</sup> Diver, *The Judge as Political Pawnbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 46-47 (1979) (footnotes omitted).

<sup>11</sup> *Id.* at 47 (footnotes omitted).

which a city council "bargains," that will not foster respect for the constitutional function which the courts perform—that of resolving cases and controversies.

If the administration of the courts—and accountability for that administration—is the matter at issue, the Constitution provides fully for accountability for that administration. Under the Constitution, the Congress is responsible for providing the judiciary with the tools needed to effectively administer the courts, and the federal judiciary is responsible for using them effectively and efficiently.

THE PROVISIONS IN S. 2045 TAKEN FROM THE GOVERNMENT IN THE SUNSHINE ACT  
SHOULD NOT BE APPLIED TO THE JUDICIAL BRANCH

In addition to questions concerning (1) how compatible S. 2045 may be with the tripartite balance of powers concept underlying the Constitution, (2) what impact it may have upon the courts' general ability to properly perform its responsibilities for judicial administration, and (3) how well it will really serve the purpose it is intended to serve, there are many questions raised by its application of provisions from GISA—provisions designed for direct application to the executive branch only—to the judiciary's administrative and policymaking panels. Just as GISA was intentionally drafted with care to preserve the ability of the executive branch of the government to carry out its responsibilities, just as the rules of the House and Senate are designed to preserve the ability of those institutions to efficiently perform their responsibilities, the need to preserve the judiciary's ability to perform its responsibilities effectively and efficiently must be considered. S. 2045, as introduced, will certainly not enhance the performance abilities of the Judicial Conference, its committees, and the judicial councils of the circuits.

The statutory provisions which Congress has enacted to authorize the exercise of administrative and policymaking duties by the Judicial Conference, the judicial councils of the circuits, and the judicial conferences of the circuits are all embodied in chapter 15 of title 28 (section 331, 332, and 333). A copy of the chapter is attached to this statement as an appendix (appendix B). Conceptually the Conference is usually described as a "board of directors" for the third branch, and its committees are acknowledged to perform a staffing function. The same conceptual analogy is partially applicable to circuit councils and conferences; the circuit council is analogous to a board of directors and the circuit conference is analogous to supporting staff in many contexts. To the extent that issues require initial review and evaluation, that task is usually the responsibility of Judicial Conference committees and units established in the circuits through judicial conferences of the circuits. I described in my introductory comments the manner in which S. 2045 was evaluated by the Conference through utilization of the committee structure. In the circuits, special committees of the circuit conferences perform analogous functions on matters which come before the councils for final deliberation.

Obviously there is a marked lack of similarity between those roles and the roles played by elements in an executive branch agency structure. The Federal courts may be, in aggregate, a "national institution;" that institution, however, is truly a reflection of our constitutional concept of federalism, and all of the virtues long identified with the concept are certainly worth preserving. No one circuit is a mirror image of another. The realistic differences between the First and Fifth Circuits are obvious in terms of geography and numbers of judges and supporting personnel. The administrative responsibilities borne by the circuit councils reflect those differences. Today, 2 judges constitute a majority on the judicial council for the First Circuit, while 14 are required to constitute a majority in the Fifth Circuit. The manner in which those two councils function reflects that reality. Application of GISA provisions to the "panels" created by Congress to share administrative responsibility for the Federal courts inevitably raises questions simply because the Conference and the councils are not "administrative agencies" in the executive branch of government. Let me cite a few of those questions which the Judicial Conference believes deserve very careful consideration. An outline of the provisions contained in S. 2045, prepared for the judges who evaluated the bill, is attached to this statement as an appendix (appendix C). Where appropriate I will refer directly to the provisions as they appear in the bill itself.

S. 2045 will require open, public discussion of matters that should be conducted in camera—and that in some instances would be conducted in closed

meetings under GISA. One recurring problem which I mentioned above, is the bill's failure to accommodate the possibility that judges, even in conferences, councils, and committees, can, do, and should draw upon their experiences on the bench in discussing matters with their colleagues. Reflections of judges on past pending litigation always have been kept confidential, and no one seriously questions this rule.<sup>12</sup> Open Conference, council, and committee meetings would lead either to the exposure of information that should remain undisclosed or to the elimination of a source of historical data vital to the judges' decisionmaking.

#### A. Exemption in GISA not in S. 2045

Subsection (c) of GISA lists 10 situations in which an agency lawfully may close its meetings.<sup>13</sup> S. 2045, by contrast, lists only two: proceedings that are likely to (1) "involve accusing any person of a crime, or formally censuring any person" or (2) "disclose information of a personal nature and such a disclosure would constitute a clearly unwarranted invasion of personal privacy."<sup>14</sup> Undeniably, some of the GISA exemptions do not apply to judicial meetings; for example, those reaching national defense matters or the regulation of financial institutions. Nevertheless, some exceptions provided in GISA—and needed in a judicial sunshine act—simply do not appear in S. 2045.

##### (1) Personnel rules and practices

GISA expressly permits an agency to close meetings that "relate solely to the internal personnel rules and practices" of that agency.<sup>15</sup> S. 2045 does not contain this exception. Thus, when a circuit judicial council discusses removal or continuance in office of magistrates,<sup>16</sup> the need to require a district judge to reside at a particular location,<sup>17</sup> approval of assignments of active or retired circuit and district judges to specific judicial duties,<sup>18</sup> or the certification of a sitting judge as disabled,<sup>19</sup> the proceedings would be open.<sup>20</sup> What is said may reflect poorly on the court official involved and thus undermine his credibility in the duties he subsequently must perform. Similarly, the absence of this exception would open up meetings of the Judicial Conference of the United States when it examines salaries and expenses of probation officers.<sup>21</sup>

##### (2) Premature disclosure

Agencies, in general, may close meetings if opening them would lead to a premature disclosure of information which would "significantly frustrate implementation of a proposed agency action."<sup>22</sup> Again, no comparable provision can be found in S. 2045. Thus a circuit judicial council would be forced to disclose in advance changes in rules, which might aggravate the problem of

<sup>12</sup> Senator DeConcini, the sponsor of S. 2045, freely acknowledged this position when he introduced the bill: "When a judge or panel of judges sits as a court, secrecy in the deliberation process is required to protect the opinion of the judges from outside pressures and to guarantee due process to the litigants." 126 Congressional Record, S17218 (daily ed. Nov. 26, 1979). Indeed, in GISA itself Congress has provided that adjudicative deliberations should remain confidential when the adjudicator is an agency. See 5 U.S.C. § 552b(c)(10) (1976).

<sup>13</sup> See 5 U.S.C. § 552b(c) (1976).

<sup>14</sup> S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(d)(1)-(2)). These are taken verbatim from GISA. Compare *id.* with 5 U.S.C. § 552b(c)(5)-(6) (1976).

<sup>15</sup> 5 U.S.C. § 552b(c)(2) (1976).

<sup>16</sup> 28 U.S.C.A. § 631(f), (i) (West Supp. 4 1980).

<sup>17</sup> 28 U.S.C. § 134(e) (1976).

<sup>18</sup> §§ 294(c), 295. The chief judge of the circuit also may approve. *Id.*

<sup>19</sup> *Id.* § 372(b).

<sup>20</sup> One could argue that many of these proceedings could be closed under the general provision for matters of a personal nature, the disclosure of which would be an unwarranted invasion of privacy. See text at n. 14, *supra*. To do so, however, one would have to meet the strong contention that Congress exclusion of a provision for personnel discussions but inclusion of one for personal matters, when both appeared in GISA, was intended to open personnel discussions. The indication in the legislative history that discussion of an individual's competence might be closed if he is a low-ranking official or a private person, see H. Rept. 94-880 (pt. 1), 94th Congress, 2d session 11 (1976), is irrelevant, for judicial officers would be higher ranking public officials not covered by GISA's exemption 6.

<sup>21</sup> 18 U.S.C. § 3656 (1976).

<sup>22</sup> *Id.* § 552b(c)(9)(B). GISA also exempts from its open-meeting requirement discussions of an agency regulating securities, commodities, currencies, or financial institutions that would be likely to lead to financial speculation in securities, commodities, or currencies. *Id.* § 552b(c)(9)(A)(i). Congress recognized that markets react even to hints of agency action. See S. Rept. 94-354, 94th Congress, 1st session 24 (1975). The premature release of information concerning court decisions, for even hints of what a decision in a pending case may be, can lead to severe speculation in the stock market and elsewhere. S. 2045 makes no provision for this possibility.

forum or panel shopping.<sup>23</sup> The absence of such a provision also eliminates the possibility of closed meetings simply because pending litigation likely will be discussed—for example, a meeting to consider court rules<sup>24</sup> or the inability to comply with the Speedy Trial Act.<sup>25</sup>

### (3) *Litigation strategy*

GISA permits agencies to discuss privately their own participation in litigation.<sup>26</sup> S. 2045 creates a cause of action against judicial entities that close their meetings,<sup>27</sup> and then fails to afford to the members of that entity the ability to discuss their defense in private.

## *B. Other Matters that Require Nondisclosure*

Several other actions that by law must be taken by entities subject to S. 2045 will have to occur in public even though nondisclosure would be a more prudent course. Frequently discussion can turn to problems arising in past litigation at which particular judges presided. Because no one argues that intramural judicial deliberations over litigation should be open, later recountings of what happened "at conference" also should be protected. S. 2045 does not take this step.

### (1) *Court-appointed plans*

By law, the judicial councils of the various circuits must discuss district court plans for the implementation of the Speedy Trial Act,<sup>28</sup> for adequate representation of criminal defendants,<sup>29</sup> and for random jury selection.<sup>30</sup> Problems judges have encountered that are best not revealed publicly may surface in these discussions. Keeping these debates confidential does not eliminate public participation, for courts may enlist aid from outside the judiciary in drawing up these plans.<sup>31</sup>

### (2) *Disagreements over district court rules*

Circuit judicial councils also act as tie-breakers when the judges of district courts cannot agree on local rules.<sup>32</sup> The origins of the disagreements may stem from problems encountered in earlier cases. Moreover, this particular function of judicial councils may expose heated disagreements among sitting judges and increase the danger that the public, in seeing only the "bargaining phase" of judicial decisionmaking, will lose its confidence in judges as adjudicators.

### (3) *Making of local rules*

Judicial councils of the circuits also must make rules for their respective circuits.<sup>33</sup> Again, the discussion properly may turn to matters from previous cases that judges should not release publicly.

### (4) *Judicial Conference activities*

Congress has charged the Judicial Conference of the United States with analyzing the efficiency of the Federal judiciary and recommending changes that would improve it.<sup>34</sup> Naturally, discussion turns to judges' personal impressions of the efficacy of certain procedures, including specific instances in which they have had to employ them. A judge's dislike for a procedure does not necessarily mean that he cannot use it fairly and competently, but exposure of his disagreement with it might undermine confidence in his ability to do so—with both the public and counsel appearing before him. In addition, under the Freedom of

<sup>23</sup> For example, the Court of Appeals for the Fifth Circuit assigns the same panel to hear the same desegregation case each time it is appealed. A change in this rule or the adoption of a similar rule by another circuit might affect when a party files an appeal. Similarly, the Court of Appeals for the District of Columbia Circuit assigns judges to panels on a purely random basis. A change in this rule might influence not only the timing of a filing but also, in some cases, the circuit in which the appellant or petitioner files.

<sup>24</sup> 28 U.S.C. § 2071 (1976).

<sup>25</sup> 18 Id. § 3174.

<sup>26</sup> 5 Id. § 552m(c) (10).

<sup>27</sup> S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(j)).

<sup>28</sup> 18 U.S.C. § 3165(c) (1976). To facilitate the formulation of these plans, clerks of district courts are authorized to obtain information from judges, attorneys, and probation officers. Id. § 3170(b). This information may be confidential.

<sup>29</sup> Id. § 3006A.

<sup>30</sup> 28 Id. § 1863.

<sup>31</sup> Indeed, the Speedy Trial Act requires the planning group for each district to include various prosecutorial and administrative officials, along with two private attorneys and a person skilled in criminal justice research. 18 U.S.C.A. § 3168(a) (West Supp. 4, 1980).

<sup>32</sup> 28 U.S.C. § 137 (1976).

<sup>33</sup> Id. § 2071.

<sup>34</sup> Id. § 331.

Information Act, internal memoranda making suggestions to agency boards are not subject to disclosure,<sup>35</sup> a policy that encourages the free flow of discussion and a competition of ideas. Judges, however, do not have large staffs; thus there would be no room for preliminarily "floating" ideas in rough form before the Judicial Conference of the United States unless some protection were added to S. 2045.

*C. Litigation under S. 2045*

S. 2045 creates a cause of action to enforce its open-meeting provisions. Under this subsection, any person can file an action to require that a meeting to be held in the future be opened or to compel the release of the transcript of a meeting that was closed.<sup>36</sup> This aspect, too, has problems that must be addressed lest it severely interfere with the functioning of the Federal judiciary.

(1) *Fivolous actions*

The framers of the Constitution took great care to establish a highly independent judiciary, one that would not bend to popular pressures when justice leads it another way. The cause of a action under S. 2045 as it now stands leaves too much room for individuals dissatisfied with judges' decisions in cases to file harassing actions against judicial entities on which they also sit. Even a non-meritorious suit can tie up the judges who were present at a meeting annoying them and distracting them from their primary responsibility; namely, deciding cases. Although a plaintiff who brings a frivolous or dilatory action may have to pay the judicial entity's legal expenses,<sup>37</sup> the damage already is done when the judge forgoes a discretionary action in court for fear of later retaliation through a nuisance suit.

(2) *Suing the circuit*

An action to enforce the open-meeting requirement in the case of a judicial council of a circuit may be brought in any district court within that circuit.<sup>38</sup> No matter which way the district court rules, the party not prevailing has no appeal: all the circuit judges would have to recuse themselves because they comprise the defendant. S. 2045 thus leave no room for correcting district judges' errors in many cases that will be filed under it.

(3) *Chilling effect*

A judicial entity may close one of its meetings only if it properly determines that closure is authorized.<sup>39</sup> If a judge in a later action rules that this decision was improper, he may order the release of a transcript of the proceedings that were closed.<sup>40</sup> This prospect may chill discussions that occur at meetings even properly closed. A judge may refrain from discussing issues fully, using examples from his experience, simply because he fears later disclosure, even though a court later would find the closing to have been authorized. The possibility that a court later can second-guess the members' decision to close a meeting is almost as stifling as a decision to make all meetings open.

IS THERE ACTUALLY A PROBLEM REQUIRING A STATUTORY REMEDY?

In the introductory remarks which accompanied introduction of S. 2045, this subcommittee's chairman noted that:

"The shroud of secrecy necessary to protect the impartiality of a judicial decision does not appropriately cloak the Judicial Conference and the judicial councils."

The judiciary has never alleged that the activities of the Conference or the councils are in need of the same standard of confidentiality as are panels of judges sitting as judges. Nor should there be any misunderstanding among Members on Congress that that standard has ever been assumed by the Conference, its committees, the judicial councils or the judicial conferences of the circuits.

<sup>35</sup> 5 Id. § 552(b)(5).

<sup>36</sup> S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(j)).

<sup>37</sup> Id. (to be codified at 28 U.S.C. § 335(i)(3)).

<sup>38</sup> Id. (to be codified at 28 U.S.C. § 335(i)(1)). The action also may be brought in the U.S. District Court of the District of Columbia or in the U.S. District Court for the district in which the meeting has been or is to be held. Id. In practice, the judicial council usually meets within the geographic boundaries of its circuit.

<sup>39</sup> Id. (to be codified at 28 U.S.C. § 335(d)).

<sup>40</sup> Id. (to be codified at 28 U.S.C. § 335(j)(1)). The bill would require the entity to keep a transcript of its closed proceedings. See id. (to be codified at 28 U.S.C. § 335(g)(1)).

When the Judicial Conference of the United States meets twice each year it does not meet as does a court "in conference"; nor do its meetings constitute "secret sessions." Attendees at the Judicial Conference are limited—to those who are invited to be there to assist the Conference in the performance of its functions. Including committee chairman, and supporting staff from the Administrative Office and the Federal Judicial Center, the number of attendees and members combined usually exceeds 40 and, on occasion may exceed 50. Every Member of Congress is familiar with the logistical and agenda problems created by large groups seeking to do much in a finite period of time. Agenda materials for the Conference in recent years have always filled at least two 3-inch loose-leaf binders and on occasion four. The volume of work which must be done in only 2 days is immense. One year ago the agenda required the Conference to meet for an additional day. Those matters which are amenable to expeditious action are efficiently processed, and those requiring discussion and full deliberation are accorded it. Flexibility is essential, as is an atmosphere in which candor and honest contests of conflicting opinion can be indulged. Conference proceedings conducted in public would inevitably require more time, and views expressed would inevitably be less candid in many instances. Issues before the Conference can be as sensitive to judges as issues before the President's Cabinet can be to the White House. Opinions expressed there may be as candid and blunt as opinions expressed in party caucuses in the House and Senate. Resolution of those issues is frequently, however, achieved because debate is candid and blunt. Would that still be possible if the Conference were to meet in the State Department Auditorium under television lights and before a national press corps?

Committees of the Judicial Conference also do not literally meet in secret session. Over the years Members of Congress and their staff personnel, academic experts, and representatives of the legal community have been invited to join committees in their meetings when matters before a committee have warranted such invitations. In recent years the Rules Committees of the Conference have regularly invited staff members from the House and Senate Judiciary Committees to attend their meetings, and at the meeting of the Judicial Conference which has just been held, the Standing Committee on Rules of Practice and Procedure presented the following recommendation, which the Conference approved:

*"Public access to committee files and records.*—From time to time the committee has received requests for access to committee files and records, including the text of proposed amendments to rules submitted by the advisory committees to the Standing Committee and by the Standing Committee to the Judicial Conference. It has heretofore been standard practice to make available to the public only the written comments on proposed changes submitted to the advisory committees in response to requests for comment. Modifications of the proposed rules so submitted for comment, made by the advisory committees or the Standing Committee, have not been made available to the public. As a practical matter, such changes have been technical or clarifying, because the Standing Committee requires recirculation to the bench and bar of any substantial change made after the original publication of proposed rules. This procedure has not been understood by the public and has led to misunderstanding and criticism. The committee therefore recommends that on request it be authorized to make available any document submitted to the Standing Committee by an advisory committee and to make available any recommendations submitted by the committee to the Judicial Conference."

Circuit council meetings, although seldom "open" to individuals who are not actually members of the council or directly staffing it, have the benefit of views and reports referred to them by the judicial conferences of the circuits, which are broadly "open" to "outside participants" in every circuit. In part the nature of the business before a council discourages participation by nonmembers: either it is of no real interest to them or, as noted above, is business which should not be conducted in public. Chief Judge Coffin of the First Circuit has filed a statement with this subcommittee explaining what his council does and why he believes S. 2045 should not be approved. His statement is brief and to the point, and I recommend its message be carefully studied in light of the fact that the First Circuit is the smallest and certainly the easiest to administer.

Let me return for one moment to one function which I discussed at the beginning of this prepared statement—the procedure which the Judicial Conference uses to evaluate proposed legislation in response to requests for comment from committees of the Congress. Presumably the Judicial Conference is asked to comment upon legislation because its opinion will be of value to Members of Congress. Presumably Members want and expect an expression of views which

truly reflects the opinion of the Judicial Conference. I have described the process through which S. 2045 has been evaluated. Do Members of Congress really want to open that process not only to the observation, but also to the influence, of individuals or groups who will later be appearing before Congress to argue their points of view? Do Members of Congress want to authorize "two bites of the apple"? In fact, the authorization may be argued to constitute "three bites of the apple." Interest groups would not only be appearing before both the House and Senate committees, they would inevitably be seeking every opportunity to influence Judicial Conference committee deliberations.

In this area especially, should nonjudiciary interests be afforded an opportunity to "join the issue" with the judiciary before the judiciary has an opportunity to report to the Congress. The members of this subcommittee are fully aware of the controversy which has been associated with congressional consideration of legislation to abolish diversity jurisdiction. Every member of this subcommittee is fully familiar with the strongly held views of the Association of Trial Lawyers of America, with their presentation of those views to Members of both houses, and with their efforts to generate public comment disputing evaluations filed by the Judicial Conference before the Congress. Clearly, the power of final determination does and should rest with Members of the House and Senate. If they are to exercise that power responsibly, they must have objective expressions of opinion from all parties. As you know, I have been intimately involved with the Judicial Conference's efforts to encourage abolition of diversity jurisdiction. I assure you that, at best, those who disagree with the Conference's position on that issue would have taken every opportunity to have influenced it—if not to have impeded it—through processes and procedures which would be authorized by S. 2045. There is no question in my mind that on matters related to the Judicial Conference's efforts to evaluate and comment upon pending legislation, it would be counter-productive to Congress purposes to receive views which may have been even subtly influenced by interest groups before they reach the Congress.

In my 11 years participation in the Conference activities I know of no instance in which a committee or members of the Conference have failed to review submissions from interested parties. I cannot envision such a failure at any time in the future. As I have already noted, committees of the Conference have frequently invited interested parties—often from congressional offices—to attend and participate in their meetings on matters of direct concern to those parties. I cannot imagine those practices being discontinued. I can, however, easily see the value of those practices destroyed by rigid processes and procedures which could all too easily be abused, yielding not constructive comment and contribution, but influences which would obstruct the formulation of the genuinely objective expression of opinion which Congress must have if it is to exercise its power of final determination properly.

#### CONCLUSION

In summary, S. 2045 needs a great deal more study. The stated purpose of the bill may well not conform to our balance of powers concepts. The provisions now embodied in the bill will certainly impede, not promote, the efficient exercise of "administrative authority" which Congress has delegated to the judiciary in chapter 15 of title 28 of the United States Code. Indeed, there is a real question as to whether legislation providing "sunshine" for the judicial branch is any more appropriate than would be legislation providing it for the Congress. The Senate, after 4 years of study, concluded that such legislation would not be appropriate for Congress. S. 2045 has been pending for approximately 4 months. The Judicial Conference firmly believes S. 2045 should not be enacted in its present form, questions the need for statutory provisions in any event, and certainly recommends that further congressional efforts to design a bill, if undertaken at all, not be undertaken without soliciting the views of every presiding officer of a circuit council—because each circuit is not a mirror image of every other—and a broad spectrum of academic and legal comment. This proposal is certainly one upon which the Congress should not rush to judgment.



**CHAPTER 15—CONFERENCES AND COUNCILS  
OF JUDGES**

Sec.

- 331. Judicial Conference of the United States.
- 332. Judicial councils.
- 333. Judicial conferences of circuits.
- 334. Institutes and joint councils on sentencing.

**§ 331. Judicial Conference of the United States**

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims, or the chief judge of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

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Complete Judicial Constructions, see Title 28, U.S.C.A.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation. As amended July 9, 1956, c. 517, § 1(d), 70 Stat. 497; Aug. 28, 1957, Pub.L. 85-202, 71 Stat. 476; July 11, 1958, Pub.L. 85-513, 72 Stat. 356; Sept. 19, 1961, Pub.L. 87-253, §§ 1, 2, 75 Stat. 521.

#### § 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

(e) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but

no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operation of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS-18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule pay rates (5 U.S.C. 5316).

The circuit executive shall serve at the pleasure of the judicial council of the circuit.

The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

As amended Nov. 13, 1963, Pub.L. 88-176, § 3, 77 Stat. 331; Jan. 5, 1971, Pub.L. 91-647, 84 Stat. 1907.

### § 333. Judicial conferences of circuits

The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits.

Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit. As amended Dec. 29, 1950, c. 1185, 64 Stat. 1128; Oct. 31, 1951, c. 655, § 38, 65 Stat. 723; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

**§ 334. Institutes and joint councils on sentencing**

(a) In the interest of uniformity in sentencing procedures, there is hereby authorized to be established under the auspices of the Judicial Conference of the United States, institutes and joint councils on sentencing. The Attorney General and/or the chief judge of each circuit may at any time request, through the Director of the Administrative Office of the United States Courts, the Judicial Conference to convene such institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States. The agenda of the institutes and joint councils may include but shall not be limited to: (1) The development of standards for the content and utilization of presentence reports; (2) the establishment of factors to be used in selecting cases for special study and observation in prescribed diagnostic clinics; (3) the determination of the importance of psychiatric, emotional, sociological and physiological factors involved in crime and their bearing upon sentences; (4) the discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal sex behavior, addiction to drugs or alcohol, and mental or physical handicaps; (5) the formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.

(b) After the Judicial Conference has approved the time, place, participants, agenda, and other arrangements for such institutes and joint councils, the chief judge of each circuit is authorized to invite the attendance of district judges under conditions which he thinks proper and which will not unduly delay the work of the courts.

(c) The Attorney General is authorized to select and direct the attendance at such institutes and meetings of United States attorneys and other officials of the Department of Justice and may invite the participation of other interested Federal officers. He may also invite specialists in sentencing methods, criminologists, psychiatrists, penologists, and others to participate in the proceedings.

(d) The expenses of attendance of judges shall be paid from applicable appropriations for the judiciary of the United States. The expenses connected with the preparation of the plans and agenda for the conference and for the travel and other expenses incident to the attendance of officials and other participants invited by the Attorney General shall be paid from applicable appropriations of the Department of Justice. Added Aug. 25, 1958, Pub.L. 85-752, § 1, 72 Stat. 845.

Outline of S. 2045  
"Judicial Conference and Councils in the Sunshine Act"

The following outline indicates the definitions, the requirements, the exceptions to those requirements, the remedies and the sanctions of S. 2045. The impact of this bill would be significant both in concept and in the administrative implementation of its provisions.

Definitions

A judicial entity, to which S. 2045 would apply, includes the Judicial Conference, its committees and subcommittees, and the judicial councils of the circuits. The bill does not specifically include advisory panels of the Judicial Conference or circuit conferences.

A meeting is defined as any deliberation between or among the minimum number of members required to dispose of official business or act on behalf of that judicial entity.

The bill defines open as access to judicial meetings by means of "public observation." The scope includes each portion of any "meeting." By implication, it also includes access to a transcription or sound recording of any meeting. The Sunshine Act (Pub. L. 92-409) permits the executive agencies the option of satisfying this latter requirement by making accessible a "set of minutes" which summarize the meeting; S. 2045 does not include this option.

Notice is defined in the bill as the announcement to the public of meetings, changes in such meetings, explanations of closed meetings, and regulations.

Requirements

The bill proposes six major items upon which the judiciary must act or must refrain from acting:

1. "...Every portion of every meeting of each judicial entity shall be open to public observation." 335(c)
2. "Members shall not jointly conduct or dispose of business of the judicial entity other than in accordance with this section." [section 335 which would require open meetings] 335(c)
3. "Each judicial entity shall publicly announce" each meeting
  - a. at least one week prior to the scheduled meeting
  - b. and the announcement must include
    - 1) time
    - 2) place
    - 3) subject matter
    - 4) status (i.e., open or closed)
    - 5) name and telephone number of official designated to respond to public information requests 335(f)(1)

4. For each meeting that is closed, the Chief Justice, chief judge of the circuit, or the applicable chairperson "shall publicly certify that in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision." 335(g)(1)
5. Within one year after enactment, the bill would require the judicial entities to "promulgate regulations" to implement public access to meetings. 335(h)(1)
6. The bill requires the Judicial Conference and each judicial council to submit a compliance report to Congress annually. 335(k)

The bill does provide two exceptions to the requirements above:

1. Exception to open meetings

Any meeting may be closed and the disclosure of information restricted if the "meeting or the disclosure of such information is likely to --

- "(1) involve accusing a person of a crime, or formally censuring any person; or
- "(2) disclose information of a personal nature and such disclosure would constitute a clearly unwarranted invasion of personal privacy."

The exception applies to the public observation of meeting itself (335(c)) and to the public's access to the transcript or recording of such meeting (335(e)(f)).

S. 2045 takes these two exceptions verbatim from the executive agency Sunshine Act (Pub. L. 92-409). S. 2045 does not, however, include two exceptions in Pub. L. 92-409 which logically should be applicable to the judiciary as well as to the executive branch. These exceptions concern exempting matters relating to personnel management and matters exempted from disclosure by other statutes. Neither this bill nor the Sunshine Act specifically exempts meetings concerning general internal administration.

2. Exception to minimum one week public notice prior to meeting

This exception permits a public announcement to be made at the "earliest practicable time" rather than at least one week prior to the meeting if and only if:

- (1) the majority of members of the judicial entity by recorded vote decide
- (2) that "business requires" such a meeting be called without giving the required one week notice.

### Remedies and Sanctions

The bill would create a civil cause of action to enforce the opening of meetings and would make available declaratory judgment, injunctive relief, and other relief as appropriate.

As proposed in S. 2045, costs could be assessed against any party by the party who substantially prevails, except that no costs would be assessed against a plaintiff unless the suit was "initiated primarily for frivolous or dilatory purposes." (335(j)(3)). Costs including attorneys' fees against a judicial entity would be assessed against the United States.

The bill would not authorize any federal court having jurisdiction over the opening of meetings to:

- (1) set aside, or
- (2) enjoin, or
- (3) invalidate

"any action by any judicial entity (other than closing meeting or withholding information) taken or discussed at any judicial entity meeting out of which the violation of this section [335] occurred." (335(j)(2)).

### Procedures

The bill sets out many administrative procedures and also details the legal procedures and standards to be followed in enforcing compliance with the administrative requirements. The following lists those procedures and cites their location in the bill.

#### Administrative Procedures

#### S. 2045

- |   |        |
|---|--------|
| - by judicial invitation, to close any portion of any meeting and to restrict the disclosure of information therefrom.                          | (e)(1) |
| - by individual request, to close any portion of any meeting and to restrict the disclosure of information therefrom.                           | (e)(2) |
| - to publicly announce any meeting  | (f)(1) |
| - to publicly explain any closing   | (e)(3) |
| - to change the time or place of any meeting after public announcement of any meeting   | (f)(2) |
| - to publicly change the subject matter or status (open/closed) of any meeting or any portion thereof after public announcement of such meeting | (f)(2) |
| - to announce any changes to any meeting already publicly announced   | (f)(2) |

- to make information concerning meetings available to the public (g)(2)
- to maintain records of meetings (open and closed) (g)(2)
- to promulgate regulations to apply to judicial entities by which openness of meetings will be assured (h)(1)(2)
- to seek Senate/House approval for such regulations (h)(2)
- to report to Congress on compliance by judicial entities with requirements for open meetings (k)

Legal Procedures

- to enforce the opening of meetings, the bill permits any person to initiate a civil action against any judicial entity in any district court: (1) where the meeting was held, or (2) where the judicial entity has its headquarters, or (3) in the U.S. District Court for the District of Columbia. (335(j)(1)).
- to enforce the promulgation of regulations to insure open meetings when appropriate, any person may initiate suit in the U.S. District Court for the District of Columbia against any judicial entity which fails to promulgate such regulations or promulgates regulations which are not in conformance with the proposed requirements for opening meeting. (335(i)).
- any person would have standing to sue, regardless of injury or interest. The bill also proposes to impose the burden to sustain the action on the defendant judicial entities, rather than on the plaintiff as in other civil actions. (335(j)(1)).

Senator DECONCINI. Our next witnesses will be Charles Halpern, director of the Institute for Public Representation, and Diane Tanaka.

I am advised that Fredda Berman is also with us.

Professor Halpern, we are pleased to have you here once again. Your full statement will be printed in the record following your oral testimony. If you would highlight it for us, please.

**STATEMENT OF CHARLES HALPERN, DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION, ACCOMPANIED BY DIANA TANAKA**

Mr. HALPERN. Thank you, Senator, for giving us this opportunity to present our views to the subcommittee.

As you know, the Institute for Public Representation has a long-standing concern with assuring public access to key decisionmakers and in particular we share your concern with the government of the Federal courts and assuring that the administrative process works in a manner which is expeditious, open and fair.

S. 2045 is a bill which falls at the intersection of those two important values—government of the Federal courts and an effective administrative process.

We have been involved with the Judicial Conference on varying matters over the past 5 years. Like the Senator, we have great respect for the Judicial Conference and for the important work that it does. We have, however, been continually puzzled by its structure and processes and often found ourselves frustrated in trying to have an opportunity to participate in its decisionmaking process there.

Indeed, the frustration has been so acute that in my role as administrative law teacher at Georgetown Law Center I frequently use my own experience with the Judicial Conference as an argument in favor of the policies and practices reflected in the Administrative Procedures Act, and in particular its sunshine and freedom of information provisions. The frustrations I have incurred in dealing with the Judicial Conference really reinforced the argument for the policies of the APA and those particular APA amendments. It has reinforced my enthusiasm for an open process, and I can only say in response to Judge Hunter's observation that what may feel like an open process from the inside does not feel like an open process from the outside.

He described an invitational system for getting to meetings. We have on a number of occasions sought invitations and continually have been excluded, notwithstanding what I consider quite clearly legitimate reasons for attending their meetings.

Before I ask Miss Tanaka to summarize our statement let me make just one other introductory observation. The Judicial Conference is an administrative agency. We are not talking about judges discharging their judicial function. Its structure is unique among administrative agencies. It has no full-time members. The Chair of the agency is ex officio, the Chief Justice of the United States. Its staff work is provided by the Administrative Office. However, none of these distinctions between the Judicial Conference and other administrative agencies leads to a conclusion that secrecy is an appropriate procedural approach. It functions as other agencies do. It makes rules. Its rules have a direct impact on the rights of citizens, and in many instances their rules have the broadest impact.

Exactly what significance the Conference has taken on in recent years was suggested by the recent legislative proposal aired by the Chief Justice, and that is that Congress delegates to the Judicial Conference the authority to create new Federal judgeships. That is a proposal that will be debated, I am sure, and it may not commend itself to many in Congress, as it does not commend itself to me. However, it does suggest I think, the kind of importance and dimension of the role that the Judicial Conference thinks of itself as exercising. It can hardly be described as a housekeeping branch of the Federal courts at this point.

With the Senator's agreement I would like Miss Tanaka to summarize our statement.

Ms. TANAKA. The Institute for Public Representation strongly supports S. 2045. We believe that it is entirely appropriate and necessary that the Judicial Conference, its committees and subcommittees be required to hold their meetings in the sunshine.

The Judicial Conference, as has been mentioned at this hearing, although it is composed of judges, functions as a policymaking body. Its policies affect the legal rights of every citizen. One has only to think of the effects of the rules of discovery or for class actions upon the shape of Federal litigation nationwide to realize its impact.

The Conference also, for instance, has the authority to establish standards and procedures for the selection of Federal magistrates. These rules will again affect the quality of Federal justice.

The guidelines, rules, and model programs recommended by the Conference also have profound public effect. They are supported by the prestige and expertise of the Conference.

The fact that some of the things that the Conference is responsible for do not amount to final rulings should not prevent this legislation from requiring open meetings. The Federal Advisory Committee Act requires that the advisory committees under it hold open meetings, detailed minutes, and provide for notice and comment, even though they are advisory committees.

The Conference, as the Senator has noted, plays an active role in the legislative process. It drafts and comments upon Federal legislation extensively.

Despite the far-reaching effects of the actions the Conference conducts its business behind closed doors. The brief report that it issues twice a year after its meeting does not help the public contribute or follow its processes during its deliberations. Our own experiences have demonstrated to us the frustration that the public must suffer because of this procedure.

We have in recent years dealt with the Conference on two major matters. One of them concerns the development of an equal employment opportunity plan for the Federal court system. Although that plan was in fact inspired by a petition submitted by the Institute, we have at every juncture been excluded from meetings on the subject. We have not known exactly what recommendations have been submitted by the subcommittee and committees concerned. Although Judge Hunter has been extremely courteous at a personal level to us, we have found that it is difficult, to say the least, to make meaningful comment on this point and this plan will have considerable social effect. It affects women and minorities who wish to work for the Federal courts.

We have also participated in the issue of the application of special Federal bar admission requirements to the district court system.

In that case the Judicial Conference had a partially open process in that it held hearings on the question of uniform nationwide requirements. However, the ultimate recommendation of the Conference was to establish a program imposing differing requirements in selected cooperating districts. This raises unique problems of nonuniformity which were, in fact, never discussed in public. By requiring open meetings, as S. 2045 provides, it thus represents an advancement.

We have two suggestions to strengthen the open-meeting requirement. The first is that the reports to be discussed at a given meeting be available at least at that meeting. Otherwise public participation may, in fact, be meaningless because the members of the Conference or the committee may refer to page numbers or chapters which are in the report.

The second recommendation is that the bill require a complete transcript of all meetings and not just closed ones, as the legislation now reads, I believe. There is only an implicit requirement for transcripts.

We also require provisions which parallel other provisions in the Administrative Procedures Act and the Freedom of Information Act requirements.

As this subcommittee is aware, the Sunshine Act was simply the last piece in a pattern of legislation which included the other provisions for notice and comment and access to documents. This pattern of legislation as a whole insures that the public has both insight and input into the decisionmaking process.

Therefore, we suggest that this bill provide for notice and comments and access to documents. Such provisions would exclude the adjudicatory-type functions that the Conference performs just as the legislation now excludes those functions.

We suggest that the notice and comment requirements include the Administrative Office inasmuch as that office has the responsibility for carrying out many of the directives of the Conference. As Judge Hunter indicated, both the Administrative Office and the Federal Judicial Center are heavily involved in the activities of the Conference, and they should not be excluded from coverage. Thus, any requirement for access to documents should include the Federal Judicial Center so that the data underlying its reports may be available to the public.

This is an important requirement, as may be seen from the proposals for special bar admissions requirements, because those proposals were in fact based on the Federal Judicial Center report. The data was extensively challenged by public commentators.

We also urge judicial review be made available. Actions of the Conference often have a significant impact on individual access to the Federal courts.

In conclusion, we reiterate our strong support for this bill and congratulate Senator DeConcini for his groundbreaking work in this area. We urge the subcommittee to continue to examine the inter-relationship of membership and powers of the institutions which form the central policymaking structure of the Federal court system, the

Judicial Conference, the Administrative Office, and the Federal Judicial Center. Thank you.

Senator DECONCINI. Thank you very much.

Miss BERMAN, have you anything to add?

Ms. BERMAN. No.

Mr. HALPERN. That concludes our prepared presentation.

Senator DECONCINI. I appreciate the examples you set forth in your statements because they demonstrate there are some real handicaps and problems when you cannot have access to nonjudicial decisions being made.

Mr. Altier will address some questions.

Mr. ALTIER. In determining which committees and subcommittees shall be covered by sunshine under the proposed bill it has been suggested by at least one of our witnesses, from whom we will hear later today, that perhaps only those committees and subcommittees with actual authority to bind the Conference as a whole be open for public observation.

Do you have any comments on this proposal?

Mr. HALPERN. I am opposed to that proposal. Much of the most critical work of the Conference goes on in those committees and subcommittees. Frequently the Judicial Conference itself considers their recommendations in a quite cursory fashion. There is, then, a very large stake in making those meetings open.

For example, with respect to the equal employment opportunity issue, we represented a coalition of 12 civil rights organizations, many of the leading national civil rights organizations. It was clear to us that an effective role in the Conference's deliberations would have necessitated our attendance at committee and subcommittee meetings, both of which were closed.

Mr. ALTIER. Do you know of any situations where the committees or subcommittees are ever authorized to act on behalf of the Judicial Conference?

Mr. HALPERN. No; I do not. To the best of my knowledge, and I should say that Judge Hunter would have been a better respondent than I, but to the best of my knowledge committee and subcommittee—

Mr. ALTIER. Merely made recommendations.

Mr. HALPERN [continuing]. Made recommendations to the Conference.

Mr. ALTIER. It also has been suggested that the Judicial Conference would be burdened unnecessarily if it had to vote on whether to close meetings and that perhaps a certification by the Chief Justice of the need to close the meeting would be an adequate safeguard for the public.

What are your thoughts on this suggestion?

Ms. TANAKA. If the various requirements for openness and responsiveness are in fact too burdensome for the Judicial Conference it suggests that the policymaking functions of the Judicial Conference should be massively restructured. It does perform administrative and policymaking functions, and we believe such functions should be covered by sunshine provisions. If technically this is impossible, then perhaps that body should not be performing those functions.

Mr. HALPERN. I would add to that comment, with which I concur, an additional point. Anything that imposes new burdens on the Chief Justice I think should be carefully scrutinized. It seems clear that being the Chief Justice of the Supreme Court is a full-time job. We are concerned that anything you add on to that, like certification of whether meetings should be closed, is adding an additional burden which is undesirable in itself.

Mr. ALTIER. I think there are at least 40 other statutes which authorize the Chief Justice to perform functions outside his role as Chief Justice of the Supreme Court. I believe this would add to that.

Mr. HALPERN. I think there should be at some point a congressional look at those various statutes. Indeed, in recent years there has been a tendency to add new obligations to the Chief Justices' job.

For example, as you know, it is he who appoints the court which in turn appoints special prosecutors. Leaving aside some constitutional questions about the Chief Justice exercising those kinds of appointive powers, I have some question about the policy which adds those kinds of burdens on to his already heavy tasks at the Supreme Court.

Mr. ALTIER. My last question, do you find it difficult to compare the costs of implementing S. 2045 with the benefits of increased knowledge and better appreciation for the Federal courts?

Ms. TANAKA. I think the values of the public being better informed about the Federal courts is invaluable. Certainly, if requirements of openness are going to be more costly, I am sure Congress will provide the necessary appropriations.

Mr. HALPERN. In a certain sense Congress has made a judgment in favor of openness in government which is reflected in the APA, Sunshine Act, Freedom of Information Act. Our position is that those were very wise judgments when made and they should be adapted, if necessary, but applied to the Judicial Conference. We believe there will be very significant benefits.

Mr. ALTIER. Thank you very much.

I have nothing further.

Senator DECONCINI. Dr. Romani has a question.

Dr. ROMANI. One technical question of both Judge Seitz and Judge Hunter referred to the onerous nature of the implementing provision, particularly as applied to the councils rather than the Conference. Do you have any views on that?

It did appear to me, at least in retrospect, that some of those points might have been well taken. Some of the notice provisions, and so on, did seem to go beyond what might be necessary for adequate public access to those meetings.

Can you comment on that for us?

Ms. TANAKA. We have not ourselves had experience with the operations of the councils, so I prefer not to make any comment on that.

Relating to burdens on the operation of the Conference. I think the experience with the original Sunshine Act shows that in fact there is a tendency for the body subject to it to circumvent its requirements and you can have such things as notational voting or informal contacts. and in fact the emphasis should be to watch out for such circumvention rather than to worry that the actual requirement will be too onerous.

Dr. ROMANI. What about the position that the judicial conference should be exempt? Do you have any feelings with regard to that?

Mr. HALPERN. We really have no experience and our testimony has been limited to the Judicial Conference and its committees. I am sorry we are not in position to assist the subcommittee on that point.

Senator DeCONCINI. Thank you very much for your testimony today. We appreciate it.

[The prepared statement of Ms. Tanaka and Mr. Halpern follows:]

PREPARED STATEMENT OF CHARLES HALPERN AND DIANA TANAKA

SUMMARY OF TESTIMONY

The Institute for Public Representation strongly supports S. 2045. The Institute believes that it is imperative that the Judicial Conference, its committees and subcommittees conduct their business in open meetings, since the Judicial Conference, like an administrative agency, functions as a major policymaker, the policies of which affect every citizen. Open meetings would ensure that the public be meaningfully informed of these important decision-making processes.

The Institute furthermore urges this subcommittee to add provisions to this legislation that would ensure the accomplishment of the larger purpose of the sunshine principle, the maintenance of responsive and responsible governmental institutions. We recommend the addition of notice and comment requirements and provision for access to relevant documents. Such provisions are necessary if the Judicial Conference is to conduct its policymaking functions in accordance with democratic principles. The Institute will illustrate the necessity for provisions requiring more open procedures with some of its own experiences with the Judicial Conference.

We also recommend that this subcommittee continue its work in this area and make a comprehensive study of the institutions that comprise the central structure of the Federal judiciary: the Judicial Conference, the Administrative Office, and the Federal Judicial Center.

INTRODUCTION

Mr. Chairman, members of the subcommittee, thank you for inviting the Institute for Public Representation to testify on S. 2045. My name is Diana Tanaka. I am a law fellow at the Institute, and I am presenting this testimony on behalf of the Institute and its Director, Charles Halpern. We were assisted in the preparation of this testimony by Fredda Berman, a third-year law student at the Georgetown University Law Center.

The Institute for Public Representation is a public interest law institute affiliated with Georgetown University Law Center. It engages in the representation of traditionally underrepresented groups before the Federal courts and administrative agencies. The Institute has as a major goal the assurance of public access to these important policy and decisionmaking bodies.

The Institute strongly supports S. 2045 and congratulates its author, Senator DeConcini, for his timely attention to an issue of ever-increasing importance. This legislation will apply the "sunshine" principle, which is central to the concept of a responsive democratic government, to the Judicial Conference, its committees and subcommittees,<sup>1</sup> bodies which play a major policymaking role and yet conduct their activities behind closed doors. The Judicial Conference exerts a fundamental influence upon the Federal court system and those it serves, by establishing policies for the Federal courts, issuing guidelines, developing rules of practice and procedure, and proposing and commenting on legislation.<sup>2</sup> It functions

<sup>1</sup> S. 2045 will also supply sunshine principles to the judicial councils of each circuit. Our testimony will be limited to a discussion of the bill as it applies at the national level.

<sup>2</sup> Indeed, S. 2045 comes at a time when the Chief Justice of the Supreme Court of the United States has proposed a particularly significant expansion of the powers of the Conference, to allow it to play the central role in establishing new Federal judgeships:

"Congress should promptly consider authorizing the Judicial Conference to evaluate the need for additional judgeships and, subject to congressional veto, establish new judgeships as the needs require." "Annual Report on the State of the Judiciary, Remarks of Warren E. Burger," at the midyear meeting of the American Bar Association, Feb. 3, 1980, p. 5.

in all essential respects like an administrative agency, but it offers no opportunity for public involvement or oversight of its activities. The Institute therefore urges that the legislation being considered here today is passed to ensure that the policy-making activities of the Judicial Conference be conducted in public view in a manner responsive to the needs of the public. While the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, and the Sunshine Act, 5 U.S.C. § 552b, may be construed to apply to the Judicial Conference without additional legislation, such legislation would serve to make Congress intention with regard to coverage of the Conference absolutely clear.

In our testimony today, we shall discuss briefly the "sunshine principle and its place in the democratic theory of government, the role of the Judicial Conference, and our experiences as members of the public with the processes of the Judicial Conference. We shall explain why we support this bill's application of the sunshine principle to the Conference, and shall offer some suggestions as to additional provisions which we believe will make the bill more effective. In conclusion, we shall offer some remarks as to further work that your subcommittee may wish to pursue in this area.

#### THE SUNSHINE PRINCIPLE

The principle behind sunshine legislation lies in the nature of democratic institutions. As the Sunshine Act, declares :

"It is \* \* \* the policy of the United States that the Public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."<sup>3</sup>

The Sunshine Act of 1975 was part of a comprehensive congressional effort to assure that Federal agencies be responsive and accountable to the public, despite the fact that they are not elected bodies and often do not have specific public constitution. The act was the final piece in a pattern of legislation that provided for public access to agency documents, publication of proposed rules, the opportunity for members of the public to submit written comments, and publication of the rules adopted with a statement of their basis and purpose. Considered together, the Sunshine Act, 5 U.S.C. § 552b, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, and the Freedom of Information Act, 5 U.S.C. § 552, represent a congressional policy of open and responsive government.<sup>4</sup> This policy should extend to the Judicial Conference.

#### THE ROLE AND PROCEDURES OF THE JUDICIAL CONFERENCE

##### *a. The Judicial Conference is a policymaker*

The Judicial Conference functions as an agency the actions of which affect every citizen who undertakes litigation in the Federal court system. It promulgates policies for the Federal courts, in the form of recommendations, guidelines and resolutions, just as an agency promulgates policies for its regulatees. Such policies affect the legal rights of every citizen. The Conference accomplishes its tasks as a policymaker by virtue of both its formal, statutory authority and the informal influence conferred by its perceived expertise and prestige.<sup>5</sup>

Thus, for example, the Conference has authority to adopt standards and procedures for the selection of Federal magistrates,<sup>6</sup> which will fundamentally affect the quality of justice received in the Federal courts. Through its authority to develop the rules of practice and procedure for the Federal courts, the Confer-

<sup>3</sup> Government in the Sunshine Act, Public Law 94-409, § 2, 90 Stat. 1241 (1976).

<sup>4</sup> Congressional commitment to this policy is also strongly evident in the Federal Advisory Committee Act which requires that committees established to advise the executive branch hold open meetings, provide for notice and comment, and keep detailed minutes of their meetings, 5 U.S.C. App. I § 10.

<sup>5</sup> 28 U.S.C. § 331 authorizes the Judicial Conference to :

(1) Submit suggestions to the various courts in the interests of uniformity and expedition of business ;

(2) Study the general rules of practice and procedure in use in the federal courts and recommend to the Supreme Court changes in and additions to such rules ; and

(3) Submit to Congress its recommendations for legislation.

<sup>6</sup> Federal Magistrates Act of 1979, Public Law 96-82, 93 Stat. 643 § 3 (1979), amending 28 U.S.C. § 636 (b).

ence similarly affects Federal litigation on a nationwide basis.<sup>7</sup> Rule 23 of the Federal Rules of Civil Procedure on class actions and the civil rules on discovery, for instance, bear directly upon the types of claims which may be pursued in the Federal courts, and the ease and expense with which they may be pursued. Other policies developed and recommended by the Conference, such as the program of special bar admissions requirements being prepared for imposition in selected district courts, also have profound effects upon clients and lawyers.<sup>8</sup> The reach of the Conference's power is moreover extended by its supervisory power with regard to the Administrative Office, which enables it to implement policies concerning the administration of the Federal courts.<sup>9</sup> In this way, for example, the Judicial Conference used its authority over the Administrative Office to establish a Judicial Salary Plan.<sup>10</sup>

The Conference also plays a significant role in the Federal legislative process with regard to its area of expertise, the Federal court system. It prepares and recommends draft legislation and comments upon pending legislation in the same way that an agency does. Thus, it has considered and expressed its views on matters such as the alteration of the appellate jurisdiction of the Supreme Court,<sup>11</sup> the abolition of diversity jurisdiction in the district courts,<sup>12</sup> and the definition of standing to sue.<sup>13</sup>

The policymaking activities of the Judicial Conference are in this way considerable. Like the agencies, the Conference issues prospective rules which are applied to its regulatees and affect those who are served by them. In making such policies, the judges of the Conference do not discharge a judicial function; they function as policymakers in the same sense that agency members do.

*b. The Judicial Conference develops its policies behind closed doors.*

At present, the Judicial Conference performs its policy and decisionmaking role behind closed doors. The Conference operates on the premise that it has complete discretion to admit or deny the public access to its decisionmaking

<sup>7</sup> The Judicial Conference develops rules such as the Federal Rules of Civil Procedure through its general authority statute, 28 U.S.C. § 331. Although the rules of practice and procedure developed by the Judicial Conference must be approved by the Supreme Court and presented to Congress where they are subject to a veto, 28 U.S.C. § 331 and § 2072, the primary responsibility is clearly with the Conference. Congress used its veto power for the first time in 1974 with regard to the Federal Rules of Evidence and over the years the involvement of the Supreme Court has been fairly limited. As Justices Black and Douglas noted in 1962:

"The present rules produced under 28 U.S.C. § 2072 are not prepared by us but by the Committees of the Judicial Conference designated by the Chief Justice, and before coming to us they are approved by the Judicial Conference pursuant to 28 U.S.C. § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power." Amendments to the Rules of Civil Procedure for the United States District Courts, Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 861, 870 (1962). (Emphasis added.)

<sup>8</sup> See generally Committee to Consider Standards for Admission to Practice in the Federal Courts, "Final Report to the Judicial Conference," September 1979.

Policies promulgated by the Judicial Conference under its powers to recommend and suggest, while not formally mandatory, are nonetheless imbued with the prestige of a body whose members include the chief judges of each of the circuits and the Chief Justice of the Supreme Court. Thus it seems likely that several districts will choose to impose the special bar admissions requirements program, despite widespread public opposition to such requirements voiced in earlier hearings.

<sup>9</sup> 28 U.S.C. § 604, the organic statute of the Administrative Office, gives the Judiciary Conference the power to supervise the specific duties of the Administrative Office, as well as to assign it "other duties." The Administrative Office has a number of specific powers, including the power to fix compensation for employees of the courts and the authority to make such rules and regulations as may be necessary to carry out the functions, powers, duties and authority of the Director, 28 U.S.C. § 604(a) (5) and (f). The Director of the Administrative Office is also instructed to perform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference, 28 U.S.C. § 604(a) (17).

<sup>10</sup> The Judicial Salary Plan sets salaries throughout the Federal courts through the Administrative Office's power to fix compensation, 28 U.S.C. § 604(a) (5) and its control over the number of court employees, 28 U.S.C. §§ 711 and 751. The Plan incorporates standards and qualifications established by the Judicial Conference.

<sup>11</sup> Report of the Proceedings of the Judicial Conference of the United States, March 1979, at 13.

<sup>12</sup> Report of the Proceedings of the Judicial Conference of the United States, March 1978, at 7.

<sup>13</sup> Report of the Proceedings of the Judicial Conference of the United States, September 1979, at 71.

process. Although it issues a report of its proceedings twice a year, after its meetings, there is no requirement that any part of the process leading to the promulgation of policies through resolutions or guidelines be open. Thus, there is no mandatory notification to the public that particular policies are being considered, or what their basis might be. There is no formal mechanism for meaningful public input. While the Conference has at times recognized the importance of more open procedures, these procedures have not always been used, even on important matters, nor have they have adequate to ensure public airing of important policy determinations. Important matters which will have far-reaching effects are still decided behind closed doors and final determinations may differ greatly from the proposals presented for discussion during open hearings. The Conference persists in conducting its activities in partial or complete secrecy, despite the fact that the principle that judicial proceedings be conducted behind closed doors was developed to maintain the integrity of the courtroom, and is consequently inapplicable in the policymaking context.<sup>14</sup> Where the Conference functions as an agency, principles of openness and responsiveness such as those embodied in acts like the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the Freedom of Information Act, 5 U.S.C. § 552, and the Sunshine Act, 5 U.S.C. § 552b, should be applied to the Judicial Conference, as they are to agencies.<sup>15</sup>

### *c. The experience of the Institute*

The Institute for Public Representation has been involved in two projects which have been the subject of deliberation by the Judicial Conference. Both illustrate the need for the application to the Judicial Conference of principles of openness and responsiveness. In the first, which concerns the development of an equal employment opportunity plan for the Federal courts, the Judicial Conference permitted no public participation in its decisionmaking process. In the second, which concerns the imposition of special Federal bar admissions requirements, the Conference allowed some participation by members of the legal profession, but in such a manner as to frustrate the purpose of such participation. In general, our experience has been one of extreme difficulty in following the progress of Conference actions and in providing information and alternate views for its consideration at meaningful points in its deliberations.

The first project concerning equal employment opportunities in the Federal courts was initiated last year, when, on behalf of a number of civil rights groups, the Institute petitioned the Judicial Conference to end discriminatory employment practices in the Federal courts. We submitted our petition to the Conference on June 5, 1979. It should be noted that there was no format or guidelines for presentation of petitions to the Conference, so that we had some difficulty in filing the petition with the Conference.

Although the substance of our petition was eventually adopted by the Judicial Conference in the form of a resolution to develop a model Equal Employment Opportunity Plan for the Federal courts, the process revealed numerous deficiencies in the workings of the Judicial Conference. Once within the Conference, the petition was forwarded to a subcommittee. We were denied our request to be present at the subcommittee meeting, and, after the meeting, were denied a request to be informed of the action taken. We had a similar experience with the committee which later considered our petition. After the Judicial Conference adopted a resolution to develop a Model Equal Employment Opportunity Plan,<sup>16</sup> our difficulties continued. Although the development of such a plan is an extremely complex task, involving important social policies and expertise, the Conference did not elicit public views on the matter. Groups representing those to be most affected by the plan, the women and minorities who wish to work for the Federal court system, were not invited to express their views on the plan orally or in writing, nor were the many members of the bar who have expertise in the issues permitted to offer comment.

We submitted a detailed plan and procedures to the Administrative Office which forwarded it to the appropriate subcommittee and committee of the Con-

<sup>14</sup> Senator DeConcini's bill rightly covers the Conference's activities as a policymaker and excludes from coverage meetings or portions of meetings in which the Conference performs its other function as an informal forum for judicial consultation and communication. S. 2045, § 335(b) (2) and § 335(d).

<sup>15</sup> Indeed, these acts may already apply to the Judicial Conference. However, given the lack of a conclusive Supreme Court ruling on the issue and the ambiguity of the definition of an "agency" in the acts, it is appropriate and necessary that specific legislation, such as S. 2045, be developed to ensure coverage of the Conference.

<sup>16</sup> Report of the Proceedings of the Judicial Conference of the United States, September 1979, at 58.

ference, along with the Administrative Office's own plan. We were not permitted to see that plan, orally address either the subcommittee or committee, or see their reports. We thus do not know what information was before the subcommittee or committee, to what degree they consulted experts in the field, what policy considerations they discussed, or what they recommended to the Judicial Conference.

The Conference will have met by the time of this hearing, and in all probability it will have taken action, based on this entirely closed door process. It is of the utmost importance that the Conference adopt a truly effective equal employment opportunity plan for the Federal courts; yet the Conference had done almost nothing to ensure public airing of the relevant issues.

The second project in which the Institute was involved concerned Judicial Conference attempts to establish special admission requirements for attorneys who seek to practice before the federal courts. In this case the Conference followed a somewhat more open procedure, though of course it did not acknowledge any obligation to do so. Many groups expressed their concern over the proposals at the initial hearings held by the Judicial Conference's Committee to Consider Standards for Admission to Practice in the Federal Courts. Serious questions were raised about the need for the proposal, the efficacy of the requirements suggested and the probable disproportionate impact on minority and other groups which depend on access to the Federal courts for the vindication of essential rights, and which already have difficulties in obtaining adequate legal representation. Indeed, the committee's own staff report stated that 85 percent of the respondents opposed the Federal bar examination and trial requirements, and that there was repeated criticism of the statistics used by the committee.<sup>17</sup>

Largely as a result of the public response, the Judicial Conference decided not to go ahead with the admission requirement as originally planned. The plan which it substituted, however, raises other serious problems which were not in any way considered during the initial open procedures. This plan will involve large scale experimentation with different admission requirements in selected districts.<sup>18</sup> There is no indication that the problems of experimentation or the lack of a scientifically reliable manner of evaluating the experiment have ever been considered. Different admissions requirements may have varying impacts on particular groups as well as possibly limiting the number of attorneys available to minority groups in a particular district. The patchwork of admission requirements may also disrupt legal education for years to come, as schools and students will not be able to plan curricula to address the differing requirements of the various jurisdictions.

We have written to the Conference committee which is to implement the experimental plan, expressing our concern that the risks and benefits of implementation be fully weighed and that guidelines to ensure comparability of results be established. Since the Conference never substantively addressed the criticisms voiced in the earlier hearings, such criticisms and the additional problems raised by varying requirements must be addressed before implementation of any plan, lest the effect of the experiment merely be to impose selectively irrational burdens on lawyers and client communities. However, once again, we are confronted by the uncertainty created by the Conference's processes; we do not know if there will be a meaningful opportunity for the public to consider or comment upon the plan which will, bearing the weight of the Conferences prestige, be recommended to the selected districts. Proposals with such potentially widespread and serious effects should be marked at every step of their development by open procedures, instead of by a process of partial and intermittent revelation to the public.

#### SENATE BILL 2045

The legislation being considered here today would greatly improve the procedures under which the Judicial Conference operates. The holding of open meetings would at least provide some indication of what factors and considerations are being discussed during the development of a Conference resolution or guideline, or a decision not to act. This legislation represents a significant advance from a situation in which the only information which the Judicial Conference is required to make public is that provided in the Judicial Conference's

<sup>17</sup> Judicial Conference Committee To Consider Standards for Admission to Practice in the Federal Courts. "The Report of Written Comments and Public Hearings" (June 1979), p. 2.

<sup>18</sup> Report of the proceedings of the Judicial Conference of the United States, September 1979, at 103-105.

report to Congress of proceedings that have already taken place, when it is too late for the public to monitor or comment meaningfully.

The Institute applauds the inclusion in this legislation of the meetings of the committees and subcommittees of the Judicial Conference, since the Conference itself meets only twice annually, leaving much of its work to be done by these bodies. They must be covered if the activities of the Conference are to be monitored effectively.

The Institute therefore supports this legislation with great enthusiasm. We would, however, like to offer a few suggestions which would strengthen the open meeting requirement and more completely accomplish the larger goal of ensuring that the central policymaking organs of the federal judiciary conduct their business in a responsive and responsible manner.

#### *A. The open meeting requirement*

The central and most important provision of this legislation as written is the open-meeting requirement. In order to ensure that the purpose behind such a requirement is fulfilled, certain additions to the bill should be made. These additions are suggested by problems which have arisen regarding the Sunshine Act, 5 U.S.C. 552b. Incorporating the additional provisions would make this legislation more effective from the outset.

First, the bill should require that the public be given access to any reports that are actually to be discussed at any open meeting or open portion of a meeting. Persons who have attempted to make use of the sunshine provisions of 5 U.S.C. § 552b have noted that the meetings are often incomprehensible to nonparticipants. One can easily envision a meeting virtually conducted in code through repeated references to charts, page numbers or sections of a report.

A requirement that reports to be discussed at the meeting be available to the public at least at that meeting would ensure that the business of the Judicial Conference is in fact conducted in the sunshine. Public presence at meetings may be meaningless without requiring access to these reports. Such a requirement would be fully in line with the goals of sunshine legislation and would not present a significant burden to the bodies covered by the bill.

Second, the bill should be changed to require that a complete transcript be made of all meetings, not only those meetings closed pursuant to § 335(d). Many of the actions taken by the Judicial Conference and its committees have far-reaching effects. To provide for open meetings in one city, when the effects of the business to be conducted may be felt over a much greater area, is to provide very little to those who cannot afford to send representatives to view the meeting. Moreover, even those interested persons in the area may be unable to attend because of other commitments during regular business hours. This problem is alleviated somewhat by requiring that a record of the meeting be available to the public. The addition of a provision of this type would help to implement the goals of sunshine legislation by ensuring that even meetings unattended by the public will be accessible to the public.

#### *b. Ensuring responsive and responsible government*

The additions outlined above would help make the open meeting requirement more effective. Other additions are necessary however to further the larger purpose of sunshine principles, that of ensuring responsive and responsible government. As we have mentioned, the sunshine principle is part of that larger policy, which also requires an opportunity for public comment and access to relevant documents. Together, such principles operate to demystify government procedures and maintain our institutions on a democratic basis.

We therefore recommend that a provision paralleling the notice and comment procedures of the Administrative Procedure Act<sup>19</sup> be included in this legislation. Such a requirement would help ensure that interested, knowledgeable members of the public be given an opportunity to provide their insights to the Conference, its committees, and the Administrative Office. The narrow range of experience and views represented by the Judicial Conference and its committees, both composed almost entirely of Federal judges, suggests the vital importance of such a mechanism. The extensive responsibilities of the Administrative Office for carrying out directives of the Judicial Conference makes it appropriate that it too solicit public comments. Notice and comment procedures of course include the right to petition for the issuance, amendment or repeal of rules, regulations, and

<sup>19</sup> 5 U.S.C. § 553.

guidelines. 5 U.S.C. § 553(e). We recommend that the provision also require that the final publication of the action to be taken include a reasoned response to material comments. This would ensure that the information provided has been adequately considered and that the action to be taken has been examined in light of all the facts available.

Two additional provisions found in other legislation should also be adopted and applied to the Judicial Conference and the Administrative Office. Like notice and comment, these are elements of the pattern of legislation which included the original Sunshine Act and are necessary to further the goal of responsive, responsible government. First, there should be a provision which assures public access to documents requested. This would parallel the Freedom of Information Act, 5 U.S.C. § 552. Such a provision should also be extended to the Federal Judicial Center ("FJC"). The Conference sometimes relies upon reports submitted by the FJC, as it did in considering special Federal bar admissions requirements; in such instances, access to FJC documents and data is necessary if the assumptions of the FJC report are to be critically examined.

Second, there should be the opportunity for judicial review similar to that offered under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. A provision for judicial review is crucial. Actions taken by the Judicial Conference in its role as a policymaker have a significant impact upon individuals' access to the Federal courts, and justice requires that they not be denied redress in a court.

#### CONCLUSION AND CONSIDERATIONS FOR THE FUTURE

We reiterate our strong support for this legislation. The application of sunshine and other principles of responsiveness to the Judicial Conference is clearly long overdue. Its policymaking processes must be brought into open view, and its policies subjected to public discussion before they are imposed on the public. It is entirely inappropriate that policies fundamentally affecting potential and actual clients, the legal profession and the administration of justice be developed through mysterious, unpredictable procedures.

In addition to approving this legislation, we would suggest that the subcommittee consider for the future a complete examination of the functions and structure of the central administration of the Federal court system. This would include an examination of the interrelationship of the Judicial Conference, the Federal Judicial Center, and the Administrative Office.

Such an examination should also include a study of the composition and leadership of the Conference. The vital matters considered by the Judicial Conference require that they be considered by a body representative of and sensitive to the varying needs of our diverse population. Among other methods to ensure the representative composition of Judicial Conference's committees and subcommittees, Congress might explore procedures similar to the Judicial Selection Panels established by Congress. The membership of the committees might also be expanded to require representatives from outside the judicial branch, again with the goal of affording consideration to diverse viewpoints.<sup>20</sup> A possible model is the Administrative Conference of the United States, the advisory functions of which are similar to those of the Judicial Conference, although of course the latter has additional powers.<sup>21</sup> One-third of the members of the Administrative Conference are selected "in a manner which will provide broad representation of the views of private citizens and utilize diverse experience."<sup>22</sup>

Another matter which Congress should examine is the overburdening of the Chief Justice in his dual capacities as head of the Judicial Conference and the Supreme Court. Alternatives might be a rotation among the members of the Judicial Conference, or the appointment of an outside director by the President. Again, the Administrative Conference provides a model. It is headed by a full-time chairman, appointed for a 5-year term by the President, with advice and consent of the Senate.<sup>23</sup> A change in this area could be expected to improve the functioning of the Judicial Conference while relieving the Chief Justice of part of his extraordinary workload.

We urge this subcommittee to approve this bill and to incorporate the provisions we have suggested. We hope that you will continue to address your

<sup>20</sup> At present, while some committees include members who are not judges, most are composed only of judges.

<sup>21</sup> 5 U.S.C. § 571.

<sup>22</sup> 5 U.S.C. § 573(b) (6).

<sup>23</sup> 5 U.S.C. § 573(b) (1).

attention to these and other issues raised by the activities of the Judicial Conference, the Administrative Office, and the Federal Judicial Center. It is time that principles of openness and responsiveness be applied to these important institutions.

Senator DeCONCINI. We will now hear from a panel of Jim Mann, reporter, Los Angeles Times, Washington, D.C., and Fred Graham, law correspondent, CBS News, Washington, D.C.

Mr. Graham, excuse my using your name in vain this morning. Perhaps you had no interest in those meetings.

Your full statements will appear in the record following your oral testimony. If you would please highlight them for us.

#### PANEL OF LAW CORRESPONDENTS:

##### STATEMENT OF JAMES MANN, REPORTER, LOS ANGELES TIMES, AND FRED GRAHAM, LAW CORRESPONDENT, CBS NEWS

Mr. MANN. Mr. Chairman, I am here to testify in support of S. 2045. As it happens, your subcommittee's hearing on S. 2045 is taking place on the very week of the regular, closed biannual meeting of the Judicial Conference. I thought it might be useful to you to provide you with some firsthand experience of the relations, such as they are, between the Conference on the one hand and the press and public on the other.

I learned of this week's session of the Judicial Conference by happenstance. There was no advance notification to the press and public that the meeting would be taking place. There was no list of who would be attending the meeting. There was no published agenda for the session.

Last Tuesday I called the Supreme Court's Public Information Office, which is responsible for inquiries by the press and public regarding the Judicial Conference. I had a couple questions to ask, of a general nature, regarding the Conference. At the time I asked when the next meeting of the Conference would be held. I was told it would be about March 15.

The official kindly promised to check further. He called back a few moments later and said no, it would be tomorrow; that is, the next day.

I asked whether I might have an agenda for the meeting and was told none was available.

Even after the meetings began, that is on Wednesday and Thursday, I found several other news reporters who had no idea they were then taking place.

This has been the custom rather than the exception during the 4 years I have been covering the Supreme Court and the Federal judiciary. The press and public are not told anything about the Judicial Conference other than those few matters on which the Conference, for one reason or another, feels it would like to have some publicity.

That is not to say there is no information at all. The annual statistical report of the Administrative Office of the U.S. Courts is made public every September, generally at the time of the September meeting of the Judicial Conference. On occasion, an official of the Administrative Office of the U.S. Courts will be assigned to brief the press on specific selected matters which have taken place, or policies which have been reached in the Conference.

Even in those instances, however, those officials do not volunteer all information or do not feel free to describe all of the discussions which have taken place in the Conference.

Finally, even the biannual report by the Chief Justice to Congress regarding the Conference, which you members receive, is not regularly or routinely distributed to the press. It is, of course, indirectly available inasmuch as it is a Government Printing Office document. However, it is worth noting that the Supreme Court's Information Office, which regularly mails out other materials, such as the annual report, does not do likewise for the official report of the Judicial Conference. As I take it, that is carrying out the policies that the Judicial Conference itself has decided to adopt with regard to the press and the public.

Suppose the Judicial Conference proceedings were open. What sort of matters would be of interest to the press and public?

Well, I can think of a number of things handled by the Conference, all of which I feel involve questions of public policy or court administration.

It is worth noting that Judge Hunter referred repeatedly to what he called internal management matters, or housekeeping matters. In a number of instances, however, the positions or policies adopted by the Conference go far beyond this. One, for example, is pending legislation.

At a briefing yesterday following the Judicial Conference, reporters were told vaguely that a position will be adopted on an estimated 40 to 50 items of pending legislation. At the moment there are still pending before the Congress bills to reform the Criminal Code, establishing procedures for handling complaints against Federal judges, permit the Justice Department to file suit on behalf of institutionalized persons, and so on. All of these bills have at one time or another in the past provoked the interest of the judiciary and have prompted the Judicial Conference to take a position of some kind or another.

In addition there is now pending in Congress a bill which would radically alter the scope of judicial review over regulatory decisions, the Bumpers amendment. That bill, too, I would think, is something that the Judicial Conference might have discussed. The views of the members of the Conference would be of public interest.

These legislative matters involve matters of public policy and not internal management.

Second, judicial salaries. Last November a lawsuit was filed in a Federal court here claiming that Federal judges are legally entitled to a pay raise of 12.9 percent rather than 5.5 percent. The suit was filed by the Administrative Office of the U.S. Courts. Again I do not intend to pass judgment on the merits of the suit nor on the problem of whether or how Federal judges can decide a case where they also serve as a plaintiff.

As a reporter, however, I would like to know, and I believe the readers of my newspaper and other members of the public have an interest in knowing, whether the Judicial Conference, a board of directors of the Federal judiciary, has taken any action or had any discussions regarding the prosecution of this lawsuit. It is interesting to note, Judge Hunter spoke of the problems which might arise if a lawsuit were filed seeking to open Judicial Conference proceedings

under S. 2045. He suggested that a Federal appeals court might feel it had to rescue itself in that situation.

From a distant perspective I find it difficult to understand why, under the rule of necessity, judges can decide suits in which they are plaintiffs but it is difficult for them to handle a suit in which they are defendants.

In any case, I cannot imagine that is more a matter of public policy than the expenditure of public moneys. The longstanding grievances of Federal judges that they are underpaid by comparison with some of their colleagues in private practice are grievances which should be aired in public.

Third, I will touch briefly on this. There have been discussions in the Conference on the need for new judgeships. That is a matter of routine in the Conference. Other witnesses have testified about it.

Again, at a time when the Chief Justice is proposing that the Conference be delegated with the authority to create new judgeships, subject to congressional veto, I think that clearly is a matter of public policy which should be open to the public.

Fourth, judicial ethics. Three years ago indirectly I learned that the legislative liaison officers for the Administrative Office of the U.S. Courts were attempting to have Federal judges exempted from the financial disclosure provisions of legislation then pending in Congress. The effort was not successful. As you know, the legislation was enacted in a form which requires Federal judges to fill out essentially the same statements as Congressmen and high-level members of the executive branch.

Again, however, the merits of the disclosure requirements are beside the point. I believe the judiciary should have arrived at its position openly and should have made its views public.

Fifth, matters of the administration of justice and of the Federal court system. The Judicial Conference regularly sets policies for the Federal courts regarding rules of practice and procedure, regarding the use of jurors in Federal courts, regarding the implementation of the Speedy Trial Act, regarding the assignment of judges from one circuit to another, and regarding many other administrative matters. All of these are issues of public concern and import, whose adoption the public should be permitted to observe.

Recently, for example, the Chief Justice has questioned the wisdom of using lay jurors in complicated or protracted civil trials. Has the Chief Justice decided this problem with the Judicial Conference? I have no idea.

The reference by Judge Seitz to discussions in the Conference this week about the Federal jury system was the first public mention that the Conference has been discussing the Federal jury system.

Judicial Conference proceedings are clearly different from the regular closed conferences in which the Supreme Court or other courts decide individual cases. In a speech 3 years ago Justice Rehnquist defended the Supreme Court's longstanding custom of holding closed conferences to decide cases in this way. He said:

From public sessions of oral arguments and published opinions and orders. we already know precisely what business the Supreme Court transacts and we know a fair amount of how it transacts that business.

With Rehnquist's words in mind, let us now look at the Judicial Conference. At the moment the public does not know precisely what business the Judicial Conference is transacting at its closed meetings. Its decisions are not always published. The reasons behind its decisions are not published. The differing views of the individual members of the Conference are not published.

We do not know, in Justice Rehnquist's words, "a fair amount" about how the Judicial Conference transacts its business.

That business, I would add, is often of greater consequence than any individual court case, since the work of the Conference sets policy for or affects the conduct of the entire Federal judicial system.

On a couple of occasions, the Chief Justice has joked to reporters that they and the public would be "bored to death" if they were ever allowed to attend proceedings of the Judicial Conference.

Having never attended, reporters are of course in no position to dispute this. As is often the case in matters of public affairs, we seek only the right to decide on our own when we are going to be bored. Thank you.

Senator DECONCINI. Thank you.

Mr. Graham?

Mr. GRAHAM. Mr. Chairman, my prepared statement will be printed in the record so I just want to mention merely a couple points and answer whatever questions you might have.

First, I certainly want to second the remarks which Jim Mann has made about the importance of some of the material that is discussed and decided at the Judicial Conference and of the frustrations of covering this beat and being kept so much in the dark as to what is going on.

My testimony, as you know, goes only to two points which really concern me. The one point that I do ask is that the subcommittee amend the statute as it is now drawn up so that it will be clear that the Judicial Conference and the Councils, if they are to be included in this, must be open to coverage by the broadcast media as well as to the print media and to the public.

Two points flow from that, Mr. Chairman. As I say in my printed statement, I think it is clear, both from the wording of the statute and as it has been construed in its application through the executive branch, and particularly to the peculiar antipathy of the Federal judiciary in its judicial proceedings, particularly toward the broadcast media, that if it is ambiguous in the statute as to whether or not the broadcast media is to be included, I think it is predictable that it will be excluded.

In this regard, it is interesting that a few years ago the Judicial Conference adopted a rule which excludes cameras from all courtrooms, Federal courtrooms in the United States, under all circumstances except a very narrow slice of proceedings having to do primarily with the swearing in ceremonies of naturalized citizens.

It would have been very interesting to those of us in my business to have covered the deliberations of the Judicial Conference which came to that conclusion and which adopted that rule. I would like to have known what the arguments were and what that was based upon.

That in itself is an example of the kind of importance that attaches to many of the decisions which are made to the public in general and to the broadcast media. We certainly would like to have been there to cover those deliberations as well as many others.

We would suggest, then, that another line be added, or another item be added under definitions which would make it clear that open to public observation means open to the broadcast media as well as to the print press.

Finally, and just briefly, the reasons for its being open I think are fairly obvious. If not no other reason than the simple equity and equality between the media it is known that more than a majority of the people do get the basis of their news these days from radio and television.

Finally, I think it would be beneficial to the Federal judiciary which has this rather odd antipathy to the broadcast media, which is not shared by a majority of the States, I think with a little exposure on their part to that they would see there is nothing inherently bad about this and it might have a beneficial fallout for them.

I am a little bit nonplussed at the remark that Judge Hunter made as to my personal welcome into Judicial Conference meetings under certain circumstances, as I understood it, as long as I didn't want to be there as a newsman. I don't know why else he would think I would want to be there. I don't know what he thought would be wrong if I wanted to be there as a newsman.

However, there will be one question, I believe, Mr. Chairman, particularly about television coverage. The theory obviously of the sunshine law is that it opens the proceedings covered by the law to the public. There is an assumption there that the press will come in with the public to cover the meeting. There is a difference when you include the broadcast media there, not so much radio. We could come in with our radio equipment and there would be no change in the atmosphere of the room.

However, there can be, as you know, a change when television cameras are concerned. However, there does not have to be. I certainly would not suggest here that we would inflict upon the Judicial Conference our necessities, and I do not think that they should be required to change the lighting of the rooms, for instance.

I would just commend to you and to them, if this is adopted, the rules which have been adopted by the Supreme Court of Florida for all of their courts. The substance is that cameras are admitted into any room as long as the lighting and the appearance of the room does not have to be changed in any way.

This room, for instance, could be covered exactly as it is right now by our cameras without the addition of any lights or any other microphones.

Obviously, when we ask this it is under those conditions that we would want to cover the Judicial Conference meetings. Thank you very much.

Senator DECONCINI. Mr. Graham, thank you.

Your observations and suggestions are well taken. We did not intend by the language to exclude the broadcast media. If we report out a bill we certainly will make some clarification.

Also, I think it is constructive that the broadcast media realize that the television lights particularly can cause some disruption and perhaps even change the tenor of a particular meeting. I take it you would have no objection to language, if a bill is reported out, suggesting something similar to what Florida has.

Mr. GRAHAM. I think that would be very wise.

Senator DECONCINI. Let me ask you both—have you directly asked to be in attendance at any Judicial Conference meetings and been denied?

Mr. GRAHAM. I confess I have not. I have been covering the Supreme Court now for 13 years. Quite often these meetings have occurred by the time I learn of them.

Perhaps the only time that I might have asked was the meeting at which the Judicial Conference was considering adopting new ethical rules in the wake of the Fortas matter where Justice Fortas' ethics were in question.

You will recall that at that time the Judicial Conference adopted new ethical rules for Federal judges. I think perhaps I did at that time.

I must say that I learned of the current Judicial Conference meeting because I happened to get on an elevator with Judge Wade McCree the day before yesterday. More often than not, I do not know until afterwards that it has occurred.

Mr. MANN. I believe that I did ask a year or two ago whether I could attend. I was refused. I am not absolutely certain of that.

My experience this week in finding out by happenstance that the meeting was going to take place, and Judge Hunter's comment that Mr. Graham could attend as long as he was not there as a reporter, I think this indicates that while selected lawyers or scholars might be welcome the press is not insofar as it is there to do news reporting.

Senator DECONCINI. Would you anticipate or consider making such a request in the future now?

Mr. MANN. Certainly.

Senator DECONCINI. Do you find that Government secrecy encourages leaks of inaccurate information? Is that your experience as newsmen?

Mr. MANN. Yes. It sounds simple but for getting accurate information there is no substitute to being there.

Senator DECONCINI. When you hear of what is going on, is it hearsay or just information from your professional colleagues as to what goes on there? I realize you cannot disclose your sources, but do some members of the Conference sometimes discuss matters with you after the fact? How do you find out what is going on other than through any statement which is issued?

Mr. MANN. It can be any one of a number of things. It can start with leaks from the Conference. It can be hearsay from other judges. It can be any one of a number of other parties who might have attended or spoken to people who have attended.

Senator DECONCINI. Does the Conference issue public statements regularly after their meetings other than their annual report? Would you anticipate some public press release being issued yesterday or today?

Mr. MANN. There was a press release issued yesterday, as there often is at the end of the 2- or 3-day meeting of the Conference.

Senator DECONCINI. Do you recall what it said?

Mr. MANN. That press release, however, does not cover all of the matters discussed but only a fraction of the matters handled by the Conference.

For example, the press release issued yesterday by the Conference mentioned that the Conference had gone on record in opposition to this piece of legislation, S. 2045.

That, however, was the only legislative matter that was mentioned in the press release.

In response to a question at a briefing, the estimate was "Well, there are 40 or 50 pieces of legislation."

Senator DECONCINI. More than 50?

Mr. MANN. Forty to fifty.

Senator DECONCINI. Which were considered and discussed?

Mr. MANN. Yes.

Senator DECONCINI. And the press release mentioned that a decision was made on only one?

Mr. MANN. Yes.

Mr. GRAHAM. Mr. Chairman, in connection with the question you asked, one thing that happens with regard to these meetings is that some of the judges, some of the members, as we know, do not really see a need for all of the secrecy that surrounds these meetings. They are fairly willing to discuss them afterward, and obviously that their names not be used.

The problem here is that if you get a press release and it simply makes a rather mysterious statement that some action has been taken, the person which hands this out, the press information officer, he is not authorized to elaborate in any way, and in fact does not know.

It is necessary, then, to get in contact with someone—

Senator DECONCINI. Who is there?

Mr. GRAHAM. Yes; who is there. Frankly, there are members who are usually quite willing to discuss it because they do not believe that it is all that secret.

The problem is, of course, that some of these people do have their own points of view. They are being quoted without attribution to them. I do think that with regard to these Administrative Conference meetings there is the problem of the inaccurate leak quite to the extent that there is in some other more extensive matters.

There is to me the unnecessary problem that you are writing stories based on unnamed sources whose own stake in the matter is not clear from the story. It just seems unnecessary.

Senator DECONCINI. I realize you may not know, but do you have any estimate of what the membership thinks of that problem of secrecy which is veiled over the Judicial Conference? Do you think there is a majority who really do not care?

Mr. GRAHAM. Did I hear Judge Hunter say this was unanimous in his testimony?

Mr. MANN. All but Judge Seitz.

Senator DECONCINI. That is right. I am talking from the standpoint of being available to discuss matters after the fact when you have to find out what went on. Are there many of them who will talk to you even though they cannot be quoted? Is it difficult?

Mr. MANN. It is not difficult. One of the problems throughout the Administrative Conference is that there has been an impression—to what extent it is true we are not sure—that the Administrative Conference hues very close to the line taken by the Chief Justice, and the Chief Justice is the gentleman who likes confidentiality.

Senator DECONCINI. Do you think that might have some real bearing as to why there is such opposition, at least by the Conference, to opening it up?

Mr. MANN. I suspect that, sir.

Senator DECONCINI. In view of your experience, both of you, with the sunshine legislation, do you feel that such legislation has significantly damaged the reputation of an agency or an official?

Mr. GRAHAM. Not in my experience.

Mr. MANN. I cannot think of any. In fact, every agency covered by the act I think has not been reluctant to meet in executive session on personnel matters or other matters which would affect the reputation of the individual.

Senator DECONCINI. If the Conference could have an executive session for very definite reasons, do you have any objection to that if the reasons were spelled out?

Mr. MANN. I believe that is what subsection (d) of your bill would do.

Senator DECONCINI. That is correct.

Mr. MANN. I think if it is a matter of selecting an individual to be hired, I have no objection at all. Speaking personally, I can think of a matter of discipline or judicial conduct which had already been discussed, which was so egregious and already so widely publicized that I would think perhaps the deliberation should be made public. As a routine disciplinary matter; no.

Senator DECONCINI. Do you care to add anything, Mr. Graham?

Mr. GRAHAM. Just a general comment. There is a difference in dealing with the judiciary as a newsman from dealing with any other organ of the Government, and that is that the judiciary is uniquely insulated from the effects of press and public expressions of outrage.

Where other provisions have sort of a self-enforcing quality to them, if you complain loudly enough about being closed out too often accommodations are made, my experience is that the judiciary does not react to that sort of reaction nearly as readily as other branches of the Government.

While I certainly would not want to burden them with nitpicking technicalities, I must say that it would be wise to have very clear, if it can be done, the circumstances under which these meetings can be closed because if they are closed in ambiguous circumstances and complaints are made, I really do not think that they will respond as readily as some other branches might.

Senator DECONCINI. I have nothing further.

Mr. ALTIER. I have nothing further.

Mr. ROMANI. One question which is somewhat philosophical. In your experience, both of you have observed Congress and the agencies both before and after enactment of various sunshine laws. Do you feel that the very act of opening meetings influence the direction and quality of decisions which come out of those meetings? I have heard it both ways. What would be your opinions?

Mr. MANN. The first example that comes to mind, there have been a number of disputes on whether congressional ethics committees should be meeting publicly or privately. My experience is that the fears of what would happen if the Ethics Committee were to meet in public were in no way justified, and that the conduct of those meetings, it seems to me, and many past members and other members felt, improved the quality of the meeting. Because they were in public the discussions were more of a philosophical and principle nature.

Mr. ROMANI. More issue-oriented rather than self-oriented?

Mr. MANN. Yes.

Senator DECONCINI. Thank you very much, gentlemen. You have been very helpful.

[The prepared statements of Messrs. Mann and Graham follow:]

PREPARED STATEMENT OF JAMES MANN

As it so happens, your subcommittee's hearing on S. 2045—a bill that would provide for open meetings of the Judicial Conference of the United States—is taking place on the very week of the regular, closed biannual meeting of the Judicial Conference. I thought it might be useful to you in your deliberations to provide you with some firsthand experience of the relations, such as they are, between the Conference on the one hand and the press and public on the other.

I learned of this week's session of the Judicial Conference by happenstance. There was no advance notification to the press and public that the meeting would take place. There was no list of who would be attending the meeting, and there was no published agenda for the session.

On Tuesday, March 3—that is, 3 days ago—I called the Supreme Court's public information office, which is responsible for inquiries by the press and public regarding the Judicial Conference. I had a couple of questions to ask, of a general nature, regarding the Conference and its procedures. During the course of this conversation, I asked when the next meeting of the Judicial Conference would be. I was first told it would take place "about March 15." The official kindly promised to check further. A few moments later, he called back to say he had been wrong; the session of the Judicial Conference would be starting the next day. I asked whether I might have an agenda for the meeting and was told none was available. Even after the meetings of the Conference had started, I found several other newspaper reporters who did not know they were taking place.

This has been something of a custom during the 4 years in which I have been covering the Supreme Court and the Federal judiciary. The press and public are not told anything about the Judicial Conference of the United States except those few matters on which the conference, for one reason or another, feels it would like to have some publicity.

The annual statistical report of the Administrative Office of the United States is made public every September, generally at the time of the September meeting of the Judicial Conference. On occasion, the Judicial Conference will issue a press release about some aspect or another of its deliberations. Once, a few years ago, as I recall, Chief Justice Burger walked into the Supreme Court's press room to introduce Judge Cornelia Kennedy, who had been appointed the only woman member of the Conference. On occasion, an official of the Administrative Office of the U.S. Courts—the staff members for the Judicial Conference—will be made available to discuss or to brief reporters on matters of their choosing that have taken place during the Conference sessions. But even in these instances, the officials meeting with the press do not volunteer information and do not feel free to discuss in general terms what has taken place at the conference. On one occasion, it was not known until several days after the Conference had ended, and from independent sources, that Senator Edward M. Kennedy, the man slated to become chairman of the Senate Judiciary Committee, had attended the conference proceedings.

Even the biannual report of the Chief Justice to Congress concerning the Judicial Conference is not regularly distributed to the press. It is, of course, indirectly obtainable, since it is an official document published by the Government Printing Office and is regularly provided to Members of Congress. But it is worth noting that the Supreme Court information office, which regularly mails out

copies of the Chief Justice's annual report on the state of the judiciary and other assorted speeches and documents, does not do likewise for the official report of the Judicial Conference.

None of the above is meant in any way as criticism of the Court's information office or of the Administrative Office of the U.S. Courts. In providing the public with so little basic information about Judicial Conference proceedings, these officials are merely carrying out the policies of the Conference itself. As the information office's lack of awareness of the dates or agenda for this week's meeting on the day before it was scheduled to begin indicates, often the officials responsible for public information about Judicial Conference proceedings are kept as much in the dark about them as are other members of the public.

Now, suppose Judicial Conference proceedings were opened to the press and public, what sorts of matters would be of interest? I can think of a number of things handled by the Conference, all of which involve questions of public policy or court administration. Let us consider just a few :

#### (1) THE POSITIONS TAKEN BY THE CONFERENCE ON PENDING LEGISLATION

At the moment, for example, there are still pending before the Congress bills to reform the Criminal Code; to abolish Federal diversity jurisdiction; to establish procedures for processing complaints against Federal judges; and to permit the Justice Department to file suit on behalf of institutionalized persons. All of these bills, I believe, are ones which have provoked the interest of the Federal judiciary and are ones on which the Judicial Conference has taken specific positions in the past.

In addition, there are now pending in Congress bills that would radically alter the scope of judicial review over regulatory decisions and that would establish comprehensive legislative charters for the intelligence agencies. These bills, too, are ones that might significantly affect the Federal court system, and as a result I would not be surprised if the Judicial Conference might choose to discuss or even take a position on them.

These legislative matters, it is worth repeating, involve questions of public policy. The views of the Judicial Conference on these issues are similarly matters of public policy. They should be openly disclosed and openly deliberated.

#### (2) JUDICIAL SALARIES

Last November, a lawsuit was filed in a Federal court here claiming that Federal judges are legally entitled to a pay raise of 12.9 percent rather than 5.5 percent. The suit was filed by the Administrative Office of the U.S. Courts, an organization which is essentially the staff of the Federal judiciary and which is run ultimately by the Judicial Conference.

I do not intend to pass judgment on the merits of this lawsuit, or on the problem of whether or how Federal judges can decide a case in which they also serve as the plaintiffs. As a reporter, however, I would like to know—and I believe the readers of my newspaper and other members of the public would have an interest in knowing—whether the Judicial Conference has taken any action or had any discussions regarding the prosecution of this lawsuit.

I can't imagine anything that is more a matter of public policy than the expenditure of public monies. The longstanding grievances of Federal judges that they are underpaid by comparison with some of their colleagues in private practice are grievances which should be aired in public.

#### (3) THE NEED FOR NEW FEDERAL JUDGESHIPS

The Judicial Conference regularly studies the caseloads of the Federal courts in order to report on the districts or circuits in which new Federal judgeships should be created. In the past, the Conference would issue formal recommendations to Congress on the number of new judgeships it felt were necessary. Earlier this year, Chief Justice Burger recommended that the procedure be changed; he urged that the Conference be empowered to create new Federal judgeships on its own, subject to congressional veto.

Once again, the need for new judgeships is a policy matter directly involving expenditures of public money. I believe the public is entitled to see firsthand how the Federal judiciary decides where new judgeships may be needed.

## (4) JUDICIAL ETHICS

Three years ago, I discovered that legislative liaison officers for the Administrative Office of the U.S. Courts had been attempting to have Federal judges exempted from the financial-disclosure legislation then pending before Congress. This effort was not successful; as you all know, the legislation was enacted, and in a form that requires judges to fill out essentially the same disclosure statements as congressmen and high-level members of the executive branch.

Again, the merits of the disclosure requirements are beside the point. The believe the judiciary should have arrived at its position openly and should have made its views public.

The legislative stance on financial disclosure was merely one of a number of instances in which the Judicial Conference has been required to discuss matters of judicial ethics. At least since the controversies over the Fortas resignation and the Haynsworth and Carswell nominations to the Supreme Court, judicial ethics has been an important matter of public concern. If the Judicial Conference is discussing the conduct of a specific, individual Federal judge, I could possibly understand its meeting in a closed or executive session. But when the Conference sets policies or guidelines for the entire Federal judiciary on ethical matters, the public ought to know what those policies are and how they were developed.

## (5) MATTERS OF THE ADMINISTRATION OF JUSTICE AND OF THE FEDERAL COURT SYSTEM

The Judicial Conference regularly sets policies for the Federal courts regarding rules of practice and procedure, regarding the use of jurors in Federal courts, regarding the implementation of the Speedy Trial Act, regarding the assignment of judges from one circuit to another, and regarding many other administrative matters. All of these are issues of public concern and import, whose adoption the public should be permitted to observe.

Recently, for example, the Chief Justice has questioned the wisdom of using lay jurors in complicated or protracted civil trials. Has the Chief Justice discussed this problem with the Judicial Conference? What policies or experiments has the Judicial Conference implemented? Once again, this is a matter of public policy.

The preceding list is meant to be general and illustrative, not exhaustive. There are many other matters of public import which may be discussed by the Judicial Conference in the secrecy of its closed-door sessions.

Last year, for example, the Southern Regional Council issued a report disclosing that a substantial number of Federal judges belong to segregated, all-white country clubs. Having once covered Attorney General Griffin Bell, I know well that this question of club memberships is one on which some Federal judges have strong views; some, in fact, find it distasteful even to have to justify their club memberships in a public forum. I do not know whether this is a matter that the Judicial Conference should address. I do believe, however, that if the Conference does choose to discuss such an issue in its proceedings, those discussions and the policies adopted should be public.

Finally, I should add I do not believe everything the Judicial Conference does must be public. If the Conference is trying to decide whom it should hire or whether it should discipline an individual, the Conference should convene in a session closed to the public. That, as I understand it, is precisely what subsection (d) of S. 2045 would permit. All I would urge is that the Conference should meet in public session when it takes positions on legislative and administrative matters.

So far, I have not heard any reasons advanced why the meetings of the Judicial Conference should not be opened to the public.

Judicial Conference proceedings are clearly different from the regular closed conferences at which the Supreme Court or the Federal appeals courts discuss individual cases.

In a speech at the Washburn University School of Law 3 years ago, Supreme Court Justice William H. Rehnquist defended the Supreme Court's longstanding custom of holding closed conferences to decide cases in this fashion: "From public sessions of oral arguments, and published opinions and orders, we already know precisely what business the Supreme Court transacts and we know a fair amount of how it transacts that business."

With Rehnquist's words in mind, let us now look at the Judicial Conference. At the moment, the public does not know precisely what business the Judicial Conference is transacting at its closed biannual meetings. Its decisions are not

always published. The reasons behind its decisions are not published. The differing views of individual members of the Conference are not published. And we do not know, in Rehnquist's words, "a fair amount" about how the Judicial Conference transacts its business. That business, I would add, is often of greater consequence than any individual court case, since the work of the Conference sets policy for or affects the conduct of the entire Federal judicial system.

On a couple of occasions, Chief Justice Burger has joked to reporters that they and the public would be "bored to death" if they were ever allowed to attend proceedings of the Judicial Conference. Having never attended, reporters are of course in no position to dispute this. As is often the case in matters of journalism and public affairs, we seek only the right to decide on our own when we are bored.

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PREPARED STATEMENT OF FRED GRAHAM

My testimony this morning is on a very narrow—but very important—aspect of the proposed Judicial Conference and Councils in the Sunshine Act. I urge the subcommittee to amend the wording of the act to make it clear that Judicial Conference and Council meetings must be open to coverage by the broadcast media as well as to the print media and the public.

In many situations—congressional hearings, Presidential press conferences, city council meetings—it is assumed that "open" sessions are open to coverage by radio and television as well as to the print media. But for legal and historical reasons, that is not always so where the judiciary is concerned. This subcommittee is probably familiar with the story: How the journalistic excesses of the Bruno Hauptman trial caused such concern in the legal world that in 1937 the American Bar Association adopted canon 35, banning still photography and radio from courtrooms; how the A.B.A. added television to the ban in 1952; and how the Supreme Court held, in the Billie Sol Estes case of 1965, that TV coverage of a criminal trial over the defendant's objection was presumptively unconstitutional.

In the years since the Billie Sol Estes decision, television equipment has improved to the point that it can function unobtrusively, often using available light and without distracting cables, noises or movements. This has prompted 26 of the States to permit radio and television coverage of court proceedings. In some States the coverage is still experimental, or is limited to the appellate courts. In others—such as Florida and Wisconsin—the supreme courts have decided that as a matter of equality under the first amendment, television cameras and radio microphones must be admitted to any judicial proceedings that are open to the public.

Unfortunately, the U.S. Courts have bucked the trend toward opening the judicial system to electronic journalism. The Administrative Conference has issued a rule forbidding the presence of cameras or microphones in U.S. courtrooms for any purposes, except such nonjudicial ceremonial occasions as the swearing-in of naturalized citizens.

I understand, of course, that the proposed Judicial Conference and Councils in the Sunshine Act would affect the judiciary only in its administrative function—in the business of discussing and deciding how the judicial system will be run. I bring up the general aloofness of the Federal judiciary toward the broadcast media only to suggest that if the proposed law does not make it abundantly clear that "open" meetings must be open to coverage by radio and television, it is predictable that the broadcast media will be excluded.

The wording of the proposed act is unfortunately vague in this regard. Section 335(c) requires that meetings covered by the act "shall be open to public observation." This language is patterned after identical wording in the Sunshine Act, which is applicable to the executive branch. The Justice Department has construed "open to public observation" to require that "the public should be permitted to take notes and photographs (without flash aids) and should be permitted to make sound recordings in a nonobtrusive manner." (Letter from Barbara Allen Babcock, Assistant Attorney General to Wayland D. McClellan, General Counsel, U.S. Foreign Claims Settlement Commission, Apr. 19, 1977.)

This apparently requires that "open" meetings be open to coverage by non-obtrusive radio sound-recording equipment, and perhaps, to television cameras that can operate on available light.

But the phrase "open to public observation" is, obviously, subject to an interpretation that could exclude electronic coverage—and I urge the subcommittee

to make it clear that, when the public and print press are admitted, the broadcast media cannot be excluded, so long as their equipment operates in a nonobtrusive manner. Perhaps this could be accomplished by inserting a definition of "open" that includes nonobtrusive electronic paraphernalia.

I can think of no sound reasons for excluding the broadcast media from news coverage of the judiciary's administrative sessions, and there are several good reasons for including radio and television: In the interest of the majority of Americans who now get most of their news from the airwaves; in the interest of fairness among the news media; and in the interest of a more enlightened Federal judiciary, which would have the opportunity to observe the unobtrusive operation of modern electronic journalism, and might then begin to catch up with the States in permitting reasonable radio and television coverage of judicial proceedings.

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Senator DeCONCINI [continuing]. Our last witness will be Douglas Wickham, professor of law, University of Tennessee.

We are pleased to have you here. Your full statement will appear in the record following your oral testimony. If you would highlight it for us.

**STATEMENT OF DOUGLAS Q. WICKHAM, PROFESSOR OF LAW,  
UNIVERSITY OF TENNESSEE**

Mr. WICKHAM. Thank you. I do not have the kinds of personal experience with the processes that I think all of the previous witnesses have had. What I hope to be able to add is the perspective of someone who has researched and thought about and occasionally participated in the process of trying to influence legislation in my home State, and just trying to think about what is going to be involved in applying this particular idea to institutions which are really, when all is said and done, not the same as any other administrative agency.

The judges act administratively but they are, after all, judges. When we are applying the values of sunshine, the public access notice which is designed to make them accountable, to make officials accountable, and to allow the electorate to exercise an intelligent choice among those officials, we have to think very clearly about what we are doing and apply it, I think, in perhaps a rather unique and discriminating manner.

Judges exercise power because they have an institutional status. They are insulated from pressure. They are not elected officials. They are not supposed to act as you are supposed to act in our system. In fact, they do not.

Nor, however, do they have the kinds of political weapons that you can bring to bear if you are involved in controversy. A fair amount of the power that judges exercise stems from the fact that they are perceived as apolitical and impartial people when they sit on that seat. While they are engaged in some nonjudicial activities here, I think we have to take greater care to preserve that rather fragile institutional status. After all, these are the same men and women who do go back to the bench and have to decide the cases.

I think it is important that judges not be seen as simply one more voice in the political dialog, even though in fact they do engage in it, maybe lobby you. We admit that.

I wonder whether cases such as Brown against Board of Education, or Reynolds, the reapportionment, or Nixon against Sirica, could really

have happened, in the sense that people would generally obey what came down if judges were simply just another voice in the political dialog. It is necessary to preserve their institutional standing.

One of the things about sunshine, one of the things that sunshine is particularly designed to do, is to strip away cloaks of secrecy from officials who are in theory and in practice supposed to be made directly accountable. That tension has to be reconciled when you draw this legislation and apply it to the workings particularly of the Judicial Conference.

I think, and I am not alone in thinking obviously, that these more administrative and more policymaking aspects of the Judicial Conference should be accessible to the public. I am not sure that this bill provides the proper measure or takes into account some of the activities of the Conference which may not be as important or may not be as necessary to apply sunshine to. I am thinking particularly of matters of housekeeping and self-study. There are a couple exceptions in the current Government in the Sunshine Act which could, as I said in my statement, as easily be carried forward as well as those you have drafted. I would commend those ideas to you.

I think some of the things that I said in my statement were the source of a couple of your questions having to do with notice, transcript, and the mechanism of enforcement. This bill has been just simply transferred lock, stock, and barrel from Government in the Sunshine Act. It is a good starting place.

However, these are not Washington-based agencies of small membership and they are not staffed quite the same way. I think some thought ought to be given to tailoring the appropriate mechanism for actually applying the idea.

I guess the major point I would like to make is that sunshine be applied with care. I have suggested in my statement several of the consequences that I think arise from that idea.

Senator DECONCINI. It is safe to say you think it is proper to employ some sunshine in the administrative area.

Mr. WICKHAM. Particularly the rulemaking process and in some of the policymaking functions as the Conference goes on, the very things that the gentlemen from the press said they are most interested in hearing about.

Senator DECONCINI. You think it is appropriate to have it applied there?

Mr. WICKHAM. I think it can be applied. I think the judges should have their processes accessible to the public. That is not the same thing as saying the entire decisionmaking process they undertake should be as open or even as open on the same basis as we treat administrative agencies.

Senator DECONCINI. So you are saying if we are going to adopt any kind of sunshine legislation we need a little higher standard or a different standard from what you would apply to administrative agencies, say within the executive branch?

Mr. WICKHAM. I think the sunshine bill should recognize and take into account the fact that these individuals have to go back to the bench and decide cases and retain the status they must have to do that effectively. Where the matter is close, where the public interest is not as high, you might want perhaps not necessarily to open it up as much.

You need to open it up as much so that the public can have the kind of input that Professor Halpern was talking about.

Again, that is not the same thing as watching the whole doggone process. The costs of doing that, costs in terms of the quality of the process or politicalization of the process, we accept as very appropriate.

Senator DECONCINI. What is your reaction to having sunshine provisions apply to discussions by the Conference, and to actual action by the Conference, as it relates to standards for lawyers practicing in the Federal courts?

Mr. WICKHAM. That would seem to be an area which would be appropriate.

Senator DECONCINI. How about the ethics codes for Federal judges?

Mr. WICKHAM. I have somewhat more difficulty with that. The idea rises from the fact that ethical conduct is very important. Yet judges discussing ethics involves real restraints on the freedom with which they might care to speak under the circumstances.

Senator DECONCINI. How about the subject matter of whether and how much to pay public defenders?

Mr. WICKHAM. I would characterize that under the heading of housekeeping frankly.

Senator DECONCINI. What about speedy trial legislation?

Mr. WICKHAM. When the Judicial Conference or its committees take positions on legislation I think they, like all other entities, should be able to speak freely and privately among themselves. When the positions come forth, then you have the ability and the staff to subject them to the necessary process of public debate.

Senator DECONCINI. If they are going to have a discussion on amendments to the Speedy Trial Act, do you think that should be closed?

Mr. WICKHAM. Let them formulate their position as they choose and within their own halls. You will hear it.

Senator DECONCINI. Do you think if you provide for a mechanism so they can do that under executive session that that would be adequate protection?

Mr. WICKHAM. Sure.

Senator DECONCINI. What about the size of juries in civil trials, if that were to be discussed?

Mr. WICKHAM. That would come under the hearing of general policymaking. Some access might be appropriate.

Senator DECONCINI. The same with Federal rules of evidence?

Mr. WICKHAM. Yes.

Senator DECONCINI. What about wiretapping legislation? Do you put that back in the same category as speedy trial legislation?

Mr. WICKHAM. There is a difference. I would differentiate two situations. One is where they are simply trying to formulate policies for action within the judiciary. The other is when they are trying to consider what position they will take, vis-a-vis the Congress, on legislation.

The discussion here, I am sure everyone would like to be inside the lobbyists' chambers when they formulate their position, but generally it is my understanding we do not do that, for either private or public bodies. Agencies are not subjected to that kind of sunshine, either.

Senator DECONCINI. However, if there is a procedure to go into executive session when they feel it is necessary—

Mr. WICKHAM. Sure.

Senator DECONCINI. That would satisfy your concern?

Mr. WICKHAM. I would think so. In terms of procedure, although I don't know how many 40 or 41 things the Chief Justice has to do, the bill as it stands requires certification by the responsible official, anyway.

The point in my statement was that I think that might be an adequate or appropriate safeguard, particularly when the voting requirement is a little bit harder to get together.

Senator DECONCINI. Thank you very much. We appreciate your testimony. You have been very helpful.

Mr. WICKHAM. I appreciate the opportunity.

[The prepared statement of Mr. Wickham follows:]

#### PREPARED STATEMENT OF DOUGLAS Q. WICKHAM

I am grateful for the opportunity to offer testimony today on S. 2045, a sunshine law for the U.S. Judicial Conference and the Circuit Councils. Sunshine legislation has been my major research interest for over a decade, and I welcome the challenge of commenting on this novel and interesting proposal.

Sunshine (open meeting) legislation is not ordinarily directed at the judiciary. This is my express exception in many statutes, and the courts and commentators are generally in accord.<sup>1</sup> A major purpose of sunshine legislation is to enhance the direct accountability of covered officials and processes. The judiciary, however, has always been considered a separate and independent branch within our government system; and so has been intentionally insulated from direct popular accountability. As the Federal judiciary has grown in size and complexity, more of its attention and effort has been directed at judicial administration. These efforts to improve the management of judicial business have involved judges in activities that more closely resemble those in the executive branch.

The judiciary has developed its own institutional norms concerning openness of its proceedings; and the values which support those norms are derived from the primary business of the courts: adjudication of individual cases.<sup>2</sup> Because the legislative and executive branches had not developed satisfactory norms of openness there has been tremendous pressure for open meeting legislation. The major value supporting the legislation is well known: Officials in theory accountable to the people are so in reality only when the people can observe them as they act. There are well recognized counter values of individual privacy and effective functioning of the Government. Difficulties arise when these competing values are applied in the myriad situations of governmental activity, and the tensions between them cannot be fully resolved by legislative enactment. The fact that the patterns among state open meeting laws are so adverse is probably the best evidence of this difficulty.

Congress recently enacted the Government in the Sunshine Act (hereafter GISA) which applies these competing values to collegial Federal agencies.<sup>3</sup> The proposed bill (S. 2045) simply substitutes "judicial entity" for "agency" in applying Sunshine to the U.S. Judicial Conference and the Circuit Judicial Councils. It is essential to begin the real drafting process by surveying the activities of those institutions and clearly identifying the value choices involved in extending this type of legislation to them. Fundamental to the process is the fact that a constitutionally independent judiciary is not and should not be considered as just another government agency. There may be some Conference or Council activities which can and should be subject to public observation, but they must be clearly identified and the legislation tailored to fit those situations.

#### JUDICIAL CONFERENCE ACTIVITY

The U.S. Judicial Conference conducts most of its business within a varied committee structure. Analysis of recent Conference proceedings suggests three broad categories of committee activity and two major committees (Court Admin-

<sup>1</sup> E.g., *Ariz. Rev. Stats* § 38-431.08; *Canon v. Board*, 231 So. 2d 34 (Fla. 1970); *Tacha, Kansas Open Meeting Act, Sunshine on the Sunflower State?* 25 U. Kan. L. Rev. 169, 183 (1977).

<sup>2</sup> Openness in the adjudication process raises difficult issues too. Witness the variety of positions taken by Supreme Court Justices in *Gannett v. De Pasquale*, 99 S. Ct. 2898 (1979) (closed hearing on motion to suppress evidence).

<sup>3</sup> 5 U.S.C. § 552b.

istration and Rules) which require individual treatment. Although the Conference committee structure changes somewhat over time, these categorical descriptions of its activity remain accurate.

### *Self-study*

First are the committees charged with studying individual aspects of the judicial process and recommending improvements: including at present the committees on Criminal Law, Probation and the Jury System. They conduct and oversee research projects, arrange meetings and conferences for the general education of the bench and occasionally prepare positions on pending legislation for action by the full Conference. Judicial efforts at self-study and self-education should be accomplished in the most effective possible manner. Even the advocates of Sunshine will admit that the quality of self-criticism diminishes if it must occur in public. It runs counter to normal patterns of human behavior to expect free exchange among students and critics if these activities must take place in open meetings.<sup>4</sup>

Even an independent judiciary must be accountable in the sense that there should be some mechanism by which popular dissatisfactions with the administration of justice comes to its attention. Having brought such matters to their attention, however, it would be the wiser course to permit the judges to deliberate the solutions in private. A requirement of public hearing might properly be engrafted onto these committee processes, but the public interest will not support the general open meeting requirement proposed in this legislation. Such a choice runs counter to the philosophy which supports an independent judiciary. These study committees should remain free to interact with the public at times and places of their own choosing.

### *Ethics*

There are three Conference committees whose primary concern is ethical conduct within the judiciary. During the late sixties and early seventies the ABA led an effort to overhaul the Code of Judicial Conduct, and the Conference cooperated through its Joint Committee on the Code of Judicial Conduct.<sup>5</sup> This group has remained active, occasionally suggesting improvements based on experience under the new code. The Conference has organized two additional committees to aid in actual implementation of the code. The Review Committee receives semiannual financial reports and publishes the names of nonreporting judges in each Conference proceeding. It may direct inquiries to the Advisory Committee based in part on those reports. The Advisory Committee receives written inquiries on ethical matters from various sources and provides formal response. Any of its opinions having general applicability are published.

These are not formal discipline mechanisms, but they certainly exert some pressure on nonconforming judicial behavior. Conference activities in the ethics area are primarily designed to avoid impropriety. Such is essential to preserving judicial independence, but cannot be effective if it must occur in public meetings. The fact that the ethical conduct of any judge would come under inquiry or that an individual judge might feel the need to seek ethical advice would automatically create sensitive situations which should definitely not become the subject of premature public disclosure. The major source of judicial power is general public acceptance of its decisions. This occurs largely because judicial efforts at impartial decisionmaking are not subject to direct public pressure. General privacy interests of an individual whose professional standing is at stake also indicate a need for executive proceedings. There is substantial debate over whether and how judges may be subjected to discipline.<sup>6</sup> They should not be subject to the indirect disciplines of open ethical inquiry within the Conference.

### *Housekeeping*

Much Conference business comes under the heading of housekeeping and personnel administration. The committees on Budget and Intercircuit Assignment are given the task of seeing that money and judges go where there is the most need. Assisted by the office of court administration, the Conference also administers the Magistrate and Bankruptcy Systems and the Criminal Justice (de-

<sup>4</sup> Little and Tompkins, *Open Government Laws: An Insider's View*, 53 N. Car. L. Rev. 451-452 (1975).

<sup>5</sup> The committee was created by Conference Action in April 1972. Report of Judicial Conference Proceedings, pp. 23-4.

<sup>6</sup> Wallace, "Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits," 51 *Indiana Law Journal* 297 (1976) reviews the history of legislative proposals and responds specifically to Senator Nunn's "good behavior" legislation. S. 1110, 94 Cong., 1st sess.

fenders for the poor) program. These are primarily concerned with positions and distribution of block appropriations.

This functional area is commonly excepted from State sunshine coverage for reasons of individual privacy and efficient governmental functioning.<sup>7</sup> Where such considerations are overridden in a given piece of legislation it is because of a felt need to make the individual concerned more directly accountable to the people. There seems no compelling reason to apply sunshine in these areas of Judicial Conference activity because the accountability factor is removed from the calculation. There is no cause to impose the costs of public meetings on the accomplishment of these housekeeping chores.

#### *Court Administration Committee*

Certain of the business done by the Committee on Court Administration is simply internal housekeeping. This committee, however, does recommend policies for the conduct of judges and court officers to the Conference. There is a heightened public interest in observing such policy deliberations, but that heightened interest does not itself answer the question of whether or how to incorporate sunshine into this conference activity. The proper relationship between the people and its judiciary requires that policies for judicial conduct should be known and that the public be able to inform the organized judiciary of dissatisfactions with the administration of justice. The first is adequately accomplished by publication of policies adopted in Conference proceedings. The need for public input to a policymaking process, however, is addressed indirectly at best by this legislation. Sunshine laws permit observation, but do not insure direct participation. Officials whose deliberations take place in public know that they are going to be directly accountable to that same public for their actions. There must be some public observation of both their decisions and their deliberations if the people are to intelligently exercise their choices among these accountable officials. The independence of the judiciary, however, requires that it be free to formulate its policies without the presence of overt public pressure which is the inevitable and intended byproduct of sunshine legislation. The quality of judicial decisionmaking depends on this rather fragile institutional independence. S. 2045 would represent an unwise intrusion into this area of Conference activity.

The Committee on Court Administration also formulates recommendations to the Conference on positions concerning pending or proposed legislation. Here again, the matters are of heightened public interest but there are at least two countervailing concerns. These Conference positions do not have the force of law. By definition, there is no decision being made. After a position becomes known it is then subjected to a public process of debate. The public, therefore, has a full and fair opportunity to influence the eventual legislative decision. It would disserve the legislative process if there were an open meeting requirement imposed on any organization public or private which submits its views. It is only through the honest airing of private differences that any organization can formulate high quality proposals. The legislature should encourage receipt of positions and proposals which have been subjected to the most thorough private scrutiny before the process of public scrutiny begins. It would be especially unwise to impose such a requirement on judges who must retain their standing as apolitical decisionmakers when they return to the bench.

#### *Rules Committee*

It has been strongly suggested by eminent authority that the process of the Standing Committee on Rules include full opportunity for public hearings.<sup>8</sup> No one has seriously suggested that sunshine values be applied to every committee proceeding, but only that there be public input on all proposals sufficiently early in the process to be meaningful. Rules of court have a very direct impact on the people; and while it may be argued that a truly independent judiciary should have plenary power to set its rules, it is generally conceded Congress has the power to determine the process by which rules are made. It would therefore be proper for the Congress to require public access to the judicial rulemaking process similar to that required in administrative rulemaking. The

<sup>7</sup> Thirty-four States have such an exception. Courts usually refuse to imply it, but the matter is unclear in some of the remaining sixteen.

<sup>8</sup> Weinstein, *Reform of Court Rulemaking Procedures* 105-115 (Ohio State Press, 1977) Lesnick, *The Federal Rulemaking Process: A Time for Reexamination*, 61 A.B.A.J. 579 (1975).

argument for public access is based not on the direct accountability of the rulemakers but on a judgment that the end product will be significantly improved by early public airing of proposals and by at least some serious public deliberation.

Sunshine legislation has both benefits and costs. Two items of potential cost are of particular importance in this context. Early proposals in the rulemaking process are developed by Advisory Committees of judges, lawyers, officials and academics, none of whom is a member of the Conference and all of whom serve on a voluntary basis. They are not part of an ongoing organization, and it is difficult enough to get their schedules to mesh and to encourage the free interchange of ideas and criticism which must characterize this early stage of the process without imposing both the monetary and quality costs of sunshine laws on their proceedings. Although public access may enhance public respect for an institution, it is also true that early in the rulemaking process the possibly foolish or heretical "what if's" should be aired. If judges must do this in public, they risk losing a significant measure of that respect necessary to their effective functioning when they return to the bench. As initial proposals are circulated for public comment and then discussed at Standing Committee and Conference levels, these difficulties diminish and public proceedings become more appropriate.

#### *Conference proceedings*

The proceedings of the full Judicial Conference stand on this analysis no differently from those of its committees. One might view the Conference itself as a rubberstamp and argue that there could be no harm in opening up its proceedings under a sunshine bill. Although much of the effective work is done at the committee level, the full conference has never outgrown its early tendency to debate some proposals at length.<sup>9</sup> It will occasionally send something back for more work or reject a proposal outright.

Members of the Conference are, after all, judges organized for the purpose of administering the business of the courts; and these same judges will return to the bench. They are not just another group of administrative officials. Their status as apolitical decisionmakers should not be unnecessarily diminished by wholesale public scrutiny of their debates and discussions under sunshine legislation. Previous analysis has suggested that some committee activities may appropriately occur in the sunshine without undue risk to the practical independence of the judiciary. When such business comes before the full Conference it should also be done in the sunshine; but there is no independent basis for extending the legislation any farther into full Conference deliberation and decisionmaking.

#### DRAFTING APPROPRIATE LEGISLATION

Although only a limited number of Judicial Conference activities are appropriate objects of sunshine legislation, the normal approach to drafting such a law is still proper. This approach defines key terms, states general coverage with functional exceptions, and provides appropriate notice and remedy provisions in support of the coverage.<sup>10</sup> Excepting named committees from coverage may unwittingly encourage expansion of their activity into areas where the sunshine calculus would yield a different result. Further, the Conference committee structure is inevitably going to change over time. Although S.2045 should be substantially rewritten, it should so far as possible remain in parallel with GISA if only to avoid providing the basis for specious technical arguments over meaningless work differences. Where GISA does not carry over, however, it should be made clear that something different is being enacted to meet the particular situation at hand. I will now indicate more specifically how S.2045 should be redrawn in light of this analysis.

#### *Definitions and coverage*

Subsection (a) states that the statute shall apply to all meetings of certain bodies. It is unclear what this provision is meant to add because other provisions fully effect the desired coverage. There is no parallel section in GISA, and it appears unnecessary to inject it into the draft.

<sup>9</sup> Fish, *The Politics of Federal Judicial Administration* 259-61 (Princeton Univ. Press, 1973).

<sup>10</sup> Wickham, *Let the Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 N.W. L. Rev. 480 (1973). Although there is much more such legislation today I believe the approach suggested then remains sound.

Subsection (b) (1) defines "judicial entity" to specifically include each committee and subcommittee of the Judicial Conference. A more appropriate balance for subgroup coverage was struck in GISA by defining agency to include "any subdivision authorized to act on behalf of the agency."<sup>11</sup> Coverage of subgroups with actual authority (in practical terms) to bind the parent exposes a sufficient range of activity to satisfy the public's interest in the accountability of its government. There is no special circumstances which compels further coverage of the judiciary's administrative affairs. The basic coverage definitions in this act should remain in parallel with GISA. The affected judicial entities should simply be identified and subgroup coverage then keyed to authority.

The definition of "meeting" in (b) (2) correctly continues the balance struck in GISA. It is impossible to capture in exact legislative language the point at which rather free-form discussion becomes actual deliberation towards a decision. The particular definition enacted in GISA does appear to permit some staff or advisory activity to occur in private. Of course, if that activity will "determine" the matter, then it must ordinarily occur in an opening meeting. This does seem a workable definition particularly with respect to Conference rule-making activities which should in their later stages be subject to public scrutiny.

### *Exceptions*

Analysis of Judicial Conference activity indicates several areas for which policy considerations weigh in favor of private meeting and discussion. The two GISA exceptions carried into the draft as (d) (1) and (2) are sound, but there are three other exceptions which should be added.

A combination of efficiency and privacy considerations led the Congress to exempt from GISA matters which relate "solely to the internal personnel rules and practices of an agency."<sup>12</sup> Judicial Conference committees are involved not only in the temporary placement of judges (intercircuit assignment) but also in administration of the magistrate and bankruptcy systems and the criminal defender program. The Committee on Court Administration is heavily involved in setting personnel policies within the Federal court system for clerks and other similar officials. There is a strong, although not universal, trend in State sunshine laws toward the position taken in GISA.<sup>13</sup> Respect for the independent nature of the judiciary should weigh toward privacy if the general trend in sunshine laws leaves this matter in doubt. The GISA exception should be adapted here by substituting "for offices administered by a judicial entity" for "of an agency."

GISA contains one rather broadly drawn exception for "matters likely to significantly frustrate implementation of a proposed agency action."<sup>14</sup> Its exact meaning has been the subject of much debate but little authoritative interpretation. It is suggested that one major purpose of this exemption is to permit an agency to operate privately while formulating positions on pending legislation.<sup>15</sup> The Judicial Conference here is not so much executing the legislative will as it is attempting to influence publicly the direction of that will. The major values supporting sunshine laws are related to public observation of lawmaking and its execution. Formulation of positions on pending legislation or the formulation of recommended legislation itself are both a major step removed from this. The GISA exception is only an indirect statement on this matter and would adapt awkwardly at best into the draft. The Judicial Conference is not involved in situations where premature disclosure will frustrate some administrative action. It does not conduct investigations or regulate sensitive areas of commerce. Better would be an exception "when formulating official Conference positions on pending or proposed legislation."

A complementary exception should apply when the judiciary is engaged in self-study of its processes. The inevitable by-product of applying sunshine legislation to such efforts will be to politicize them to an unacceptable degree. Respect for the institutional independence and integrity of the Federal judiciary demands they retain control over public access to their efforts at self-improvement. It is appropriate, however, to require some open sessions during this process. There should be an exception for judicial entities "when engaged in research or deliberation

<sup>11</sup> 5 U.S.C. § 552b (a) (1).

<sup>12</sup> *Id.* (c) (2).

<sup>13</sup> Open Meetings: Exception to State Laws 21-48 (National Association of Attorneys General, 1979).

<sup>14</sup> U.S.C. § 552b (c) (9) (B).

<sup>15</sup> Berg and Klitzman, A Interpretative Guide to the Government in the Sunshine Act 25 (1978). This monograph arose from Administrative Conference consultation with the Federal agencies as GISA was implemented. It is considered an excellent authority.

concerning the improvement of judicial administration. Committees of Conference engaged in such activities shall, however, conduct from time to time open meetings at which the views of the public are received and discussed by the membership."

*Notice and remedy*

It is necessary to depart from the GISA model in drafting notice and remedy provisions. The elaborate GISA notice, transcript and remedy provisions are, for better or worse,<sup>16</sup> quite specifically tailored to Washington-based agencies whose membership is small and whose operations are heavily staffed. The public interest in observation of such activity is reinforced by the existence of direct lines of political accountability, and these provisions in GISA are designed to insure enforcement of that accountability. On all of these counts, the U.S. Judicial Conference stands quite differently. Its membership is comparatively large and geographically diffuse. Although the Administrative Office provides staff support, the Conference and its committees do not operate bureaucratically. Although the judiciary is very much a part of our political system, its integrity depends in large part on protection from direct public accountability. A section-by-section analysis will indicate those few ideas in this GISA-inspired draft which should be preserved.

Subsection (e) (1) indicates that meetings should be closed only upon formal vote of the body membership. The purposes of such an exercise are to impress upon the membership the fact that such a decision runs counter to the statutory norm of openness, and to preserve a record for accountability purposes. A voting requirement would seriously burden the operation of the Judicial Conference and its committees. Certification by the chair (discussed *infra*) would seem a more appropriate, yet adequate safeguard.

Subsection (e) (2) permits an individual to protect his privacy interest by suggesting a closed proceeding. There are diverse positions among State sunshine laws on the question of who should have ultimate control in this situation.<sup>17</sup> Final decision on this matter has been left to the agency under GISA and there appears no reason why a judicial entity should not retain similar control. Any individual whose privacy interests would be affected by Conference business may suggest a closed proceeding to the chairperson who may then choose to file the necessary certification under subsection (g).

Subsection (e) (3) requires quick disclosure of any vote to hold a closed meeting. The certification required by (g) is a more appropriate safeguard, but it too should be quickly spread of record.

The notice mechanism in (f) is tailored for Washington-based agencies and is further based on a fiction that the Federal Register is an adequate and effective means of providing notice to the public concerning agency meetings. Many State legislatures have simply declared that there be adequate notice and have left it to the regulators and the litigators to determine further applications.<sup>18</sup> Even if there are lengthy notice rules in the statutes courts have often quite properly overlooked technical violations and have applied a commonsense standard of substantial compliance.<sup>19</sup> It would be wasted effort to create a series of notice rules to encumber Conference activities. This is a matter which should be left to the Conference in the first instance under subsection (h).

It has been observed, quite correctly, that the certification mechanism contained in GISA is at best redundant.<sup>20</sup> Elaborate voting and record spreading conditions for closed meetings were added into GISA during the later stages of the legislative process. What was originally intended to be a serious sanction was thereby reduced to an essentially meaningless gesture by a subordinate official. In the context of Judicial Conference affairs, certification by the Chair (g) (1) is certainly an appropriate means to insure that the decision to close a proceeding will be made by a responsible person after some thought. The practicality of this system is also in keeping with the constitutionally independent nature of the judiciary. We put these men and women on the bench and then entrust so many important matters to their sound judgment. Requiring the Chair to publicly certify that she/he has thought about it and definitely feels that certain

<sup>16</sup> Cutler, *A Practicing Lawyer's View of Sunshine*, 38 Fed. B.J. 175 (1979), considers them very much the worse.

<sup>17</sup> Attorneys General Report, *supra*, n. 13, at 37-44.

<sup>18</sup> E.g. Tenn. Code Ann. 8-4403.

<sup>19</sup> E.g., *Karol v. Board of Trustees*, 593 P. 2d 649 (Ariz. Sup. Ct. 1979). *Sullivan v. Credit River Twp.*, 217 N.W. 2d 502 (Minn. Sup. Ct. 1974). *Carter v. Nashua*, 308 A. 2d 874 (N.H. Supt. Ct. 1973).

<sup>20</sup> Berg & Klitzman, *supra*, n 15, at 60-62.

meeting topics do in fact come within an exception to the statute is more consistent with general norms of judicial accountability.

Transcript requirements under (g) (2) impose a heavy burden on entities who are not staffed for such purposes. Preserving so expensively a basis to determine after the fact whether the meeting was properly closed is a step which very few State legislatures have required. It should be noted that these provisions were added to GISA at a time when tapes and transcripts had what one hopes was unique significance in our affairs. It would seem that proper minutes identifying the persons who spoke and the matters to which they addressed themselves would be sufficient to insure the honesty of any evidentiary hearing on such a question. Again, the strict accountability notions which may support such requirements within the administrative agencies are not present in this setting.

Subsections (h) and (i) are largely beside the point in the sense that the Judicial Conference doesn't promulgate regulations. There are some matters on which Conference policy statements are appropriate to amplify statutory terms; but given the absence of continuous staff support, 1 year might be an insufficient time for requiring such guidance. Permitting a court action to require compliance could conceivably raise difficult constitutional issues of judicial independence over matters which are ultimately of minor importance. Congressional oversight is more than enough to insure compliance here.

The remedy for violation contained in (j) (1) would have to be reworked in one respect. The running of the 60-day limitation period ought to commence with the filing of Chair certification. If minutes are considered a sufficient record of any closed proceedings, then the terms "transcript" and "electronic recording" should be deleted. Subsection (j) (2) contemplates a situation which does not exist. There is no provision for judicial review of actions by the Judicial Conference. A direct action for injunctive relief is the only appropriate mode of remedy for violation.

#### CIRCUIT COURT ACTIVITIES

It is curious that the draft applies to "each judicial council of the circuits." There are both Judicial Conferences and Councils in each circuit, each with different membership and with different yet somewhat overlapping functions. The Conferences are similar to the U.S. Judicial Conference that they are primarily discussion and study forums among the bench and bar. The Councils consist of all the circuit judges in regular active service. Their purpose appears more directly connected with the actual administration of dockets and judicial conduct. The enabling statute states that the Councils may make orders to expedite business before the courts and that the district judges shall obey those orders.<sup>21</sup>

Circuit Council activity is simply not susceptible to an orderly analysis like here undertaken for U.S. Judicial Conference. The most thorough study of Federal judicial administration observes a great deal of variety among circuit councils concerning what they address and how they operate. It appears that most of their activity occurs on an informal plane to induce individual judges within the circuit to cooperate in staying within acceptable norms in disposition of their dockets.<sup>22</sup> This should indicate caution because sunshine legislation is designed to eliminate such informal activities. It would be the wiser course to delete circuit coverage from the current proposal until an affirmative case based on further research can be made for extension of sunshine legislation to this level of judicial affairs.

Senator DECONCINI. The record will remain open. If the minority staff has any questions to submit we encourage you to do so.

If there is no further business to come before the subcommittee, we will stand in recess.

[Whereupon, at 10:55 a.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

<sup>21</sup> 28 U.S.C. § 332.

<sup>22</sup> Fish, *supra*, n. 9, at 379-426.

## APPENDIX

96TH CONGRESS  
1ST SESSION

# S. 2045

To provide for open meetings of the Judicial Conference of the United States and of each judicial council, public access to transcripts of meetings of the Judicial Conference of the United States and of each judicial council, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 26 (legislative day, NOVEMBER 15), 1979

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide for open meetings of the Judicial Conference of the United States and of each judicial council, public access to transcripts of meetings of the Judicial Conference of the United States and of each judicial council, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Judicial Conference and
- 4 Councils in the Sunshine Act".

1       SEC. 2. (a) Chapter 15 of title 28, United States Code,  
2 is amended by adding the following new section immediately  
3 after section 334:

4       “§ 335. **Open meetings of the Judicial Conference and the**  
5   **judicial councils**

6       “(a) The provisions of this section apply to the meetings  
7 of the Judicial Conference of the United States, each com-  
8 mittee and subcommittee of the Judicial Conference, and  
9 each judicial council.

10       “(b) For purposes of this section, the term—

11               “(1) ‘judicial entity’ means the Judicial Confer-  
12               ence of the United States, each committee and sub-  
13               committee of the Judicial Conference, and each judicial  
14               council of the circuits;

15               “(2) ‘meeting’ means a deliberation of at least the  
16               number of individual members required to take action  
17               on behalf of the judicial entity in which such delibera-  
18               tion determines or results in the joint conduct or dispo-  
19               sition of official business, but does not include delibera-  
20               tions required or permitted by subsection (e) or (f); and

21               “(3) ‘member’ means, as the case may be, a mem-  
22               ber of—

23                       “(A) the Judicial Conference of the United  
24                       States;

1                   “(B) any committee or subcommittee of the  
2                   Judicial Conference of the United States; and

3                   “(C) a judicial council of a circuit.

4                   “(c) Members shall not jointly conduct or dispose of  
5 business of the judicial entity other than in accordance with  
6 this section. Except as provided in subsection (d), every por-  
7 tion of every meeting of each judicial entity shall be open to  
8 public observation.

9                   “(d) Except in a case in which the judicial entity finds  
10 that the public interest requires otherwise, the second sen-  
11 tence of subsection (c) shall not apply to any portion of a  
12 meeting of that judicial entity, and the requirements of sub-  
13 sections (e) and (f) shall not apply to any information pertain-  
14 ing to such meeting otherwise required by this section to be  
15 disclosed to the public, if the judicial entity properly deter-  
16 mines that such portion of its meeting or the disclosure of  
17 such information is likely to—

18                   “(1) involve accusing any person of a crime, or  
19                   formally censuring any person; or

20                   “(2) disclose information of a personal nature and  
21                   such disclosure would constitute a clearly unwarranted  
22                   invasion of personal privacy.

23                   “(e)(1) Action under subsection (d) shall be taken only  
24 when a majority of the entire membership of the judicial  
25 entity votes to take such action. A separate vote of the mem-

1 bers of that judicial entity shall be taken with respect to each  
2 meeting a portion or portions of which are proposed to be  
3 closed to the public pursuant to subsection (d), or with re-  
4 spect to any information which is proposed to be withheld  
5 under subsection (d). A single vote may be taken with respect  
6 to a series of meetings, a portion or portions of which are  
7 proposed to be closed to the public, or with respect to any  
8 information concerning such series of meetings, so long as  
9 each meeting in such series involves the same particular mat-  
10 ters and is scheduled to be held no more than thirty days  
11 after the initial meeting in such series. The vote of each  
12 member of that judicial entity participating in such vote shall  
13 be recorded and no proxies shall be allowed.

14       “(2) Whenever any person whose interests may be di-  
15 rectly affected by a portion of a meeting requests that the  
16 judicial entity close such portion to the public for any of the  
17 reasons referred to in paragraph (1) or (2) of subsection (d),  
18 the judicial entity, upon request of any one of its members,  
19 shall vote by recorded vote whether to close such meeting.

20       “(3) Within one day of any vote taken pursuant to para-  
21 graph (1) or (2) of this subsection, each judicial entity shall  
22 make publicly available a written copy of such vote reflecting  
23 the vote of each member on the question. If a portion of a  
24 meeting is to be closed to the public, the judicial entity shall,  
25 within one day of the vote taken pursuant to paragraph (1) or

1 (2) of this subsection, make publicly available a full written  
2 explanation of its action closing the portion, together with a  
3 list of all persons expected to attend the meeting and their  
4 affiliation.

5       “(f)(1) Each judicial entity shall publicly announce, at  
6 least one week before the meeting, the time, place, and sub-  
7 ject matter of each meeting, whether it is to be open or  
8 closed to the public, and the name and phone number of the  
9 official designated to respond to requests for information  
10 about the meeting. Such announcement shall be made unless  
11 a majority of the members determines by a recorded vote that  
12 business requires that such meeting be called at an earlier  
13 date, in which case the judicial entity shall make public an-  
14 nouncement of the time, place, and subject matter of such  
15 meeting, and whether open or closed to the public, at the  
16 earliest practicable time.

17       “(2) The time or place of a meeting may be changed  
18 following the public announcement required by paragraph (1)  
19 only if the judicial entity publicly announces such change at  
20 the earliest practicable time. The subject matter of a meet-  
21 ing, or the determination to open or close a meeting, or por-  
22 tion of a meeting, to the public may be changed following the  
23 public announcement required by this subsection only if (A) a  
24 majority of the entire membership determines by a recorded  
25 vote that business so requires and that no earlier announce-

1 ment of the change was possible, and (B) the judicial entity  
2 publicly announces such change and the vote of each member  
3 upon such change at the earliest practicable time.

4       “(3) Immediately following each public announcement  
5 required by this subsection, notice of the time, place, and  
6 subject matter of a meeting, whether the meeting is open or  
7 closed, any change in one of the preceding, and the name and  
8 phone number of the official designated to respond to re-  
9 quests for information about the meeting, shall also be sub-  
10 mitted for publication in the Federal Register.

11       “(g)(1) For every meeting closed pursuant to paragraph  
12 (1) or (2) of subsection (d), the Chief Justice of the United  
13 States, the chief judge of the circuit, or the chairperson of the  
14 committee or subcommittee, as the case may be, shall public-  
15 ly certify that in his or her opinion, the meeting may be  
16 closed to the public and shall state each relevant exemptive  
17 provision. A copy of such certification, together with a state-  
18 ment setting forth the time and place of the meeting, and the  
19 persons present, shall be retained by the judicial entity. The  
20 judicial entity shall maintain a complete transcript or elec-  
21 tronic recording adequate to record fully the proceedings of  
22 each meeting, or any portion of a meeting, closed to the pub-  
23 lic.

24       “(2) Each judicial entity shall promptly make available  
25 to the public, in a place easily accessible to the public, the

1 transcript or electronic recording of the discussion of any  
2 item on the agenda, or of any item of the testimony of any  
3 witness received at the meeting, except for such items of  
4 such discussion or testimony as the judicial entity determines  
5 contain information which may be withheld under subsection  
6 (d). Copies of such transcript, or a transcription of such re-  
7 cording disclosing the identity of each speaker, shall be fur-  
8 nished to any person at the actual cost of duplication or tran-  
9 scription. The judicial entity shall maintain a verbatim copy  
10 of the transcript, or a complete electronic recording of each  
11 meeting, or portion of a meeting, closed to the public, for a  
12 period of at least two years after such meeting.

13       “(h)(1) The Judicial Conference and each of the judicial  
14 councils shall, within one year after the date of enactment of  
15 this section and following published notice in the Federal  
16 Register of at least thirty days notice and opportunity for  
17 written comment by any person, promulgate regulations to  
18 implement the requirements of subsections (c) through (g) of  
19 this section. The regulations promulgated by the Judicial  
20 Conference shall apply to the Judicial Conference and to the  
21 committees and subcommittees of the Judicial Conference.

22       “(2) The Judicial Conference and each of the judicial  
23 councils shall transmit a copy of the complete text of each  
24 final rule to the Senate and the House of Representatives on  
25 the day on which the final rule is published in the Federal

1 Register. No final rule shall become effective if, within sixty  
2 calendar days of continuous session of Congress after the  
3 date of transmittal of the rule to the Congress, either House  
4 passes a resolution stating in substance that that House does  
5 not favor any part or all of the regulations submitted pursu-  
6 ant to this section.

7 “(3) For the purposes of this subsection—

8 “(A) continuity of session is broken only by an ad-  
9 journment sine die; and

10 “(B) the days on which either House is not in  
11 session because of an adjournment of more than three  
12 days to a day certain are excluded in the computation  
13 of calendar days of continuous session.

14 “(i) Any person may bring a proceeding in the United  
15 States District Court for the District of Columbia to require  
16 the Judicial Conference or any of the judicial councils to pro-  
17 mulgate regulations if such regulations have not been pro-  
18 mulgated within the time period specified in subsection (h).  
19 Subject to any limitations of time provided by law, any per-  
20 son may bring a proceeding in the United States Court of  
21 Appeals for the District of Columbia to set aside regulations  
22 issued pursuant to this subsection that are not in accord with  
23 the requirements of subsections (c) through (g) of this section  
24 and to require the promulgation of regulations that are in  
25 accord with such subsections.

1       “(j)(1) The district courts of the United States shall  
2 have jurisdiction to enforce the requirements of subsections  
3 (c) through (g) of this section by declaratory judgment, in-  
4 junctive relief, or other relief as may be appropriate. Such  
5 actions may be brought by any person against a judicial enti-  
6 ty prior to, or within sixty days after, the meeting out of  
7 which the violation of this section arises, except that if public  
8 announcement of such meeting is not initially provided by the  
9 judicial entity in accordance with the requirements of this  
10 section, such action may be instituted pursuant to this section  
11 at any time prior to sixty days after any public announcement  
12 of such meeting. Such actions may be brought in the district  
13 court of the United States for the district in which the meet-  
14 ing is held or in which the judicial entity in question has its  
15 headquarters, or in the United States District Court for the  
16 District of Columbia. In such actions a defendant shall serve  
17 his answer within thirty days after the service of the com-  
18 plaint. The burden is on the defendant to sustain his action.  
19 In deciding such cases the court may examine in camera any  
20 portion of the transcript, electronic recording, or minutes of a  
21 meeting closed to the public, and may take such additional  
22 evidence as it deems necessary. The court, having due regard  
23 for orderly administration and the public interest, as well as  
24 the interests of the parties, may grant such equitable relief as  
25 it deems appropriate, including granting an injunction against

1 future violations of this section or ordering the judicial entity  
2 to make available to the public such portion of the transcript,  
3 recording, or minutes of a meeting as is not authorized to be  
4 withheld under subsection (d) of this section.

5       “(2) Any Federal court otherwise authorized by law to  
6 review action by any judicial entity may, at the application of  
7 any person properly participating in the proceeding pursuant  
8 to other applicable law, inquire into violations by the judicial  
9 entity of the requirements of this section and afford such re-  
10 lief as it deems appropriate. Nothing in this section autho-  
11 rizes any Federal court having jurisdiction solely on the basis  
12 of paragraph (1) to set aside, enjoin, or invalidate any action  
13 by any judicial entity (other than an action to close a meeting  
14 or to withhold information under this section) taken or dis-  
15 cussed at any judicial entity meeting out of which the viola-  
16 tion of this section arose.

17       “(3) The court may assess against any party reasonable  
18 attorney fees and other litigation costs reasonably incurred  
19 by any other party who substantially prevails in any action  
20 brought in accordance with the provisions of subsection (i) or  
21 of this subsection, except that costs may be assessed against  
22 the plaintiff only where the court finds that the suit was initi-  
23 ated by the plaintiff primarily for frivolous or dilatory pur-  
24 poses. In the case of assessment of costs against a judicial

1 entity, the costs may be assessed by the court against the  
2 United States.

3       “(k) The Judicial Conference and each of the judicial  
4 councils shall annually report to the Congress with respect to  
5 its compliance with the requirements of this section, includ-  
6 ing a tabulation of the total number of meetings open to the  
7 public, the total number of meetings closed to the public, and  
8 the reasons for closing such meetings. The report of the Judi-  
9 cial Conference shall include the information required under  
10 the first sentence of this subsection for each of the commit-  
11 tees and subcommittees of the Judicial Conference.

12       “(l) Nothing in this section expands or limits the rights  
13 of any person under section 552 of title 5 of the United  
14 States Code, except that the exemptions set forth in subsec-  
15 tion (d) of this section shall govern in the case of any request  
16 made pursuant to section 552 of such title to copy or inspect  
17 the transcripts or recordings described in subsection (g) of  
18 this section. The requirements of chapter 33 of title 44 of the  
19 United States Code, shall not apply to the transcripts or re-  
20 cordings described in subsection (g) of this section.

21       “(m) This section does not constitute authority to with-  
22 hold any information from Congress, and does not authorize  
23 the closing of any meeting of a judicial entity or portion  
24 thereof required by any other provision of law to be open.

1       “(n) Nothing in this section authorizes any judicial enti-  
2 ty to withhold from any individual any record, including tran-  
3 scripts or recordings required by this section, which is other-  
4 wise accessible to such individual under section 552a of title  
5 5 of the United States Code.”.

6       (b) The table of sections for chapter 15 of title 28,  
7 United States Code, is amended by adding immediately after  
8 the item relating to section 334 the following new item:

“335. Open meetings of the Judicial Conference and the judicial councils.”.

○

## ADDITIONAL PREPARED STATEMENTS

Prepared Statement of  
Senator Robert Dole

MR. CHAIRMAN, AS THE RANKING MINORITY MEMBER, I WELCOME THIS OPPORTUNITY FOR OUR SUBCOMMITTEE TO RECEIVE TESTIMONY ON THIS PROPOSED LEGISLATION, THE "JUDICIAL CONFERENCE AND COUNCILS IN THE SUNSHINE ACT." THE EFFECT OF THIS BILL WOULD BE TO IMPOSE THE SAME SORT OF PUBLIC MEETING REQUIREMENTS ON THE JUDICIAL CONFERENCE AND THE JUDICIAL COUNCILS OF THE VARIOUS CIRCUITS THAT WE IMPOSED ON EXECUTIVE BRANCH AGENCIES IN THE GOVERNMENT IN THE SUNSHINE ACT IN 1976. THE INTENT OF THE SUNSHINE ACT IN 1976 AND THIS BILL TODAY IS ALSO APPARENTLY THE SAME: TO INCREASE THE ACCOUNTABILITY OF THE GOVERNMENT BY EXPOSING ITS OPERATION TO PUBLIC VIEW.

IN MANY CIRCUMSTANCES, I BELIEVE THIS LOGIC IS ACCURATE AND FAVORS THE ENACTMENT OF WHAT HAS COME TO BE KNOWN AS "SUNSHINE" LEGISLATION. INDEED, I WAS ONE OF THE ORIGINAL CO-SPONSORS OF THE GOVERNMENT IN THE SUNSHINE ACT. HOWEVER, I DO NOT BELIEVE SUNSHINE LEGISLATION CAN BE UNIFORMLY IMPOSED ON ALL BRANCHES OF THE GOVERNMENT, OR EVEN ON ALL ACTIVITIES WITHIN ONE BRANCH.

I FURTHER BELIEVE THAT THIS SUBCOMMITTEE MUST BE UNUSUALLY CAUTIOUS IN CONSIDERING LEGISLATION WHICH SO DIRECTLY IMPINGES ON THE OPERATION OF THE JUDICIARY. IT IS A COMMONPLACE THAT THE AUTHORITY OF THE JUDICIARY RESTS TO A LARGE DEGREE NOT ON PUBLIC PARTICIPATION IN ITS OPERATION, BUT ON THE INDEPENDENCE OF ITS OPERATION FROM ALL NON-JUDICIAL PARTIES. INDEED, I COULD GO FARTHER AND SAY THAT THIS AUTHORITY RESTS NOT ON THE PUBLIC SEEING

THE INTERNAL OPERATIONS OF THE COURT SYSTEM, BUT ON THE PUBLIC SEEING THAT NO ONE OUTSIDE THE JUDGES THEMSELVES SEE THE INTERNAL OPERATIONS OF OUR COURTS.

NOW I REALIZE THAT THE ADVOCATES OF THIS LEGISLATION COULD AGREE WITH MY OBSERVATIONS BUT CONTEND THAT MY FEARS ARE GROUNDLESS BECAUSE THIS BILL APPLIES ONLY TO THE JUDICIARY IN ITS ADMINISTRATIVE CAPACITY. YET INSOFAR AS THE JUDICIAL CONFERENCE REVIEWS THE CONDUCT OF JUDGES AND COURT OFFICERS, I SUGGEST THE INDEPENDENCE OF THE JUDICIARY IS DIRECTLY AT STAKE.

MR. CHAIRMAN, EVEN ON A LESS FUNDAMENTAL LEVEL THAN THE ISSUES INVOLVING JUDICIAL INDEPENDENCE, THIS BILL RAISES MANY PRACTICAL QUESTIONS IN MY MIND. IF THE PURPOSE OF THIS BILL IS TO INCREASE PUBLIC ACCOUNTABILITY OF THE JUDICIAL CONFERENCE AND THE CIRCUIT COUNCILS, IT SEEMS TO ME THAT A CASE MUST BE MADE THAT THE JUDICIAL CONFERENCE SHOULD BE MORE ACCOUNTABLE THAN IT IS NOW.

THE JUDICIAL CONFERENCE CAN REALLY DO NOTHING OF CONSEQUENCE WITHOUT CONGRESSIONAL APPROVAL, OR AT LEAST WITHOUT BEING SUBJECT TO CONGRESSIONAL VETO. FURTHERMORE, CONGRESS ESTABLISHES ALL THE FEDERAL COURTS, SAVE THE SUPREME COURT, AND APPROPRIATES MONEY FOR THEM ALL. ANY SUGGESTION OF A LACK OF ACCOUNTABILITY IN THE JUDICIAL CONFERENCE SUGGESTS TO ME THAT WE IN CONGRESS HAVE NOT BEEN DOING OUR JOB.

ALSO, HOW IS THIS INCREASED ACCOUNTABILITY TO BE ACHIEVED? THIS BILL OBVIOUSLY TAKES THE APPROACH THAT THIS ACCOUNTABILITY WILL BE INCREASED BY PUBLIC OBSERVATION. YET THIS TOO LEADS TO A SERIES OF QUESTIONS. WILL PUBLIC OBSERVATION CHANGE WHAT THE JUDICIAL CONFERENCE DOES? IS IT A GOOD IDEA FOR PUBLIC PRESSURE TO SO INFLUENCE THE ACTIONS OF THE CONFERENCE? SINCE THE BULK OF THE DUTIES OF THE JUDICIAL CONFERENCE INVOLVE HOUSEKEEPING

ACTIVITIES, WILL THE PUBLIC CARE TO OBSERVE THE CONFERENCE? DOES THE JUDICIAL CONFERENCE PRESENTLY HAVE THE STAFF AND OTHER RESOURCES NEEDED FOR IT TO SATISFY THE REQUIREMENTS OF THIS BILL? HOW MUCH WILL ADDED STAFF COST? HOW WILL PUBLIC OBSERVATION OF THE CONFERENCE LIMIT ITS EFFECTIVE OPERATION? WHAT IMPACT WILL THE LOSS OF INFORMALITY AND CANDIDNESS IN THE CONFERENCE HAVE ON WHAT THE CONFERENCE DOES?"

MR. CHAIRMAN, IT IS THESE KINDS OF QUESTIONS WHICH I BELIEVE NEED TO BE ANSWERED BY THE TESTIMONY IN TODAY'S HEARING. IF THIS BURDEN IS NOT MET AND A COMPELLING RATIONALE FOR THIS BILL NOT ESTABLISHED, I AM AFRAID S.2045 WILL NOT MERIT MY SUPPORT OR THE SUPPORT OF SENATORS LIKE MYSELF, WHO, THOUGH A DEMONSTRATED FRIEND OF ACCOUNTABILITY IN GOVERNMENT, BELIEVES THERE IS NO EASY UNIFORM RULE TO ASSURE SUCH ACCOUNTABILITY.

Prepared Statement of  
Senator Lawton Chiles

I am pleased to have this opportunity to comment on government in the sunshine in general and S. 2045 in particular.

When I first came to Washington, 10 years ago, I noticed that all of the doors in town were closed. Whatever of the public's business that was being conducted behind those doors was apparently of such import and necessary secrecy that the public could not be trusted to know how its own government ran. Upon inquiry, I was informed that secrecy was necessary to facilitate the "very frank" discussions that were so important to running the government.

Although, I am very sympathetic with the desire to be inarticulate in front of as few people as possible, I don't think that fear of embarrassment should override the public's right to see how its government operates.

As you know, I have long been a strong advocate of open government. Starting in my first year in the Senate, I worked toward opening up meetings of Congressional committees and federal agencies. I introduced the federal Government in the Sunshine Act which was passed in 1976. The Sunshine Act requires that all federal collegial agencies conduct their meetings in public absent specific circumstances

necessitating secrecy for the public good.

The Sunshine Act was a revolutionary idea to the federal bureaucracy. Federal agencies have increasingly had a tremendous direct impact on the lives of all citizens. Yet, they historically operated anonymously, under a heavy cloak of secrecy. Thousands of significant decisions have been made over the years by the agencies completely hidden from public scrutiny. The federal bureaucracy grew very comfortable operating in secrecy. This mode of operation, however, has been shown to lead to a breakdown in accountability. In view of the size of the agencies and their well guarded anonymity, it had become increasingly more difficult to attach responsibility for agency actions.

Although the concept of open government is relatively new to the federal government, it has enjoyed a long history in this country on the state and local levels. It has its roots in colonial America's town meetings. Today, all fifty states have adopted legislation guaranteeing citizens the right to attend government meetings. Most states have constitutional provisions relating to open government.

The Sunshine Act had a curious history. No one was too interested in it when we first started talking about it up here. I had a great deal of respect for the notion of open government after watching it work in Florida. I became firmly convinced that secrecy is not a necessary ingredient to the

effective resolution of conflicting views and interests. Secrecy neither enhances nor improves how our government works.

On the contrary, secrecy, and the generally paranoid mentality that goes along with it, has severely hindered and damaged the integrity of our government. After working hard, we finally convinced some of our fellow legislators that this was the case.

The Sunshine Act was enacted in the wake of the Watergate scandal when public confidence in federal government was at an all time low. It was one of several legislative efforts aimed at increasing public confidence in government and in making those who govern more responsive and accountable to the public. Government in the Sunshine embodies the principle that, absent special circumstances requiring secrecy for the public good, democracy demands that government operate in the open. It is founded on the belief that the public has a right to know how government officials are conducting the public's business.

It has taken the federal agencies some time to understand the Sunshine Act and adapt their operating procedures to its requirements. I also believe it has taken time for the agencies to change their attitudes about how they conduct public business. For example, there has been a significant improvement in the statistics of open and closed meetings -- i.e., the agencies have more open meetings today than they did during the first

year of operating under the Sunshine Act. Initially, there was a relatively poor record of compliance with the spirit of the Sunshine Act. I believe that this resulted more from old agency attitudes and habits of secrecy than from the legitimate use of the exemptions cited when meetings were closed. Consistent persistence in pressing for openness can ensure that the rate of openness will continue to grow.

My Subcommittee on Federal Spending Practices and Open Government has the responsibility of overseeing the implementation of the Sunshine Act. S. 2045 has been modeled somewhat after the Sunshine Act. In light of this fact, I would like to highlight some of the problem areas that I have encountered in my continuing effort to monitor and oversee the implementation of the Sunshine Act. Hopefully, you will benefit from my experience and be alerted to the kinds of practices and activities that can thwart full implementation of S. 2045.

Many agencies have had problems understanding and determining what the term "meeting" encompasses. Several agencies have defined a meeting in such a manner as to restrict the kinds of joint deliberations that come under the operation of the Sunshine Act. For example, some agencies eliminated important briefings and preliminary discussions from the scope of the definition. Other agencies have been found to conduct working luncheons outside of the agency at which agency business is discussed and yet fail to consider these discussions as meetings.

By defining this term narrowly, agencies can severely impede and effectively negate fulfillment of the fundamental national policy

expressed by Congress. It is my position that the definition of a meeting should be liberally construed to further the spirit and congressional intent behind open meeting legislation. A meeting should encompass discussions of recommendations, briefing sessions, preliminary or informational discussions of matters affecting official business. The Department of Justice has gone on record endorsing and encouraging the liberal interpretation of this term.

I cannot stress too much the importance of defining this term in a broad fashion. It is one of the most critical issues of interpretation of laws such as the Sunshine Act and S.2045. By narrowly construing the term, agencies have managed to avoid the application of the Sunshine Act's provisions by simply deciding a discussion is not a meeting. From my experience, agencies have had significant difficulties in drawing the parameters of this term. In view of the laws purpose and overriding presumption in favor of openness, the judicial entities, when in doubt, should err on the side of openness.

Another significant problem has involved meetings, allegedly open, at which reports and papers are discussed by agency members in terms of page and paragraph numbers. This is a critical problem that you should be alerted to.

The Sunshine Act requires, as does S.2045, that meetings shall be open to public observation. This implies the right to meaningful public observation. Based on my subcommittee's oversight hearings and other activities, it is apparent that not all agencies are conducting meaningful open meetings. Agencies have been found, for example, to be talking in terms of code, page or paragraph number and thus have conducted these meetings in an essentially closed manner. By conducting open meetings in cryptic terms, agencies have

rendered the Sunshine Act meaningless to the public. Several agencies have avoided or remedied this situation by distributing to the public copies of the staff documents and papers which are the topic of discussion. In the past year, some agencies have reevaluated their Sunshine policies and have begun to make more substantive information available to the public prior to or during open meetings. Such agency practices have contributed greatly to the purposes and effectiveness of open government and have allowed for meaningful public observation of the decisionmaking process.

It will be the responsibility of judicial entities to provide the public with full information. This responsibility includes providing the public with the tools to be able to follow discussions and understand the decisionmaking process. It is contrary to the spirit of open government to have a full discussion of papers or reports at an open meeting and then proceed with the discussion in a manner that is unintelligible and meaningless to the general public. Openness thus can become a mere façade.

There is a hidden danger in conducting meetings in a cryptic or incomplete terms. Such meetings can result in misinforming the public by presenting incomplete information and thus creating more confusion and misunderstanding of an entity's actions.

The arguments that I have heard against distributing necessary tools for understanding to the public, i.e., staff memoranda, reports, etc., generally are that to do so would result in inhibiting the free flow of ideas among staff members and the agency members. Congress, however, in passing the Sunshine Act, rejected any argument that openness in government would chill full and frank discussion.

Once a report is publicly discussed at an open meeting, it becomes an integral part of that meeting and thus is in the public domain and part of the public record.

The "chilling effect" argument is a false one. We heard all sorts of tales of doom and destruction prior to enacting the Sunshine Act. Most agency members now admit that, once they got accustomed to the idea of having the public present, they found that such presence was not an inhibiting factor. Indeed, several agencies have been handing out staff reports and memoranda to the public and have found this practice not to be a detriment to the free flow of ideas among staff and the agency members.

Another aspect of public observation that is important to consider is the use of recorders and cameras at open meetings. The term "public observation" has been interpreted by the Department of Justice and others to include the use of cameras and recorders. Permitting the unobtrusive use of cameras and recorders provides an opportunity for accurate reporting of what transpired at an open meeting. Accurate reporting by these devices permits better reasoned evaluations of the decisionmaking process and greatly enhances the public's ability to observe and understand agency proceedings. Moreover, it also provides a way of accurately informing persons who did not attend the open meeting of the nature and content of the agency's action.

Another practice to be aware of is the use of notation voting, i.e., written voting on the basis of circulated papers. The Sunshine Act does not prohibit the use of notation voting as a means of taking agency action. It is evident, however, that an agency or judicial entity can circumvent the law by conducting business on paper.

There is a serious potential for abuse of this procedure. Generally, there is little or no public record of the entire decisionmaking process when decisions are made by notation procedure.

Judicial entities should be instructed or encouraged to restrict their use of notation voting as a means of deliberating and disposing of official business to routine, non-controversial or administrative matters. Also, records should be kept of all matters disposed of by notation voting. These records should include a record of each member's vote and written comments and all documents circulated in relation to the action taken. These records should be indexed and made available to the public.

Our studies and those of Common Cause have shown that there is a tendency to close meetings unnecessarily. This is especially a problem with respect to exemption (9) (B) of the Sunshine Act which allows closing meetings involving information the premature disclosure of which would be likely to significantly frustrate proposed action. I would strongly advise against amending S.2045 to include a comparable exemption. There is a very real danger that this type of exemption could be used or abused by judicial entities and treated as a catch-all exemption when nothing else applies.

From my understanding of the Judicial Conference, it exerts a basic influence upon the federal court system and the public by establishing operating policies for federal courts, issuing guidelines, developing rules of practice and procedure and proposing and commenting on legislation. As such, it appears that the official business of the Judicial Conference has a very significant and direct impact on the public. Yet, there has been no provision for any public observation in its activities.

Moreover, I understand that S.2045 in no way attempts to affect

the judicial process of deciding cases. It only affects the administrative operation of the federal courts.

As such, there does not appear to be any sound justification for permitting the administrative policy-making of the courts to be conducted in secrecy. S.2045 allows for the closing of meetings that are sensitive in nature and can be justly conducted in private.

By opening up the decisionmaking process of the Judicial Conference, S.2045 should enhance and strengthen the federal judicial system by dispelling the public suspicion and distrust and alienation that is inevitable when policy is formulated in secret. Moreover, it will allow the public to better understand the policies and procedures of the courts and thus, enable the public to better comply with them. I believe such openness will result in greater public respect for the judiciary.

I want to applaud Senator DeConcini and this subcommittee for working towards a more open and responsible government. I endorse the concept of S.2045 because I feel it can only contribute to and promote the goals of open government.

Prepared Statement of  
Judge Frank M. Coffin

Mr. Chairman. This statement is submitted for the record concerning the Subcommittee hearings on S. 2045, the Judicial Conference and Councils in the Sunshine Act. Without commenting on the bill as it would affect the Judicial Conference, I shall confine my remarks to conveying to the members of the Subcommittee my apprehension that passage of S. 2045 would create serious impediments to the efficient functioning of the Circuit Councils, at least in the First Circuit, without providing any offsetting benefits, either to the Circuit or to the public.

Contrary to one of the bill's implied premises, matters discussed and acted upon at meetings of the Circuit Council could only infrequently be characterized as "quasi-legislative". Instead, the meetings of my two colleagues and myself generally concern rather mundane housekeeping matters which are often dealt with rather informally. "Meetings" of the Council are sometimes conducted by phone or through written memoranda. When we actually meet in person, we often do so at the end of a day's arguments and conference. This allows us to deal flexibly, efficiently, and, I believe,

effectively with the numerous details of in-house administration without being forced to interfere unnecessarily with the time consuming task of our primary job -- hearing and deciding cases.

In order to illustrate the nature of the matters which are discussed at Council meetings, I proffer the following list of topics which have dominated the subjects of Council actions during the past year.

- The Council agreed to amend the local rules to require that citations to state court decisions contain both the official and unofficial cites when available.
- The Council authorized the Clerk to discontinue preparing bound sets of briefs and opinions.
- The Council made arrangements for two dinners to be held in conjunction with the Circuit Conference.

BT  
-- The Council agreed that I would check into a problem with delays in the production of transcripts by a court reporter.

- The Council agreed by telephone to authorize the appointment of two additional full-time magistrates in the Circuit, as recommended by the Administrative Office of the United States Courts and the Chief Judges of district courts.

- The Council made arrangements to contact the Administrative Office to obtain temporary secretarial help because of the illness of a secretary in the Staff Attorneys' office.
- The Council approved plans for presenting the portrait of a senior circuit judge.
- Council members discussed the progress of the selection of a new chief librarian.
- Council members discussed plans for modification of the Boston chambers.
- The Council approved the hiring of a Lexis operator.
- The Council discussed selection of a new chief librarian, narrowing field of applicants.
- The Council discussed appointing a committee to look into various details of organization arising out of the new Bankruptcy Act.
- The Council discussed the rating of a Staff Attorney.
- The Council by telephone endorsed after discussion a request for an additional attorney in the Puerto Rico Federal Public Defender Office.

- The Council considered plans for the 1980 Circuit Conference.
- The Clerk outlined an expanded rating plan to be used in the Clerk's office.
- The question of future space needs for the courts in Boston was reviewed.
- Circuit Judge Bownes gave a brief outline of the Bankruptcy Study Committee's work to date.

In offering this brief list of examples of topics discussed at Council meetings, I do not mean to suggest that the Council's business is unimportant. Rather, I merely wish to demonstrate that there would seem to be nothing to be gained by requiring us to issue notices and agendas in advance, schedule meetings before knowing when it would be most convenient to conduct them, and abandon our practice of dealing with matters by telephone as they arise when it seems reasonably certain that if our meetings were in fact open, no one would come. As far as the Council is concerned, the chief effect of S. 2045 would be to increase the bureaucratization of judicial administration, introduce added delays, add to the ministerial duties of both myself and our Clerk, and in general detract from our ability to conduct our business effectively and efficiently. I therefore am opposed to passage of the bill, at least to the extent that it would apply to the Circuit Council.

Prepared Statement of  
Judge Donald P. Lay

CONFIDENTIAL

I am unalterably opposed to passage of S. 2045. I fail to see any need or justification for the passage of this act. In its overall form I am confident it will totally inhibit the administrative efficiency of the entire federal judiciary. I fail to see any benefits that would result to the legal system or to the public if S. 2045 is enacted into law. According to the proponents of the bill, at least one of the concerns expressed, is that the Judicial Conference of the United States and the Judicial Councils are encroaching upon the Executive and Legislative Branches when judicial members discuss proposed legislation. I think this premise totally unsound. I would hope that the Executive and Legislative Branches would continue to solicit views, such as you are now soliciting, of the various chief judges on S. 2045, on legislation that affects judicial administration throughout the Country. It is difficult for me to perceive that there is any exercise of legislative policy or executive judgment made by judges in formulating a composite view on proposed legislation either through the Judicial Conference of the United States or through the Judicial Council. Public awareness of the views of these bodies are made known at the time that the views are formulated and sent to Congress or to the Executive Branch. There is no attempt by these entities to pass laws or to encroach upon the Executive Branch of the government in so formulating such views.

The general discussions that are carried on at the Judicial Council meetings pertaining to the business of the circuit courts and the district courts are seldom secretive,

but at the same time are not generally worthy of public interest. Oftentimes the Eighth Circuit Judicial Council meetings are called impromptu and on an emergency basis. In the Eighth Circuit the judges live in seven different states ranging in a geographic area from the Canadian border to the southern tip of Arkansas. Our court meets once a month at a designated situs of court and wherever possible notice of council meetings is given to the judges and a prescribed agenda is set forth. On the other hand, quite often when we are either in St. Louis, Missouri or St. Paul, Minnesota, and the court is fully assembled the Chief Judge will call an emergency session of the council. This happened in our last term of court in March in St. Louis; to provide you an idea as to what the emergency agenda was I list the following areas that required discussion:

1. Proposed invitations to be sent to the magistrates and bankruptcy judges to attend our Judicial Conference.
2. Implementation of an EEOC Plan as adopted by the United States Judicial Conference.
3. Discussion of a threatening letter to members of the federal judiciary written by a state prisoner.
4. Consideration of a federal public defender to be set up in St. Louis, Missouri.
5. Consideration of the request by the Eastern District of Missouri and the Western District of Arkansas for an additional judge.
6. Sittings for our fall term and the request by three different law schools to visit the schools to hold court.
7. Status reports to the Chief Judge as to assignment of cases.
8. Establishment of an ad hoc committee on disposition of court records.
9. Discussion of standards to be adopted by the circuit as to the workload for senior judges and their staff.

If the Sunshine Act were to be passed it would be impossible for our court to set up an emergency council meeting and to conduct the business of the court as required. The adoption of the Sunshine Act would totally inhibit our judicial council from carrying on any business as we recently did in St. Louis. Secondly, due to the geographic distribution of the judges' home base within our circuit, much of our council activity is carried on by telephone vote or by written letter. For example, at the present time I have pending for immediate council approval, certification of designated magistrates to try civil cases as required by the new Magistrates Act. This requires council action. I do not contemplate our full court being together until sometime in June so that it is necessary for me to get immediate council approval as to the certification of these magistrates by mail vote. Under the Sunshine Law this would be impossible and would require us to give public notice and to have judges travel from the various states to hold such a meeting so that we could have immediate approval of magistrates. The design of the present proposed bill would completely inhibit our efforts to carry out this work.

If time permitted I could write much more concerning the impracticality of the proposed act. In summary, I respectfully submit that passage of this act or any similar act is not needed. Secondly, the view of the council relating to passage of legislation is publicly known or made known without the necessity of providing public notice and public attendance at the council meetings. Since the passage of the Circuit Executive Act the courts have attempted to provide as much administrative responsibility in nonjudicial officers of the court. This was a step forward. The Sunshine Act inhibits the effectiveness of this legislation. Implementation of council action through the circuit executive is

daily carried on by letters and telephone conversations. I have been on the court for 14 years and it seems to me more and more judges are being given new administrative responsibilities. It has been my goal as newly appointed Chief Judge to attempt to decentralize the administrative responsibilities from under the guidance of the Chief Judge and the Judicial Council and to place these responsibilities into working committees of the Bar, district judges and circuit judges as well as the clerk and the circuit executive of the court. The same policy has been pursued by the Judicial Conference of the United States through the functioning of various committees of the Judicial Conference. The attempt to require these committees to do all their business by formal meeting and by formal notice would totally inhibit that process and break down the entire efficiency of the court. The only gain I perceive from such a bill would be to provide an emotional palative to the media's plea for open hearings in all processes of government. In due course of time, at least as far as Judicial Council meetings are concerned, I am confident that the media would not be interested in attending or in reporting any of the activity or discussions at the Judicial Council meetings. I am further confident that no discussion at the council meetings would be worthy of public dissemination. Sooner or later, notwithstanding all the technicalities placed upon the councils to meet under the requirements of the act, no one other than the members of the council would attend. The end result would be to entirely inhibit the council in the implementation of administrative procedures to operate our court system as efficiently as possible.

I am unalterably opposed to the so-called Sunshine Act.

Prepared Statement of  
Prof. Eugene Gressman

I submit this statement in response to Senator DeConcini's invitation to comment on S. 2045, the Judicial Conference and Councils in the Sunshine Act.

I confine my remarks to the so-called "one-House veto" provision embodied in §335(h)(2) of S. 2045. That subsection provides that the complete text of every regulation or rule promulgated by the Judicial Conference or by any of the judicial councils, designed to implement the open meeting requirements of subsections (c) through (g), shall be transmitted

" . . . to the Senate and the House of Representatives on the day on which the final rule is published in the Federal Register. No final rule shall become effective if, within sixty calendar days of continuous session of Congress after the date of transmittal of the rule to the Congress, either House passes a resolution stating in substance that that House does not favor any part or all of the regulations submitted pursuant to this section. "

The purport of this subsection, as I read it, is to empower the Judicial Conference and the judicial councils to

draft and publicize proposed rules or regulations implementing the open meeting requirements. These judicial agencies are given no power to make these proposals effective or to promulgate them in final form. Instead, the proposals are to be transmitted to the Congress immediately upon their publication in the Federal Register. The proposals then lie over in the Congress for a period of sixty calendar days, during which time both Houses will have the opportunity to review and consider the substantive merits of the proposals. Any such proposals "shall become effective" at the end of this sixty day layover period, unless within that period either House passes a resolution stating that it "does not favor any part or all of the [proposed] regulations."

Four critical factors emerge from this reading of §335(h)(2):

(1) Congress is here delegating to the Judicial Conference and the judicial councils the limited function of drafting proposed rules or regulations for submission to, and consideration by, the Congress. These judicial agencies are also empowered to publicize their proposals and receive public comments thereon.

(2) Congress is deliberately withholding from these agencies any power to finalize these proposals or to make them finally effective.

(3) When these proposals are transmitted to the Congress, they retain their status as mere proposals; in no way have they achieved finality or effectiveness.

(4) During the sixty day layover period, the Congress reviews proposals. Final promulgation and effectiveness await the termination of the sixty day period. If neither House has voted to disapprove the proposals during that period, then the statutory scheme gives an automatic finality to the proposals.

In my judgment, the §335(h)(2) scheme does not involve a true "one-House veto" situation and hence does not implicate any constitutional objections usually associated with a true legislative veto mechanism. A one-House disapproval of a proposed regulation or rule is not a "veto" of a regulation that has achieved finality before being transmitted to Congress for review. The regulation proposed by one of these judicial agencies is no more and no less than a recommendation. Congressional disapproval of such a recommendation, like a single House's disapproval or refusal to enact a legislator's proposed bill, simply means that the Congress has refused to give its final approval to the proposed regulation. In other words, under S. 2045 the Congress has retained unto itself the legislative power to make effective the detailed regulations needed to implement some of the broad statutory provisions. Congress has done no more than call upon these judicial agencies to make recommen-

dations for the implementation process.

As Mr. Justice White said in Buckley v. Valeo, 424 U.S. 1 at 285 (1976), the power of either House to disapprove a proposition or proposal is not "equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses." For that very reason, it cannot be said that this kind of a "one-House disapproval" technique -- which is a more accurate description than the term "one-House veto" -- violates any principle of separation of powers or is inconsistent with the Presentment Clause of Article I, Section 7, of the Constitution.

The Court of Claims was confronted with precisely the same kind of "one-House disapproval" technique in Atkins v. United States, 556 F.2d 1028, 1057-1071 (Ct.Cl. 1977), certiorari denied, 434 U.S. 1009 (1978). The constitutionality of the Salary Act was there called into question, with respect to the provision that reserved to each House the power to disapprove any Presidential recommendation respecting judicial salary increases. The court found that Congress had ample power under the Necessary and Proper Clause of Article I, Section 8, to enact such a disapproval scheme in execution of the Congressional power to establish judicial salaries.

In according constitutional validity to the Salary Act scheme of "one-House disapproval," which is precisely the same scheme that S. 2045 proposes with respect to judicial

agency proposals, the Atkins court noted that much of the constitutional criticism of this technique rests on "the faulty assumption that the President's [or agency's] recommendations themselves are automatically the law, which the single House's action of veto [or disapproval] then changes." 556 F.2d at 1063. Such recommendations are of course not the law; and the one-House disapproval technique "does not alter the existing law in any fashion, but only preserves the legal status quo." Ibid.

I conclude that the "one-House disapproval" concept incorporated in §335(h)(2) of S. 2045 fully passes constitutional muster. But I would suggest that, to avoid needless confusion, the three references in §335(h)(2) to a "final rule" being promulgated by the Judicial Conference or a judicial council be changed to a "proposed rule." It is somewhat misleading to refer to such a recommended rule as a "final rule," particularly since the rule does not become final until the expiration of the sixty day layover period.

With that minor word clarification, §335(h)(2) is both workable and constitutionally sound.

Prepared Statement of  
David Cohen

Common Cause

welcomes the opportunity to comment on S. 2045, the "Judicial Conference and Councils in the Sunshine Act." Since its founding in 1970, a guiding principle of Common Cause has been making government more open and accessible. We believe that the public's right to know is fundamental to responsible and effective citizen participation in governmental affairs.

It is common knowledge that information is power and that secrecy is often used as a screen for information, keeping those in power isolated from public view. Representative self-government depends on the public's ability to hold government officials accountable for what they do. Yet these officials cannot be held accountable if information about their activities is withheld from the public. Nor will the public know where to probe when it is kept ignorant of important governmental matters. Throughout our government, secrecy undermines the public's ability to participate reasonably in the political process.

The Sunshine Act, enacted in 1976 and Congressional reforms adopted in the 1970's have proven to be effective in opening the decision-making processes of both the executive and legislative branches. We believe appropriate sunshine provisions should also be extended to the administrative decisions of the Judiciary. S. 2045 would open to the public the meetings of the Judicial Conference of the United States, its committees as well as the judicial council of each circuit. The legislation would in no way hamper due process. In matters involving criminal accusations, censures, or disclosure of personal information that "would constitute a clearly unwarranted invasion of personal privacy," a majority of

judges could vote to close that portion of the meeting.

The Judicial Conference is the chief administrative body of the federal courts. The Conference reviews and recommends changes in rules of procedure affecting federal courts. These rules embody policy choices about how important controversies are to be resolved. The Conference also sets salary ranges for magistrates, court personnel, and court reporters. These are decisions which materially affect the costs borne by litigants in federal courts. Additionally, the Conference develops a policy position in response to proposed legislation affecting the courts, such as the statute enacted in the last Congress to increase the size of the federal judiciary. These matters are of major importance and should not, as is presently the case, be resolved behind closed doors. Given the mandate of the Judicial Conference, we see no reason to exempt it from Sunshine.

Common Cause strongly recommends eliminating the one-House veto provision in S. 2045. The legislative veto focuses Congressional attention at an inappropriate level of detail and on an essentially piecemeal basis. Legislative vetoes are neither practical nor wise. A one-House veto clutters up a Sunshine bill with an unresolved constitutional issue. Congress' role should be to establish a broad framework within which the Judicial Conference can operate. Congress should provide vigorous oversight and make necessary changes if experience warrants, but not by second guessing agency rules with a one-House legislative veto.

We commend the Chairman for introducing this legislation to extend Sunshine to aspects of the judicial branch. Few matters are more important today than the restoration of public confidence in government. We believe S. 2045, without a one-House legislative veto, will help build the public's confidence in the processes of government, and foster a needed understanding of our judicial institutions.

## LETTERS

United States District Court  
Western District of Wisconsin  
P. O. Box 591  
Madison, Wisconsin 53701

Chambers of  
James F. Boyle  
Judge

February 4, 1980

Honorable Dennis DeConcini  
Committee on the Judiciary  
United States Senate  
Washington, D. C. 20510

Dear Senator DeConcini:

This is in response to your inquiry of January 30, 1980, concerning S.2045, the Judicial Conference and Councils in the Sunshine Act. I appreciate the invitation to express my views on the subject. I will do so now. Please feel free to use this letter in any way you wish, including making it part of the public record. I have no desire to testify at the hearings.

I support the bill.

I appreciate that some of its provisions, particularly the specifics of sections (d), (e), and (f), may require some revision to respond to special attributes of the work of the Conference or the Councils.

I served a term as a district judge member of the Judicial Conference of the United States, elected from the seventh circuit, and I attended all six of its meetings from October, 1972 through March, 1975. After I had attended two meetings, I approached a much more experienced member of the Conference with the suggestion that the Conference consider, deliberately and consciously, whether its meetings and the meetings of its committees should be conducted openly and publicly, in whole or in part. The response was negative. I deferred to this view, at least until I had enjoyed a fuller opportunity to observe the work of the Conference.

After I had attended two more meetings, I decided that I would pursue the matter. The Chief Justice courteously arranged to call for discussion at the September, 1974, meeting.

On August 21, 1974, I prepared a letter to the Chief Justice and the other members of the Conference, to which I attached a proposed resolution and a statement in support of the resolution. Copies of these documents are attached to this letter as exhibits A, B and C. These papers were made available to the membership. When my proposal was reached as an item of "new business" at the September, 1974 meeting near the end of the second of two typically busy and wearing days, it became clear promptly that there was inadequate time for discussion and also little enthusiasm for my proposal. I stated that I was serious about the proposal and that I did not intend to drop it. I did not insist that it be taken up then and I expressed willingness to raise it at the next meeting.

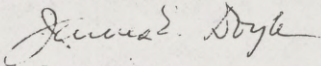
I sent a letter on January 3, 1975, to the Chief Justice and the other members of the Conference. A copy of my letter is attached as exhibit D. The letter explained that if any member were to express support by February 15, 1975, I would request the Chief Justice to include the subject in the agenda for the March, 1975, meeting, but that if none expressed support, I would not pursue the suggestion further.

By February 18, 1975, three members of the Conference had expressed a willingness to support the resolution proposing a study. On that day, I wrote the Chief Justice, with copies to all other members, saying that I had decided not to request discussion at the March, 1975, meeting. At the conclusion of that meeting, my term expired. A copy of my February 18, 1975, letter is attached as exhibit E.

I have this to add. As of September, 1974, and March, 1975, I was proposing only that the Conference study the question of opening the doors upon its work. Reflection and observation since March, 1975 have persuaded me definitely that the public is entitled to know, in full and unfiltered, virtually everything that is said and done at the meetings of the Conference and its committees. Whether the judicial branch is to lose advantage or, as I believe, gain advantage, the doors should be opened.

Because he is the presiding officer of the Judicial Conference, I am directing a copy of this letter to the Chief Justice of the United States so that he will be aware of it.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "James E. Doyle".

James E. Doyle

cc: The Honorable Warren E. Burger  
Chief Justice

Agenda I-1(a)  
Supplement to I-1 (open sessions  
of Judicial Conference)  
September 1974

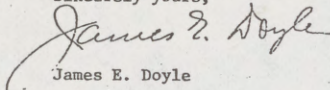
August 21, 1974

To the Chief Justice of the United States  
and to the other members of the Judicial  
Conference of the United States:

I appreciate the courtesy of the Chief Justice in arranging for discussion under Item I (New Business) at the September 19, 1974, session, of the question raised in my letters to the Chief Justice dated May 30, 1973, and May 1, 1974, copies of which have been furnished you by Mr. Kirks.

I am keenly aware of the pressures upon the time of the Judicial Conference during its two-day meetings. Accordingly, I enclose to each of you a copy of a formal motion embodying my suggestion. I also enclose to each of you a copy of a brief statement of my views. I will be content on September 19 to have the written motion submitted, and to refrain from making any further statement in support of it. If it fails to win a second, or if it is seconded but defeated, I have no wish to pursue the matter.

Sincerely yours,



James E. Doyle

Exhibit A

Motion by James E. Doyle for consideration  
by the Judicial Conference of the United  
States at its September 19, 1974, session,  
under Item I (New Business).

Resolved, that the Chief Justice of the United States refer to a standing committee of the Judicial Conference of the United States to be selected by him, or to a special committee of the Judicial Conference of the United States to be appointed by him, for study and for a report to the Judicial Conference of the United States, the following subject:

Whether existing procedures and practices of the Judicial Conference of the United States with respect to informing the public of its activities and of the activities of its committees should be modified in the direction of conducting its meetings and the meetings of its committees, in whole or in part, openly and publicly at times and places previously and publicly announced.

Exhibit B

August 21, 1974

Statement by James E. Doyle in support of his motion to be presented to the Judicial Conference of the United States at its September 19, 1974, session, concerning open meetings of the Judicial Conference and of its committees.

The public policy at stake is that in a democratic representative government, "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business." Wis. Stats. §66.77(1). An important means to implement this public policy is to open to the public the doors of the rooms within which public business is transacted by public bodies.

The function performed by the Judicial Conference of the United States is not a judicial function. The Conference has been created by Congress to perform certain duties described in the statute. There is little, if anything, involved in its performance of those duties which need be shielded from direct scrutiny by the public.

There is a price to be paid for openness. Members of a public body may be inhibited to some degree in expressing their views. A few members may be prompted to make some statements more for their effect on public sentiment than for the resolution of the issue at hand. The press reports may sometimes be inaccurate or incomplete. But with respect to these points, there is no significant distinction to be made between the Judicial Conference of the United States and a local school board. Also, experience has shown that when the transition from closed sessions to open sessions has been made, usually the anxieties over these anticipated difficulties have proved to have been exaggerated.

If the Conference is disposed to move in the direction I suggest, perhaps it may wish to limit the move. Presently I see no reason to limit it. But I can understand that others may wish to move a step at a time. For example, it may be that those from academic life who assist our committees should be permitted to attend entire sessions of the Conference and that they should be relieved of any strictures of confidentiality.

In any event, I consider that the question of openness is worthy of careful consideration, and that thereafter the Conference should make a deliberate and conscious choice.

Exhibit C

Madison, Wisconsin 53701  
January 3, 1975

To the Chief Justice of the United States  
and to the other members of the  
Judicial Conference of the United States:

Enclosed to each of you is a copy of a letter which I addressed to you on August 21, 1974, together with its enclosures (namely, a motion to be submitted by me at the September, 1974, meeting of the Conference and a statement in support of the motion).

As most of you are aware, after a brief discussion under "new business" at the close of the September meeting, I withdrew the motion at that time, but stated that I intended to renew it in March, 1975.

I have decided to proceed in this way: If any of you advises me by February 14, 1975, that you will support the motion in its present form or in some modified form, I will request the Chief Justice to schedule it for discussion under new business in March. If none of you advises me of your support by February 14, 1975, I will inform the Chief Justice that I will not pursue the suggestion further.

Sincerely yours,

James E. Doyle

JED:cm  
Enclosure

Exhibit D

United States District Court  
Western District of Wisconsin  
P. O. Box 591  
Madison, Wisconsin 53701

Chambers of  
James F. Doyle  
Judge

February 18, 1975

The Honorable Warren E. Burger  
Chief Justice  
The Supreme Court of the United States  
Washington, D. C. 20543

Dear Mr. Chief Justice:

Three members of the Judicial Conference of the United States have advised me that they are prepared to support my proposal that the following question be submitted to an appropriate committee for study:

Whether existing procedures and practices of the Judicial Conference of the United States with respect to informing the public of its activities and of the activities of its committees should be modified in the direction of conducting its meetings and the meetings of its committees, in whole or in part, openly and publicly at times and places previously and publicly announced.

Upon further reflection, however, I have decided not to request you to include this subject in the agenda for the March meeting of the Judicial Conference.

I remain persuaded of the merits of my suggestion. Indeed, since May 30, 1973, when I first made the suggestion in a letter to you, I have come to see less and less reason not to let the sunshine in on the work of public officials who, as members of the Judicial Conference of the United States, are performing a non-judicial function.

Exhibit E

I consider modest my proposed motion that the matter be studied. But it is the modesty of the motion which persuades me not to offer it. If even a study would muster but four of 25 votes, or possibly five or six or seven after discussion, it is plain that there is little support for the underlying thesis.

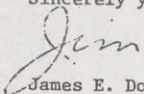
I accept all this in good spirit. I have informed the three responding members that I intend not to request that the matter be taken up in March. Perhaps a little later one or more of them may choose to renew the suggestion. Perhaps it will gain support over a period of time. Perhaps not.

I am sending copies of this letter to all members of the Judicial Conference and to Mr. Kirks.

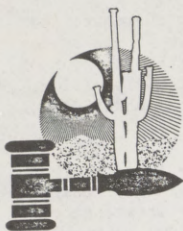
I appreciate your courtesy in this particular matter, as in others.

With my good wishes,

Sincerely yours,

  
James E. Doyle

JED/vc



# MARICOPA COUNTY BAR ASSOCIATION

3033 N. CENTRAL AVENUE, SUITE 604 • PHOENIX, ARIZONA 85012 • 602-277-2366

March 10, 1980

#### OFFICERS

ROBERT D. MYERS  
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RALPH E. MAHOWALD  
VICE-PRESIDENT  
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IMMEDIATE PAST-PRESIDENT

GREGORY A. ROBINSON  
PRESIDENT, YOUNG LAWYERS

Senator Dennis DeConcini  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

RE: S.2045, The Judicial Conference  
and Councils in the Sunshine Act.

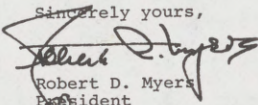
Dear Senator DeConcini:

After reviewing S.2045 and because I am always in favor of any mechanism which might improve the administration of justice, I wholeheartedly agree with your support of this bill.

As you have stated, Judicial Conference and Councils have proved to be "invaluable and indispensable" in helping to resolve the building caseloads in the district and appellate courts. I also agree that they have been a substantial force in upgrading the Federal judiciary and in expediting the effective administration of the courts.

Therefore, I urge you to continue to muster support among your colleagues for the passage of S.2045 which, when it becomes law, will improve the Federal Judicial Branch of Government.

Sincerely yours,

  
Robert D. Myers  
President

RDM/mh

MAR 19 1980

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

MAR 19 1980

COLLINS J. SEITZ  
CHIEF JUDGE

LOCK BOX NO. 32  
FEDERAL BUILDING, 844 KING STREET  
WILMINGTON, DELAWARE 19801

March 12, 1980

The Honorable Dennis DeConcini  
United States Senator  
United States Senate  
Washington, D. C. 20510

Dear Senator DeConcini:

At the hearing held on Friday, March 7, 1980, you invited me to submit my ideas for simplification of S. 2045.

I believe it would be more propitious for passage if the bill were to seek to accomplish a limited objective, at least in the first instance.

I would therefore respectfully suggest that if it is to apply to the Circuit Councils that it provide that the meetings of the Circuit Councils shall be public except that by a two-thirds vote a Council may meet in executive session to consider matters affecting specific personnel or other sensitive areas. I would merely provide for ten days public notice of such meetings. I definitely would not require that all Council action take place in the first instance at such meetings because it would substantially impede the ability to process matters between Council meetings. It is not feasible for judges to take the time required to come to Philadelphia for every routine action. Many matters are ratified at the formal meetings.

Hon. Dennis DeConcini

March 12, 1980

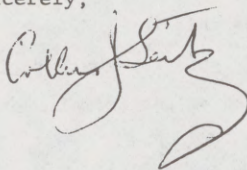
I know our court would be delighted to invite you or a member of your staff to attend one of our Council meetings to get the flavor. I enclose an agenda from the last meeting.

As to meetings of the Judicial Conference of the United States, again, I believe a modest start would be a requirement that the meeting be open to the public and that public notice of the meetings be given at least ten days in advance of such meetings. I believe the Conference should be able to consider sensitive matters in Executive Session on the vote of two-thirds of the members. Whether the public should be entitled to a copy of the committee reports submitted to the Conference is an open question with me.

I tender these suggestions in lieu of the strict procedures now in the bill in the hope that a more restricted effort would accomplish your basic objective. If it should not accomplish its objective, amendments could be considered.

I trust this may be of assistance to the committee.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anthony J. Santilli". The signature is written in dark ink and is positioned below the typed name "Sincerely,".

## COUNCIL MEETING

## AGENDA

<u>Item No.</u>	<u>Page</u>
C - 1	Approval of Minutes of Previous Meetings - May 18, 19, 1979 and September 10, 1979.
C - 2	Items for Ratification or Notation for the Record <ul style="list-style-type: none"> <li>a. U. S. Magistrates -- Certification.</li> <li>b. U. S. Magistrate - District of Delaware (full time).</li> <li>c. Additional Places for Holding Court - "No Compelling Need"               <ul style="list-style-type: none"> <li>(1) Lancaster, Pennsylvania</li> <li>(2) Hackensack, Patterson and Morristown, New Jersey</li> </ul> </li> <li>d. Court Reporter authorizations.</li> <li>e. Engagement of Mr. Elmer Rosen, CPA.</li> <li>f. Interim Bankruptcy Rules (Status Report re District Court Action).</li> </ul>
C - 3	U. S. Magistrates -- Certification of "part-timers"
C - 4	3-year old cases. (Status Report)
C - 5	Cases under Advisement. (Status Report)
C - 6	1980 Judicial Conference Invitations.
C - 7	Space Matters - District of New Jersey

In Attendance:Active Judges:

Collins J. Seitz, Chief Judge, Presiding  
 Ruggero J. Aldisert  
 Arlin M. Adams  
 John J. Gibbens  
 Max Rosenn  
 James Hunter, III  
 Joseph F. Weis, Jr.  
 Leonard I. Garth  
 A. Leon Higginbotham, Jr.  
 Dolores K. Sloviter

Circuit Executive:

Wm. A. (Pat) Doyle, Secretary

## ADMINISTRATIVE MEETING

## AGENDA

<u>Item No.</u>		<u>Page</u>
A - 1	Approval of Minutes - Meetings of May 17, 1979 and September 10, 1979.	
A - 2	Proposed Rule changes per FRAP amendments of August 1, 1979.	
A - 3	Proposed Rule re Direct Bankruptcy Appeals.	
A - 4	Additional Staff Attorney.	
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THE FOLLOWING WERE LISTED ON THE AGENDA BUT WERE NOT REACHED BECAUSE OF LACK OF TIME:		
-----		
A - 5	Proposed Financial Disclosure Rule (Judge Hunter).	
A - 6	How should we process fee applications under the Civil Rights Statute for services in the Court of Appeals -- Master -- Remand (Chief Judge Seitz).	
A - 7	Notice of Clerk's filing of opinions (Shoup) (Mr. Quinn).	
A - 8	Advising Counsel of issues to be argued in banc -- should a committee be appointed? (Judge Aldisert)	
A - 9	Failure of bar to comply with requirements of Rule 21 -- 21(1)A(b)(1) -- subject matter jurisdiction (Judge Hunter).	
A -10	Filing signed opinions (Judge Gibbons).	
A - 11	Naming District Court of Origin (Judge Gibbons).	
A - 12	Naming District Judge in draft/typescript opinion (Judge Higginbotham).	

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

CHAMBERS OF  
IRVING R. KAUFMAN  
CHIEF JUDGE  
U. S. COURTHOUSE  
NEW YORK, N. Y. 10007

March 17, 1980

Honorable Dennis DeConcini, Chairman  
Subcommittee on Improvements in  
Judicial Machinery  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

Dear Senator DeConcini:

I am grateful for this opportunity to give you my views concerning S. 2045, "The Judicial Conference and Councils in the Sunshine Act." In short, I concur wholeheartedly in the resolution of the Judicial Conference of the United States "disapproving" this proposed legislation. I can conceive of few other statutory schemes that augur such mischief in response to no discernible problem. Moreover, I have grave doubts about the constitutionality of the Bill.

Initially, I simply note the manifold practical difficulties that this Bill would create. Court of Appeals judges who sit on Circuit Councils maintain chambers in many states within a circuit, rendering it difficult to gather the entire court for regular meetings. When we do assemble, we use the occasion to dispose of a number of problems ranging from routine administrative matters to discussions of en banc cases. In addition, Council meetings often involve candid discussions of judges who have, for example, fallen behind in their work. It is my view, along with Mr. Justice Harlan, that even matters of "judicial administration" constitute elements of the "judicial power," which must be insulated from popular scrutiny. See Chandler v. Judicial Council, 398 U.S. 74, 103 (1970) (Harlan, J., concurring). Nevertheless, assuming arguendo that a discrete enclave of "non-judicial" tasks could be identified, it is totally impractical to

suggest that already overburdened federal courts can carefully juggle a series of special meetings devoted, in turn, to judicial and non-judicial business. Moreover, the chief judge would be saddled with the impossible task of scheduling these meetings, categorizing innumerable topics, preparing written explanations for closed meetings, defending frivolous lawsuits, scrutinizing transcripts for accuracy, etc.

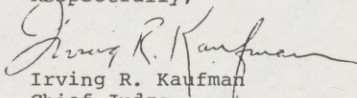
More importantly, I am certain that the Bill would serve to hamper the ability of the judiciary to solve the vexing problems of administration that are our constant concern. In the words of the Chief Justice, "human experience teaches those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974).

I am also puzzled by the perceived need for this legislation. I, at least, have not been favored by an explanation why such a statute would have any salutary effect, except for some vague hyperbole about the need for "openness" in the post-Watergate era. Surely, the sponsors of this legislation must do better if they are to impose these unprecedented and burdensome requirements on the judiciary.

Indeed, the apparent lack of justification for S. 2045 leads me to conclude that the proposed statute is an unconstitutional violation of the separation of powers. In this regard, I enclose the manuscript of my most recent article, The Essence of Judicial Independence, which will be published this spring. Briefly stated, the article attempts to demonstrate that, absent a showing of compelling need, legislation that threatens to compromise the impartiality of an individual judge violates the separation of powers. By mandating public dissemination of a judge's preliminary views on a variety of issues relevant to his case-deciding function, S. 2045 exposes each judge to harassment by disgruntled litigants and other interest group pressures. Accordingly, the best course, in my view, is for the Senate to abandon further consideration of this or similar legislation.

I appreciate the opportunity you have afforded me briefly to state my views.

Respectfully,

  
Irving R. Kaufman  
Chief Judge

United States Court of Appeals  
Washington, D. C. 20001

March 18, 1980

Chambers of  
J. Skelly Wright  
Chief Judge

Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements in Judicial Machinery  
United States Senate  
Washington, D. C. 20510

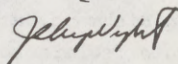
Dear Senator DeConcini:

I have your letter of March 13 enclosing a copy of S. 2045 and requesting my views on this legislation for inclusion in the hearing record.

As you know, I am a member of the Judicial Conference of the United States. The Conference at its last meeting took a position on S. 2045, a report of which, I assume, was furnished to your Subcommittee. Having participated in the discussion and consideration of this legislation at the Judicial Conference which, again as you know, was a closed meeting, I am reluctant to stake out a separate position of my own, particularly since I am not aware of the precise nature of the report on the Conference action made to your Subcommittee.

I can say that for my part Judicial Council or Judicial Conference of the United States meetings open to the public would not offend my judicial sensitivities. Open meetings would obviously make the judges more guarded about what they say, but I am not prepared at this time to conclude that this in itself would be a good thing or a bad thing. Perhaps the public should make that judgment.

Sincerely,



United States Court of Appeals **MAR 21 1980**  
Fourth Judicial Circuit

CHAMBERS OF  
CLEMENT F. HAYNSWORTH, JR.  
CHIEF JUDGE  
GREENVILLE, SOUTH CAROLINA 29603

March 18, 1980

The Honorable Dennis DeConcini  
United States Senate  
Washington, D.C. 20510

My dear Senator:

I have your inquiry about my views on S.2045, the Judicial Conference and Councils in the Sunshine Act.

At its meeting earlier this month, the Judicial Conference of the United States adopted a resolution disapproving the bill. I am a member of the Judicial Conference, and I support its position.

The Judicial Conference of the United States and the Judicial Councils are policy making bodies. As the President's Cabinet, there is a need for full and frank discussion and uninhibited exchanges. I believe that routine admission of the public to those meetings would substantially inhibit that kind of discussion.

The business of the Council is conducted in a very informal manner. In emergency situations, we are capable of very expeditious action. When we are in Richmond, a meeting of the Council can be assembled on a few minutes notice. When we are not in Richmond, urgent business is handled by telephone or by mail.

The Honorable Dennis DeConcini

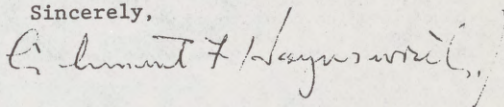
March 18, 1980

The Executive Committee of the Judicial Conference handles urgent business in similar fashion. I strongly believe that that kind of capability for prompt responses should not be impaired by a requirement of open meetings held only after public notice including a disclosure of the agenda.

What is done in the Conference and in the Council does become a matter of public record. There are minutes and reports which any one who wishes to may examine. These do not usually disclose the comments or positions of individual members, but no secret is made of the collective action. It is only the deliberative process preceding collective action which I think needs to be conducted in an uninhibited manner without the presence of the press or the public.

With best wishes.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edmund F. Hayesworth".

cc: Mr. William E. Foley  
Director  
Administrative Office of the  
United States Courts  
Washington, D.C. 20544

INSTITUTE FOR PUBLIC REPRESENTATION  
 GEORGETOWN UNIVERSITY LAW CENTER

DAVID J. MCCARTHY, JR.  
 DEAN

CHARLES R. HALPERN  
 DIRECTOR

DOUGLAS L. PARKER  
 RICHARD LOWE  
 ASSOCIATE DIRECTORS

ABRAM CHAYES  
 VISITING RESEARCH FELLOW

LEONARD B. BARSON  
 WILLIAM LENOX  
 ANDREW SACKS  
 CLAUDIA SILVERMAN  
 DIANA T. TANAKA  
 FELLOWS

600 NEW JERSEY AVE., N.W.  
 WASHINGTON, D. C. 20001  
 TELEPHONE (202) 624-8390

NAN ARON, EXECUTIVE DIRECTOR  
 COUNCIL FOR PUBLIC INTEREST LAW

March 21, 1980

Honorable Dennis DeConcini  
 Chairman, Subcommittee on Improvements  
 in Judicial Machinery  
 United States Senate  
 Washington, D. C. 20510

Dear Senator DeConcini:

The Institute for Public Representation would like to take this opportunity to respond, for the record, to one of the points raised by Judge Hunter's testimony on S. 2045. Judge Hunter stated, both in his oral and written testimony,<sup>1/</sup> that interested parties are frequently invited to attend and participate in meetings of Judicial Conference committees on matters of direct concern to those parties. Correspondence which the Institute has received from Judge Hunter indicates, however, that this is not a practice which is followed by his own Committee on Court Administration, one of the most important of the Judicial Conference committees. Moreover, two serious problems exist with regard to a practice of selective invitations as described by Judge Hunter. First, it leaves to the committees the decision of who is a sufficiently interested party to receive an invitation. Second, without open meetings the public has no indication of whose views are being transmitted through the

<sup>1/</sup> Statement of Honorable Elmo B. Hunter Before the Subcommittee on Improvements in Judicial Machinery, March 7, 1980, at 28 (typed version). Judge Hunter's oral testimony on this point is particularly forceful.

committees to the full Conference for final action. The Institute's own experiences with the Judicial Conference illustrate these problems. We are therefore submitting this letter for the record, along with a chronology of our correspondence with the Conference and excerpts from our correspondence to document our experiences.

As we testified on March 7, the Institute for Public Representation submitted a petition to the Judicial Conference on June 5, 1979 on behalf of various civil rights organizations seeking an end to discriminatory employment practices in the federal courts. In response to our petition the Conference adopted at its September 1979 meeting a resolution to develop a model equal employment opportunity plan for the federal courts. Over the course of our involvement on this matter we were repeatedly denied requests either to attend, to participate or to make presentations to the committee and subcommittee which studied our petition and our outline of a model plan. One of these denials came from Judge Hunter in a letter dated January 23, 1980. Writing as chairman of the Committee on Court Administration, Judge Hunter declared that it was not the Committee's "practice to have advocates of various projects appear and make presentations or join in the discussions of the committee itself."

In addition, we believe that serious issues are raised by the use of selective invitation procedures. A threshold problem is that the committee or the Conference determines who is an "interested party". Again, our own experiences can illustrate. Although our petition eventually led to the Conference's September action, as is indicated by the reference to the petition in the Conference report introducing the resolution,<sup>2/</sup> our numerous requests to attend the relevant meetings were denied. As counsel for the petitioning organizations whose members are vitally concerned with discriminatory employment practices in the federal courts, the Institute was surely an interested party with respect to the matter raised by our petition.<sup>3/</sup> In spite of these facts, neither the Institute nor any of our clients were considered to be among the class of interested, "directly concerned" parties invited to attend Judicial Conference committee meetings.

The other major problem with selective invitations is that the public does not know whose views have been selected for consideration nor do they know the content of the views presented. The deficiencies of this practice were quite apparent in the equal employment opportunity matter. There was never any indication to the public of whether or to what extent outside expertise was obtained by the bodies performing the complicated task of developing a model EEO plan for

<sup>2/</sup> Report of the Proceedings of the Judicial Conference, September 1979 at 58. This notation belies Judge Pollack's statement in his letter of January 2, 1980 that the petition did not "trigger" Conference action on this matter.

<sup>3/</sup> Among our clients are the NAACP Legal Defense and Education Fund, Inc., the Women's Legal Defense Fund, the Mexican American Legal Defense and Education Fund, Inc. the Puerto Rican Legal Defense and Education Fund, Inc., the Southern Regional Council and the Asian Law Caucus, Inc.

the federal courts. Had this information been available, for example through the proposed open meeting requirement, any expertise provided to the Conference could have been examined, analyzed and perhaps criticized to the end of producing a more satisfactory result. Without this information, it was impossible to know whether the materials we submitted were countered by inaccurate information from other sources or whether significant gaps remained in the body of information used to develop the model plan. We believe that the plan which was adopted by the Conference at its March 1980 meeting was inadequate and that the procedures used contributed to this result. In our view the replacement of a practice of secret, selected invitations with an open meeting requirement would encourage the free flow of information and thus be an important step towards improving Conference procedures.

In closing, we would again like to commend the Subcommittee for its attention to this important matter. Improved governmental decisionmaking is an important goal which extends to all bodies of government, including the Judicial Conference. We believe that the attached chronology and correspondence demonstrate the need for the open meeting requirements embodied in S. 2045 as written. Similarly, they demonstrate the need for access to documents, notice and comment and judicial review procedures, along the lines of those provided by the Freedom of Information Act and the Administrative Procedure Act.

Respectfully submitted,

*Charles R. Halpern*

Charles R. Halpern

*Diana T. Tanaka*

Diana T. Tanaka

*Fredda R. Berman*

Fredda R. Berman

CHRONOLOGY OF CORRESPONDENCE BETWEEN CHARLES HALPERN AND DANIEL LEWIS <sup>1/</sup> AND MEMBERS OF THE JUDICIAL CONFERENCE, ITS COMMITTEES AND SUBCOMMITTEES.

June 5, 1979

Petition submitted to Judicial Conference on behalf of various civil rights groups. The petitioning organizations were: Affirmative Action Coordinating Center; Asian Law Caucus, Inc.; Black American Law Student Association, Inc.; La Raza Legal Alliance; Mexican American Legal Defense and Education Fund, Inc.; NAACP Legal Defense and Educational Fund, Inc.; National Association of Black Women Attorneys; National Bar Association; National Conference of Black Lawyers; Puerto Rican Legal Defense and Education Fund, Inc.; Southern Regional Council; Women's Legal Defense Fund.

June 12, 1979

Letter from Daniel Lewis to Judge Milton Pollack, Chairman of Subcommittee on Supporting Personnel expressing hope that we might have the opportunity to meet with him and the members of his subcommittee on June 19, 1979 in order to discuss matters raised by our petition.

June 26, 1979

Letter from Daniel Lewis and Charles Halpern to Judge Elmo Hunter, Chairman of Committee on Court Administration informing him that we had been denied our request to appear at Judge Pollack's Subcommittee meeting and requesting the opportunity to make a presentation concerning our petition at the Committee's upcoming meeting or at least to be present at the meeting where this matter would be discussed.

June 28, 1979

Letter from Judge Hunter to Daniel Lewis acknowledging receipt of our June 26th letter and the enclosed petition. The letter characterizes the Committee on Court Administration as a "study and recommendation committee."

September 6, 1979

Letter from Daniel Lewis and Charles Halpern to Chief Justice Warren Burger informing him of the denial of all our previous requests to be present when our petition has been discussed and requesting the opportunity to attend the Conference discussions relating to our petition.

<sup>1/</sup> Counsel for various civil rights groups which petitioned the Judicial Conference to adopt a model equal employment opportunity plan for the federal courts.

September 14, 1979

Letter from William E. Foley, Director of Administrative Office of the United States Courts informing us that the Judicial Conference does not entertain individual appearances on matters of this kind since it functions through committees on specific subjects.

September 21, 1979

Letter from William Foley enclosing copy of resolution adopted by the Conference.

October 15, 1979

Letter from Daniel Lewis and Charles Halpern to Chief Justice Warren Burger informing him of our interest in playing a role in the drafting of a model equal employment opportunity plan for the federal courts and urging that steps be taken to provide interim relief pending final Judicial Conference action in 1980.

November 19, 1979

Letter from Daniel Lewis and Charles Halpern to Judge Elmo Hunter noting that the Chief Justice had not responded to our letter of October 15, 1979 and requesting that Judge Hunter take steps to provide interim relief.

December 5, 1979

Letter from Judge Elmo Hunter to Daniel Lewis responding to our letter of November 19, 1979 and denying that he had the authority to write to federal judges informing them of the action taken by the Conference at its September 1979 meeting.

December 17, 1979

Letter from Daniel Lewis to William E. Foley enclosing an outline of appropriate contents for an equal employment opportunity plan and stressing the importance of an opportunity to discuss the outline with members of the committees of the Judicial Conference which would be considering this issue.

December 20, 1979

Letter from Daniel Lewis and Charles Halpern to Judge Milton Pollack requesting an opportunity to discuss our model EEO plan with his Subcommittee and an opportunity to review the model plan drafted by the Administrative Office so that we might submit comments on it to the Subcommittee.

January 2, 1980

Letter from Judge Milton Pollack to Daniel Lewis denying our request.

January 7, 1980

Letter from Daniel Lewis and Charles Halpern to Judge Milton Pollack responding to letter of January 2, 1980 and expressing our regret that we would not be permitted to make a presentation to the Subcommittee to further illuminate the complex issues involved.

January 22, 1980

Letter from Daniel Lewis and Charles Halpern to Judge Elmo Hunter requesting opportunity to attend deliberations of his Committee on the development of a model plan or, in the alternative, the opportunity to make a presentation to the Committee explaining our submissions.

January 23, 1980

Letter from Judge Elmo Hunter to Daniel Lewis denying our request to be present or make a presentation at the Committee's meeting.

EPILOGUE: The Judicial Conference met on March 5-6, 1980, and adopted a Model Equal Employment Opportunity Plan for the federal courts. The Plan adopted lacks specific goals and deadlines for hiring, training and promotion, definition of relevant labor pools, and enforcement mechanisms; it moreover establishes unduly burdensome and unreasonable grievance procedures. It disregards the basic principles underlying most governmental and private equal employment opportunity plans.

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS  
SUPREME COURT BUILDING  
WASHINGTON, D. C. 20544

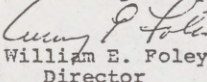
September 14, 1979

Dear Sirs:

Your letter of September 6, 1979 requests an opportunity to appear before the Judicial Conference of the United States and present certain material. We understand that you have already presented this material to the Committee on Court Administration of the Conference. That Committee will report in due course at the next meeting of the Conference. The Conference does not entertain individual appearances on matters of this kind since it functions through committees on specific subjects.

You may be sure that the Committee has given due consideration to your presentation.

Yours very truly,

  
William E. Foley  
Director

Daniel M. Lewis, Esquire  
Arnold & Porter  
1229 Nineteenth Street, N.W.  
Washington, D. C. 20036

Mr. Charles Halpern  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, D. C. 20001

## ARNOLD &amp; PORTER

1229 NINETEENTH STREET, N. W.

WASHINGTON, D. C. 20036

TELEPHONE: (202) 872-6700

CABLE: "ARFOPO"

TELEX: 89-2733

DANIEL M. LEWIS

DIRECT LINE:XXXXXXXXXXXX

December 20, 1979

The Honorable Milton Pollack  
United States District Court  
United States Court House  
Foley Square  
New York, New York 10007

Dear Judge Pollack:

On behalf of those groups who have petitioned the Judicial Conference for the adoption of equal employment opportunity plans for the federal courts, we are writing you concerning the Subcommittee on Supporting Personnel's consideration of the model EEO plan called for by the Judicial Conference's September Resolution.

As you may know, we have discussed the drafting of the model EEO plan with Mr. William Foley, Director of the Administrative Office. Pursuant to these discussions, we submitted to Mr. Foley an outline for such a plan and the procedures required for its implementation and monitoring. Mr. Foley told us that he would distribute this outline to you and members of your Subcommittee for consideration at your January 11 meeting.

Mr. Foley also informed us that the Administrative Office had prepared its own draft of a model EEO plan for your Subcommittee's consideration. We requested an opportunity to review the plan, so we might submit comments on it to your Subcommittee. Mr. Foley informed us that he did not have the authority to disclose a copy of the plan to us.

ARNOLD &amp; PORTER

The Honorable Milton Pollack  
December 20, 1979  
Page Two

We are writing you to request (1) an opportunity to discuss our model EEO plan with members of your Subcommittee, and (2) an opportunity to review the Administrative Office's model plan, so that we might submit comments on it to your Subcommittee.

We think this request for such limited participation in the Subcommittee's consideration of the model EEO plan is reasonable and will be of substantial benefit to your Subcommittee. This is an area of great complexity and difficulty. The establishment of a model EEO plan for the federal courts breaks totally new ground both for the courts and for EEO plans. In such a situation, we feel it is undesirable to limit severely the input of those groups whose direct interests will be affected by and which have devoted an extensive amount of work to this precise issue. This is a problem which is so new, and to which so few resources have been devoted, that we think it would be unwise to deny the Judicial Conference the benefit of additional views as to its solution from those who have some expertise in this area.

Although we are sure that your Subcommittee's members will review with care the outline we have submitted, the issues raised by it and the approaches adopted in it are of such complexity and subtlety that, without some discussion, we respectfully feel they cannot be adequately addressed. We believe that the contribution we can make to the Subcommittee's consideration of this matter would be immeasurably increased if we had the opportunity to discuss our outline with your Subcommittee.

In addition, we are confident that we could add a great deal to the Subcommittee's consideration of the Administrative Office's draft on the same subject. But, of course, if we are denied an opportunity to see the draft, we cannot contribute to this process at all.

ARNOLD &amp; PORTER

The Honorable Milton Pollack

December 20, 1979

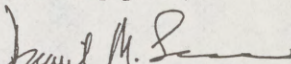
Page Three

We think this limited participation in your Subcommittee's process could be arranged without any delay or disruption to its work. Further, such participation, which would not necessarily involve participation in or our presence at your Subcommittee's deliberations on this issue, would not create any precedent which would cause difficulty in the future to the Judicial Conference or its Committees. After all, all we seek is an opportunity to present meaningful comments.

In this instance, the Judicial Conference has already adopted an EEO policy for the federal courts. All that remains to be done is to implement that policy. It would not serve the interests of the Judicial Conference or the federal courts to deny groups such as ours -- whose petition triggered Conference action -- a timely role in planning the implementation of the Resolution until after the March 1980 meeting of the Judicial Conference, when any comments would be moot.

We respectfully seek consideration of this request by your Subcommittee.

Sincerely yours,



Daniel M. Lewis  
Charles R. Halpern

cc: The Honorable Elmo Hunter  
William Foley, Esq.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURT HOUSE  
NEW YORK, NEW YORK 10007

MILTON POLLACK  
JUDGE

January 2, 1980

Daniel M. Lewis, Esq.  
Arnold & Porter  
1229 19th Street NW  
Washington, D.C. 20036

Dear Mr. Lewis:

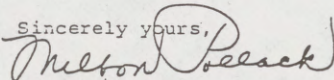
I appreciate your interest in our work and your offer to participate in our meeting to discuss with us your draft of suggestions for an EEO plan and to comment on the suggestions of the Administrative Office.

Your viewpoints seem to have been carefully and adequately expressed and there seems to be no additional need for your presence at or participation in the Subcommittee's deliberations. We certainly shall consider not only your thoughts but those of all the interested parties who have given their attention to the subject matter.

By the way, you are laboring under a misapprehension if you believe that you "triggered Conference action". I don't want to be understood as minimizing your study of the subject matter or assistance heretofore supplied but those were only additional to many other volunteer efforts of similarly concerned sources.

I do want to thank you for your interest.

Sincerely yours,



Milton Pollack

## ARNOLD &amp; PORTER

1229 NINETEENTH STREET, N. W.

WASHINGTON, D. C. 20036

TELEPHONE: (202) 872-6700

CABLE: "ARFOPO"

TELEX: 89-2733

DANIEL M. LEWIS

DIRECT LINE (202) 872-6661

January 22, 1980

The Honorable Elmo B. Hunter  
United States District Judge  
613 United States Court House  
811 Grand Avenue  
Kansas City, Missouri 64106

Dear Judge Hunter:

By way of the attached letter and enclosures, we are submitting to you and to members of the Committee on Court Administration an outline which sets forth what we believe to be an appropriate model equal employment opportunity plan for the federal courts and related procedures for its adoption and implementation. This outline was previously submitted to the Subcommittee on Supporting Personnel prior to its consideration of this issue.

In the past, we have requested an opportunity to attend and participate in the deliberations of your Committee on this issue. Although our requests have been denied in the past, we renew such a request today on behalf of the petitioners we represent.

If our request is denied, we urge you to consider a more limited request. Because of the inherent difficulty, complexity and subtlety of the many issues raised by consideration of EEO plans for the federal courts, we feel that the only effective and meaningful way to present to you and to members of your Committee the material enclosed herein would be a presentation in person. We therefore request an opportunity to make such a presentation.

This request is much more limited than a request to join or monitor your Committee's deliberations. We only

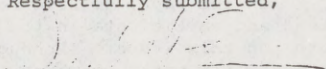
ARNOLD &amp; PORTER

The Honorable Elmo B. Hunter  
January 22, 1980  
Page Two

seek a hearing -- an opportunity to present our views and discuss our proposal with the Committee before your Committee's deliberations on this question. Such an opportunity does not involve any precedent concerning public presence during or participation in a Committee's deliberation of substantive matters.

In addition, we respectfully request a copy of the recommendations on a model EEO plan being forwarded to your Committee by the Subcommittee on Supporting Personnel. While we think the outline we have prepared, along with the supporting explanation, is comprehensive, because your Committee will be considering a Subcommittee draft which we have not seen, we are unable to address fully the issues to be considered by your Committee. In order to permit us to do so and to make our contribution to this process more helpful, we respectfully request a copy of the Subcommittee's report to you. With such a copy, our presentation, whether in person or by way of letter, at least can be more useful to all parties concerned.

Respectfully submitted,



Daniel M. Lewis  
Charles R. Halpern

Attorneys for Petitioners

Enclosures

cc: Members of the Committee on  
Court Administration  
The Honorable Milton Pollack  
Mr. William Foley

United States District Court  
Western District of Missouri  
Kansas City 64106

Elmo F. Hunter  
District Judge

January 23, 1980

Mr. Daniel M. Lewis  
Arnold & Porter  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036

Dear Mr. Lewis:

I wish to acknowledge receipt of your January 22, 1980, letter which I received today (January 23, 1980). I am in the process of reading the enclosures you submitted and I note with pleasure you were thoughtful enough to send a copy of your letter to me, as well as the enclosures, to all of the members of the Committee on Court Administration. That will save me both the time and effort of reproducing them and should assure that each member of the Court Administration Committee will have received and read that material prior to their arrival at our oncoming Court Administration Committee Meeting.

In your January 22nd letter you again seek the opportunity of appearing before the Committee on Court Administration to participate in the discussions that may occur there on the subject of affirmative action. In the event that you do not receive that opportunity you asked to be present to present your views and to discuss your proposal with that committee--this being the proposal you had forwarded to me, and to all the members of the Court Administration Committee. Lastly, you request a copy of the "recommendations on a model EEO plan being forwarded to your Committee by the Subcommittee on Supporting Personnel."

Addressing each of those requests in the order presented, I refer you to my last letter to you of June 28, 1979, in which you made a request to appear before the Committee on Court Administration

Mr. Daniel M. Lewis

1/23/80

and an opportunity to participate in its discussions. As I explained in that letter the Committee on Court Administration is a creature of the Judicial Conference and is basically designed to be a study and recommendation committee. It does not hold public hearings and it is not its practice to have advocates of various projects appear and make presentations or join in the discussions of the committee itself. Rather through its subcommittee process, and particularly on matters of depth, the Court Administration Committee considers itself to be a deliberating body and undertakes through its own process to thoroughly research and study the matters before it. In this connection it is, of course, indebted to you for all of the research, materials and suggestions that you have made to it in writing. I assure you that each and all of that material has been considered and will continue to receive the careful consideration of the Committee on Court Administration. Since we have the benefit of that material which you have sent to us there is in our judgment no real need to deviate from our usual procedures. The format that we have used successfully over the years appears to us to remain adequate for the consideration that you wish your views and materials to receive.

With regard to your request to receive a copy of the recommendations of the subcommittee, chaired by Judge Pollack, it has always been the practice of the Court Administration Committee, going back the full ten years that I have been a member, not to release materials or recommendations of the subcommittees where such materials and recommendations are but a preliminary to a thorough consideration by the Committee on Court Administration and after that by the Judicial Conference of the United States. Those reports and materials do not have the status of representing the official views of the Judicial Conference or even of the Court Administration Committee.

As I tried to explain earlier in my correspondence with you, and as I am again trying to explain to you, I do not believe it is either appropriate or proper for me to release any of this material, or a report

Mr. Daniel M. Lewis

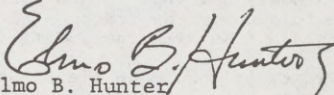
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without the prior approval of the Judicial Conference of the United States.

My secretary received a telephone call from someone in your office with the message that I was to return the call to that person. In view of the need to have no misunderstanding, I have elected to respond to you in writing rather than engage in a telephone conversation on this subject with someone of your staff.

Again, I thank you for your research, your materials, and your suggestions. Again, I assure you they will receive full consideration by the Committee on Court Administration. And, again, I hope you understand my reasons and position with regard to your request.

Sincerely,

  
Elmo B. Hunter

PUBLIC CITIZEN LITIGATION GROUP  
SUITE 700  
2000 P STREET, N. W.  
WASHINGTON, D. C. 20036  
(202) 785-3704

March 21, 1980

The Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements in Judicial  
Machinery of the Committee on the  
Judiciary  
United States Senate  
Room 6306 Dirkson  
Washington, D.C. 20510

Re: S-2045

Dear Senator DeConcini:

Thank you for the opportunity to comment on S-2045, a bill to provide open meetings for the Judicial Conference of the United States. I have had the opportunity both to study the bill and to examine the written statements of the witnesses at the March 7 hearing. Based upon that analysis, I am writing you to support the fundamental concepts of the bill and urge its adoption with the modifications noted herein.

First, it should be clear that S-2045 does not represent an incursion into judicial independence. It is not intended to nor does it speak to the adjudication of any case pending in any federal court. It deals with the opening up of the processes by which a number of important decisions are made by bodies composed of federal judges. Some observers have referred to them as policy decisions. At the very least, without applying labels, they involve functions similar to that performed by legislative bodies or by executive agencies acting in their rulemaking capacity. They are wholly different from the consideration of individual cases and in general they are matters of considerable importance not simply to the judiciary but to the public at large. Indeed, the importance of these matters is underscored by the description of the Judicial Conference at page 23-24 of Judge Hunter's written testimony.

Second, within the category of matters resolved, there are two categories: those involving recommendations and those involving final decisions, both of which are of great importance. As to matters on which the Judicial Conference has final authority, opening up the meetings is the only way to find out what happened and why. The fact that the participants all have life tenure makes it more, rather than less, important that their deliberative processes be open to public scrutiny. As to

The Honorable Dennis DeConcini

Page two

recommendations, these often reflect compromise rather than consensus and the bare recommendation may not disclose the competing considerations that led to the result. Since in many cases it will be impossible or at least impractical to probe behind the recommendation, it is important that the public have a glimpse of what went into it in order to assess its validity.

One of the objections raised by Judge Hunter was that opening the meetings would require judges to disclose facts of individual cases which form the basis of their views, and this might require the divulging of confidential matters. If that is the result, and I am uncertain that it will be, then in my view it is far better to withhold such information rather than to close the meeting. Indeed, a judge in such circumstances is no different from an attorney who finds himself on a Bar committee and wishes to use a personal experience to illustrate a particular point of view. It is vital that the public know "the evidence" on which an opinion is based and secret case studies interfere with that goal.

Third, although strongly in favor of the bill, I recognize that we are embarking on a new area of openness. We cannot know for certain what the effects of this law may be or precisely how it will operate in practice. Therefore, albeit with considerable reluctance, I believe that it would be wise to eliminate the judicial review provisions of S-2045 and to rely on the Conference to carry out the statutory mandate. In this connection, I note that Congress' own Sunshine Laws are not judicially enforceable and I believe that they are largely observed and that the judicial Sunshine Laws would be followed. Once again it seems important to me that the judges have life tenure and hence are not personally threatened by any opinions they may express that are contrary to the popular will.

Eliminating judicial review also lessens the importance of a number of other issues which are raised by the bill. It also avoids the awkward problems surrounding district judges reviewing actions taken collectively by their superiors on the Circuit and Supreme Courts. Nonetheless, it is necessary to have oversight and to this end I would urge the committee to include provisions requiring the filing of reports regarding the reasons for closing meetings to the public. A review of the Act should be undertaken within two to three years to determine if the absence of judicial review is seriously handicapping its effectiveness.

The Honorable Dennis DeConcini  
Page three

Fourth, I wish to endorse almost entirely, with the exception of the judicial review provisions, the testimony submitted by the Institute for Public Representation. In particular, their recommendation to make available all documents discussed at public sessions is a valuable one and I urge the committee to adopt it. Moreover, I also am in favor of a number of the changes contained on pages 14-17 of the Institute's statement, but I believe that their scope extends beyond this bill and I urge that the committee consider them at a later date.

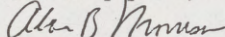
Fifth, a number of objections have been raised and I wish to deal with them briefly. As to the alleged chilling effect of opening these meetings, this strikes me as rather odd coming from judges who have been hearing similar claims regarding the Executive Branch and have been largely rejecting them. In my view, most of the comments that are unwilling to be made public ought not to be made at all. I would also note that Judge Hunter observed (p. 24) that selected outsiders are already permitted to come into the meetings and that it is highly unlikely that these topics will attract large, let alone unwieldy, audiences.

As for the problem of evaluations of individual persons such as magistrates, I would not oppose a provision authorizing the closing of any portion of the meeting which discussed the hiring, re-hiring or firing of any individual. However, when matters such as inter-Circuit assignments or problems relating to the backload of individual judges are raised, those issues are of great importance to the public and meetings discussing them should not be closed.

Finally, Judge Hunter's discussion about the harm that might flow from premature disclosure (p. 19) seems to me to be misdirected. As I understand his comments, they are a plea for allowing the judges to decide for themselves with no public in-put any important matters relating to judicial administration and other rules directly affecting litigants and their counsel. The trend is precisely away from that closed door approach and to the extent that his testimony is directed toward eliminating public in-put, it is inconsistent with that trend and should be rejected by the committee.

Thank you for this opportunity to comment and I would be willing to assist you and the committee in any way possible.

Sincerely yours,

  
Alan B. Morrison

ABM/ms

MAR 27 1980  
UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT  
POST OFFICE BOX 847  
SAN FRANCISCO, CALIFORNIA 94101

S/c

JAMES R. BROWNING  
CHIEF JUDGE

March 21, 1980

Honorable Dennis DeConcini  
Chairman of the Subcommittee  
on Improvements in Judicial Machinery  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator DeConcini:

I write in response to your letter of March 13 requesting views on S. 2045.

I have examined the statement of the Honorable Elmo B. Hunter, Chairman of the Committee on Court Administration, submitted to the Subcommittee on March 7, 1980, and the statement of the Honorable Frank M. Coffin, Chief Judge of the Court of Appeals for the First Circuit. The position taken in these two statements comports with my own experience, and I endorse them both fully.

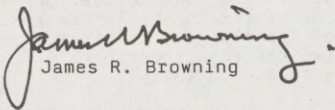
I have served on the Judicial Council of the Ninth Circuit for 18 years. I do not believe anyone familiar with the work of a judicial council could disagree with Judge Coffin's assessment that "As far as the Council is concerned, the chief effect of S. 2045 would be to increase the bureaucratization of judicial administration, introduce added delays, add to the ministerial duties of both [the Chief Judge] and our Clerk, and in general detract from our ability to conduct our business effectively and efficiently."

As you know, there are 23 judges on the Judicial Council of the Ninth Circuit. They have their chambers in widely separated cities in the nine western states. To minimize the expense and time required to assemble this large group of busy people to deal with the largely routine business of the council, much of the council's business is conducted by mail or, in emergencies, by telephone. To the extent S. 2045 would prevent or substantially burden this process, it would do a disservice to the administration of the business of the courts in this area.

A major problem in a court made up of many judges who are widely dispersed is that of maintaining the collegiality essential to productivity and to the maintenance of a harmonious body of law for the circuit. Periodic opportunities for the judges to meet in candid, free, and wide-ranging discussions are essential to maintaining collegiality. The meetings of the Judicial Council now serve this function, which would be impossible if council meetings were converted into formal, on-the-record proceedings as contemplated by S. 2045. The loss would be substantial and would far outweigh any conceivable minimal gain from more general availability of access to the details of these meetings.

It is my personal opinion that if S. 2045 became law, it would be a very rare occasion indeed when anyone not a member of the council would bother to attend or would read the transcripts of the proceedings. In this connection, it should be pointed out that it is misleading to refer to these meetings as "secret." Agenda are prepared and circulated in advance to all of the judges of the circuit. Members of the staff are present at all meetings. The minutes are prepared and circulated to all judges of the circuit -- over 120 men and women.

Sincerely,

  
James R. Browning

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT  
219 SOUTH DEARBORN STREET  
CHICAGO, ILLINOIS 60604

CHAMBERS OF  
THOMAS E. FAIRCHILD  
CHIEF JUDGE

March 25, 1980

Honorable Dennis DeConcini  
United States Senator  
Committee On The Judiciary  
Washington D.C. 20510

Dear Senator DeConcini:

Thank you very much for your letter of March 13, 1980, requesting my views on Bill No. S. 2045. I regret that I could not get an answer to you by March 21.

In my view (speaking for no one else, of course,) there is merit in the proposition that some, perhaps much, of the proceedings of the Judicial Conference of the United States should be open to public view. The deliberations of the Conference consist in large measure of discussion of and action upon recommendations contained in Committee Reports. At times the Conference takes positions for or against, or for modification of, proposed legislation by Congress. At times it adopts codes of conduct for judges and other personnel of the federal courts, recommends procedures for the administration of federal courts, or recommends rules of procedure for adoption by the Supreme Court. The more these actions involve significant choices of policy and the more they are open to debate and controversy, the more, I think, there would be public benefit in making the public aware of the conflicting views expressed.

I have in mind a few instances in which the Conference adopted a position by a divided vote, or adopted a committee recommendation only after significantly modifying it. These actions, in my opinion, would have been better understood if the sessions at which these actions were taken had been open and the proceedings reported by the press.

I feel, however, that the opening of meetings of Committees of the Conference and of the Judicial Council of the Circuits present different problems.

Honorable Dennis DeConcini

March 25, 1980  
Page Two

With that introduction, I respectfully tender my answers to your questions.

(1) "What are the benefits to the legal system and to the public if S. 2045 is enacted into law?"

As in most areas, there must be a balancing of costs and benefits. As already indicated, I see a benefit in providing public access to sessions on matters involving significant choices of policy, particularly when controversial. One cost incurred would be the resulting changes in character of those meetings, including a chilling of free discussion, becoming more mechanically cumbersome and longer, and therefore consuming more judicial time. To the extent that S. 2045 makes a body unable to act by correspondence, it would compel an increase in numbers of meetings and judge-hours consumed. We do not have enough judges to maintain standards of quality and promptness as it is, and a change which takes more of judges' time from judging is a serious cost.

In my view the factors above mentioned apply differently, and the outcome should be different with respect to (1) The Judicial Conference of the United States, (2) the Committees of the Conference, and (3) the Judicial Councils of the Circuits.

A. The Judicial Conference. I believe that a substantial part of the recommendations and decisions adopted by the Conference involve choices of policy and are open to difference of opinion. I think there would be public benefit in opening these proceedings to the public. It is true, of course, that many actions of the Conference are routine, and the benefit would not be so clear. One disadvantage is the chilling of discussion. The members, being judges, are familiar with the problems addressed. Thus when a judge speaks under present conditions, his audience consists of others with like experience, who readily understand his comments, even if they disagree. Opening the meeting vastly expands the audience, and the fear of being misunderstood becomes significant, and chills discussion.

Nevertheless, with respect to the greater part of the proceedings of the Conference, I would, individually, assess the benefits as exceeding the cost.

B. The Committees of the Conference. I would favor in general, making committee reports available to the public in advance of the meeting of the Conference at which they would be considered.

As to the opening of the committee meetings, I think the costs outweigh the benefits. Committees are composed of judges from different parts of the country. They meet infrequently and often reach agreement in the interim by mail. Their work would be substantially encumbered by provisions requiring that all business be done at a meeting and those which would make their agendas inflexible. Longer and more frequent meetings would require more judge time for the same amount of product. This is a serious cost to the court system.

C. The Circuit Council. Council procedures differ from circuit to circuit, and my experience is limited to the Seventh Circuit. I understand, however, that many of the difficulties I see here would apply elsewhere.

Opening our Council to the public would produce little public benefit. Very few decisions are made which involve choices of policy. Many actions of the Council are decisions on quite routine matters, required by rule or statute. A few others involve the consideration of the quality of performance or other situations of particular individuals, where maintenance of privacy is important. Because the Council and the Court of Appeals are the same people, a good many actions taken at Council meetings are actually matters of management peculiar to the Court of Appeals and are not Council business.

I will list the disadvantages of applying S. 2045 to the Council under Question 2, but I am strongly of the opinion that the costs outweigh any minimal benefit of public access to Council meetings.

2. "What problems do you foresee in the application of S.2045 to the circuit councils?"

S. 2045 would, in my opinion, make council action unnecessarily cumbersome, time-consuming, and inflexible. Much council business requires no meeting. For example, the Administrative Office often sends each circuit judge recommendations for approval or disapproval, involving a magistrate position in one of our districts or some similar matter. The matter has already been studied and pertinent information is supplied. Or we may receive a district court's amendment of a jury plan for approval. Ordinarily each circuit judge sends his vote of approval to every other judge, and the Administrative Office or district court is notified. If any of these raise a question, it can be resolved at a meeting, but ordinarily there is no reason for a meeting. Meetings called to consider all their requests would cumulatively amount to a serious burden.

Honorable Dennis DeConcini

March 25, 1980  
Page Four

S. 2045 has requirements of advance notice of agenda, public announcements of a change of agenda, a recorded vote for each change, certification and vote if a meeting is to be closed, maintenance of a transcript or recording, formal adoption of implementing regulations, and other matters. With all respect, I think these requirements would unnecessarily complicate and burden the proceedings of the council, and require expenditure of the time of judges and other personnel without producing equivalent benefit.

The Judicial Conference meets only twice a year and does most of its business at those meetings. Occasionally, though much less often than the Council, action is taken by mail ballot. It would be desirable to retain that flexibility. It is difficult to estimate the frequency with which meetings of the Conference would be closed if S.2045 were enacted. Compliance with the mechanical provisions of S. 2045 would be cumbersome, but these provisions would probably have less adverse impact on the Conference than on the Councils.

3. "What suggestions can you offer to improve S. 2045?"

I agree in part with the position of the Conference that S.2045 presents a constitutional question. On the one hand the Conference exercises certain powers delegated to it by Congress. It seems reasonable that Congress may regulate the procedure by which such powers are exercised. On the other hand, I think the Conference does much in the field of judicial administration which could be done by a body of the judiciary even if there were no statute such as 28 U.S.C. § 331. Insofar as judicial power (though administrative in nature) is being exercised, a statute imposing a requirement of open meetings in the absence of judicial agreement seems to raise a constitutional question.

Perhaps there is an alternative approach which would leave the regulation of details in the hands of the Conference, avoiding to that extent the constitutional question. I suggest an amendment to 28 U.S.C. § 331 announcing the policy that after some future date meetings of the Conference should be open to public observation and directing the Conference to adopt regulations to implement the policy. The policy could well be made subject to the exceptions proposed in S. 2045 concerning proceedings involving accusation of crime, formal censure, and any clearly unwarranted invasion of privacy.

I emphasize, again, that the views expressed in this letter are individual views, and I speak for no one else.

Sincerely,

*Thomas E. Fairchild*

Thomas E. Fairchild  
Chief Judge of the  
Seventh Circuit

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
U. S. COURTHOUSE  
CINCINNATI, OHIO 45202

CHAMBERS OF  
GEORGE EDWARDS  
CHIEF JUDGE

March 27, 1980

APR 02 1980

Honorable Dennis DeConcini  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510

Dear Senator DeConcini:

Thank you for your letter inviting my comment on Senate Bill 2045.

If your Bill were proposed in the form of a Senate Resolution expressing the opinion of the Senate on a matter of public interest within the jurisdiction of another and co-equal branch of government, I would simply express approval of its essential purpose and suggest to my colleagues that we give it the respectful consideration which it would deserve. This, to me, would mean the adoption of the principle of public meetings when a judicial conference or council is dealing with purely administrative matters or legislative bills referred for advice by Congress. I recognize that your bill does not suggest that court meetings for judicial decision-making purposes should be public.

I would not favor adopting the specific language of S. 2045. Requirement of a 7-day notice and publication of all judicial council agenda items, for example, would seriously hamper transaction of circuit judicial council business and would create a vast amount of useless (and unread) printing at taxpayer expense.

Despite my general agreement with what I believe to be your essential purpose, at the U.S. Judicial Conference earlier this month, I both spoke and voted for the Conference to oppose adoption of Senate Bill 2045.

My objection was based entirely upon the doctrine of separation of powers of government. As I understand the history and purpose of the Constitution of the United States, it was designed so as to divide the

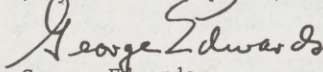
awesome power of government into three separate and co-equal branches. Our forefathers in risking their lives to defeat an all powerful monarchy, clearly did not desire to substitute therefor an all powerful parliament. They carefully (if not precisely) divided the totality of power of the federal government into executive legislative and judicial branches. As I understand their purpose, it was to make each branch independent within its own realm of constitutional authority.

There are repeated references by those who participated in writing our fundamental documents to their desire to create an independent judiciary - doubtless as opposed to Royal judges whose servility to the crown helped to cause the American Revolution.

For example, in the great exchange of correspondence concerning the Bill of Rights between Thomas Jefferson serving as Ambassador to France and James Madison preparing for the first session of the United States Congress, there was emphasis upon the independence of the federal judiciary. It was Jefferson who first made the judicial independence argument by letter dated March 15, 1789. Madison in turn adopted and repeated it in his own words on June 8 of that same year in proposing his draft of the Bill of Rights to Congress. That argument was that although statements of rights had been ineffective in colonial charters, that would not be the case of the United States Constitution because there would be an independent federal judiciary capable of giving them meaning.

Respectfully, I suggest the mechanism of a Senate Resolution would be more appropriate to your purpose than a statutory command since the latter would be violative of at least the spirit of the constitutional doctrine of separation of powers.

Very sincerely yours,

  
George Edwards  
Chief Judge

## Dark Doings Among the Judges

by John P. MacKenzie

“**S**UNLIGHT,” said Justice Louis D. Brandeis, “is the best of all disinfectants.” Yet one enormously influential body of high-level jurists, the Judicial Conference of the United States, has been meeting in the dark for so many decades that by now one almost hesitates to throw its proceedings open to the cleansing sunlight and fresh air.

Twice a year, this government-financed body meets secretly in a large, rarely used room in the cavernous Supreme Court Building—that awesome edifice in which even the great Brandeis said he felt uncomfortable, and where, Justice Harlan Fiske Stone complained, the Justices perch like “nine black beetles in the temple of Karnak.”

But why should the public care about this secret society of a few dozen eminent judges? Why not just let the judicial “beetles” doze away on their perches, safe from the glare of publicity?

The answer is that, whatever its original intended functions, this conference of respected jurists, chaired and guided by Chief Justice Warren Burger, has slowly become a secret lobby, a powerful policy-shaping instrument that is in no way accountable for its often questionable actions.

Not content with lobbying for higher salaries for judges (a perhaps understandable preoccupation), the group has lately gone on to influencing congressional deliberations on wiretap legislation and similar key policy matters. As things stand, the Judicial Conference is fast becoming a secret governmental force to be reckoned with.

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Both the conference and the edifice in which it meets are monuments to William Howard Taft, who was Chief Justice from 1921 until he died in 1930, too soon to see the shrine built, but not too soon to launch the judicial organization and become its first presiding officer. Taft was an activist Chief Justice, though an advocate of what is called "judicial restraint" in deciding whether courts should intervene in any but the most conventional kinds of legal disputes. Until recently, Taft was probably the undisputed titleholder of "foremost empire builder" in American judicial history since the Founding Fathers. A modern challenger is the current and fifteenth Chief Justice, Warren E. Burger, whose designs for a more "efficient" and less activist federal bench often are first aired—if that word can be applied to the hermetically sealed meetings—before the U.S. Judicial Conference.

Chief Justices have many collateral duties thrust upon them, but Burger, who has sought and gained more renown as a judicial administrator than as a jurist, has accepted the conference chairmanship with gusto and spends long hours on its work. The members (11 chief judges of the regional U.S. courts of appeals, 11 federal district judges elected by their peers from those same regions, and representatives from claims and patents courts) often are no match for a well-prepared presiding officer, even if the judges were inclined to resist his leadership.

What does the conference actually do? An attempt to help outsiders find out was quietly launched a few years ago—and just as quietly buried last year. James E. Doyle, a U.S. district judge in Madison, Wisconsin, advanced the modest proposal that the conference meetings be thrown open to the public. He told his colleagues that after attending a number of these meetings as a conference member, he couldn't think of any discussion he had heard that couldn't have been held in the open. His proposal was drowned in apathy and opposition led by Burger. The subject itself became classified. Burger refused to discuss the details. Terrified staff members, taking that cue, were struck dumb when questioned. Judge Doyle himself found the topic too hot to talk about. "No comment," he replied to inquiries.

Was he the initiator of such a proposal? "No comment on that either," he answered.

The closest to a reasonable explanation was an off-the-cuff remark by Burger to a group of news reporters. Asked what prevented the opening of the conference to the public, he replied, "Would you open up the editorial conference of your newspaper to all members of the public?" The questioner protested that the press was not part of the government (and thus not bound to do what the Constitution might require of government institutions). "Oh, you're *not* government?" Burger quipped. "I thought you were the fourth branch of government." It was reminiscent of Burger's frequent comments from the bench during a recent series of First Amendment cases. He never tired of noting the irony that the press was seeking confidentiality for its informants but was unwilling to let the government take "effective steps" to protect *its* secrets from the prying press.

**W**HETHER or not the press can be likened to government, there's little doubt that the Judicial Conference performs important governmental tasks—judicial, legislative, and executive. It has come a long way since 1922, when Congress heeded Taft's call for a body to cope with case-load arrears and possibly do something about the disparity among courts in their sentencing of convicted criminals. Those two problems remain as baffling as ever, but the conference has branched out into other fields. One is lobbying, and not just for higher federal-court payrolls. One recalcitrant congressman predicted early that the conference would become "a legally constituted and publicly financed propaganda organization on behalf of the federal judiciary." His predictions have been borne out several times.

One notable instance occurred in 1967, when the conference, then led by the late Chief Justice Earl Warren, voted to volunteer its views to Congress on the wisdom of then pending wiretap bills. It was an odd stance, one that came to light only in the fine print of the conference's

report and the satisfied reactions of wiretap advocates. The conference, with its roster of senior and prominent jurists, could be expected to properly comment on the practicality of specific provisions in a bill, but this body went beyond that: it chose a pro-tap bill in preference to a bill banning all wiretapping, and it favored a bill that was clearly unconstitutional under existing Supreme Court precedents. Activists and advocates of judicial restraint alike let the resolution pass, since there was no recorded dissent. Subsequent inquiries by several members of the Judicial Conference as to what had happened yielded the inescapable conclusion that many of them had no idea of what they had done.

Chief Justice Warren and Chief Justice Burger have inspired many studies in contrast, but they are alike in their passion for conference secrecy. Congress could cool that passion by bringing the conference under the lash of disclosure and public access now required of government advisory committees and agencies by the Freedom of Information Act. The judicial branch is not covered by the information law—indeed, the alarming fact is that these same secretive jurists are the ones with power to say what that law means—but there is little reason to exempt the conference, especially when it is not performing strictly judicial work.

That was the view of former senator Sam J. Ervin, Jr. (D-N.C.). Like many other lawmakers, Ervin found other fields to conquer than the Judicial Conference. But he said this in 1970:

“They certainly do not act as judges when they vote to approve or disapprove of pending legislation, or adopt rules of financial disclosure for their colleagues. Why, then, should the conference meet in secret? I believe that when judges act as policy makers and lobbyists, it follows that their discussions should be public. If the conference supports or opposes a bill, the Congress and the public should have free access to the conference’s debate on that proposal. The Congress should know how carefully the Judicial Conference researches its positions so that it can attach relative weights to them.” ©

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## Black-Robed Secrecy

There is a problem with the Judicial Conference of the United States, one of the most powerful but least known Federal agencies. The problem is not that it does wicked things. On the contrary, it has just announced some laudable advances in civil rights — approval of affirmative action hiring rules for 12,000 Federal court jobs across the country, and disapproval of judges' membership in private clubs that discriminate against minorities and women. The problem is that the conference does its work in secret.

Congress created the Judicial Conference in 1922 to help the Federal judiciary keep house. The Chief Justice, by law, is chairman. Other members include the chief judges of the 11 Federal Courts of Appeals and 11 district court judges. They meet secretly twice a year in a guarded conference room at the Supreme Court. Initially their main duty was to monitor court case-loads, but now they set employment policies, draft ethical codes, write court rules and sometimes emerge publicly to lobby for better pay and more judgeships. Chief Justice Burger has called for still more power — the power to create new judgeships subject only to a Congressional veto.

Despite the conference's power, it has managed to

remain nearly invisible. But most of its powers are not judicial; they do not require the secrecy to which judges are entitled when they confer on cases.

Senator Dennis DeConcini and other concerned individuals have begun to wonder why the conference shouldn't obey the same laws of openness that apply elsewhere — laws requiring open meetings, fair procedures and public access to documents. He would not intrude on judges when they're deciding actual cases, but he would open the conference when it functions as administrator, rulemaker or lobbyist. We like that approach and are not persuaded by the conference's assertion — also voted in secret — that the Senator's bill, pending in subcommittee, would transgress the Constitution's separation of powers.

The Judicial Conference's two admirable civil rights actions signify awareness that Federal courts, where many seek relief from discrimination, must set an example. But the conference leaves the public utterly uninformed as to why these actions were taken and why other measures were not. Why, for example, does the affirmative action order lack teeth? Why did the conference not write its stand on private clubs into the code of judicial ethics? Congress, which created it, can make the conference operate more openly so the public can learn the answers.



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Application of a Sunshine Act to  
Judicial Councils and Judicial Conference  
Constitutional Questions

by Johnny M. Killian

By S. 2045, it is proposed the meetings of the Judicial Conference of the United States and of the Judicial Councils of the 11 Circuits be open to the public and that transcripts be made of all such meetings to which there shall be public access. This paper addresses whether any constitutional questions would attend enactment of this bill.

S. 2045 - A Summary

In 1976, Congress enacted the Government in the Sunshine Act, P.L. 94-409. §3(a), 90 Stat. 1241, 5 U.S.C. §552b, requiring that all portions of all meetings conducted by federal agencies be open to the public unless they fit within one of ten exceptions.<sup>1/</sup> This legislation follows generally upon similar enactments in all 50 States that provide, with varying comprehensiveness and exceptions, for public meetings of multi-member government agencies.<sup>2/</sup> The term "agency" in the Act, 5 U.S.C. §552b(a)(1), adopts the definition set out in 5 U.S.C. §552(e), which does not comprehend courts or judicial agencies. The pending bill would not make applicable the existing law but would instead enact into law a new statute covering specifically the Judicial Conference and the Judicial Councils.

The Conference, the Councils, and each committee and subcommittee of them would be covered. Each meeting of at least the number of members required to

<sup>1/</sup> See Comment, "The Government in the Sunshine Act - An Overview," 1977 Duke L.J. 565.

<sup>2/</sup> National Association of Attorneys General, Committee on the Office of Attorney General, Open Meetings: Types of Bodies Covered (June 1979); Open Meetings: Exceptions to State Laws (March 1979); Open Meetings: Actions and Meetings Covered (August 1979).

take action on behalf of the respective entity in which official business is carried out as a result of the meeting is required to be open to the public, with certain exceptions, and it is prohibited to conduct or dispose of the business of the entity except in accordance with the statute. Neither public access to the meeting nor public access to transcripts of meetings is required by the bill if the entity determines that the meeting or portion thereof is likely to involve accusing any person of a crime or formally censuring any person or is likely to disclose information of a personal nature that would constitute a clearly unwarranted invasion of personal privacy, although the entity may determine that the public interest requires public disclosure. A determination by the entity to close or to open meetings subject to these exceptions may be made only by a majority vote of the entire membership of the entity; a person whose interests may be directly affected by reason of one or the other of these exceptions may request closure of that portion of the meeting and the entity, upon request of one of its members, shall vote by recorded vote whether to close such meeting. The bill spells out the requirements for calling meetings, for announcements of meetings, and for altering previously determined decisions. Transcripts or electric recordings of all meetings not voted to be closed are to be maintained in a place easily accessible to the public and copies of the transcripts are to be furnished to any person at actual cost.

The Judicial Conference and the Judicial Councils are required to promulgate regulations within one year of enactment to implement the law. The regulations are to be transmitted to Congress and are not to go into effect for 60 days after transmission, subject to a one-House congressional veto. Failure

to promulgate such regulations could be met by judicial action brought in the District Court of the District of Columbia to require promulgation. Similarly, the bill confers standing on any person to bring an action in the District Court of the District in which the meeting took place or in which the entity has its headquarters or in the District of Columbia for declaratory, injunctive, or other relief to enforce the law. The court could not invalidate action taken at a meeting not in compliance with the law but could enjoin future violations, could require that transcripts be made available, or take other action. Any participant of a meeting of the entity could bring a court action to challenge violations of the law and would be entitled to appropriate relief.

#### Congress' Power to Act

State open meeting laws generally exclude the courts from coverage, e.g., Fla. Stat. Ann. 286.011, although some do apply when judicial bodies are exercising rulemaking authority or deliberating and deciding upon issuance of administrative orders. E.g., Neb. Rev. Stat. §84-1409. Efforts in some States to cover rulemaking and other non-case-related actions of courts have been pronounced invalid as an infringement of separation of powers or intrusion into the inherent powers of the judiciary. In re the "Sunshine Law," 400 Mich. 600, 255 N.W. 2d 635 (1977); Goldberg v. Eighth Judicial District Court, 93 Nev. 614, 572 P. 2d 521 (1977); In re 42 Pa. C.S. §1703, 482 Pa. 522, 394 A. 2d 444 (1978); see also Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973)(dictum); Mrotek v. Nair, 4 Conn. Cir. 313, 231 A. 2d 95 (1967)(dictum). These decisions proceed upon express state constitutional provisions recognizing or conferring upon the judiciary powers respecting rulemaking and administrative

actions, but they are also informed with the view, of noteworthy breadth in some state courts, of inherent judicial power to manage judicial business.<sup>3/</sup> Irrespective of the merits of these decisions at the state level, the constitutional standards governing the relationship of Congress and the courts at the federal level have developed differently.

Basic learning under our constitutional theory is, of course, that the Constitution separated governmental powers into tripartite divisions. Wayman v. Southard, 10 Wheat. (23 U.S.) 1, 46 (1825). From this assignment of powers and functions within the Federal Government, it might be argued, along the line of the state court decisions, that Congress lacks the authority to legislate with respect to the internal procedures of the judicial branch and does not have the power to mandate public access to the activities of judicial organizations. There would be present in such an argument two interrelated but separate arguments as to Congress' power to legislate at all and as to the limitations imposed by the separation of powers doctrine. The response to the argument is interrelated as well.

It must be kept in mind, of course, that S. 2045 imposes no requirements upon the courts. The proposed legislation is directed toward what are essentially administrative bodies composed of judges, the entities performing functions largely delegated to them by Congress.

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<sup>3/</sup> With respect to rulemaking, see Pound, "The Rule Making Power of the Courts," 12 A. B. A. J. 599, 601 (1926); Levin & Amsterdam, "Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision," 107 U. Pa. L. Rev. 1 (1958). For discussion of similar assertions of control over the court budget, see C. Baar, Separate but Subservient - Court Budgeting in the American States (1975), 143-161.

While there are opinions of the Supreme Court that ascribe to the constitutional scheme of separation a rigidity which in fact it does not have, Kilbourn v. Thompson, 103 U.S. 168, 190-191 (1881), the more considered opinions recognize the flexibility that underlies the concept. Springer v. Philippine Islands, 277 U.S. 189, 201-202 (1928); Myers v. United States, 272 U.S. 52, 116 (1926). "[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley v. Valeo, 424 U.S. 1, 121 (1976).

The Court's language is reflective of Madison's philosophy which found in "constitutional discrimination of the departments on paper" an insufficient security against encroachment of one on the others. Rather "a balance of powers and interests" was to be prescribed. 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937), 77. To those purists who objected that the blending achieved in the Constitution was a violation of the doctrine, Madison replied that Montesquieu, the foremost expounder of separation of powers, "did not mean that these departments ought to have no partial agency in, or no

controll over the acts of each other." The philosopher had instead meant that the whole power of one department must not be exercised by another department. The Framers had acted on the principle, Madison said, "that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be maintained." The Federalist, Nos. 47, 48, J. Cooke ed. (1961), 323, 325-326, 332 (emphasis in original).

Examination of the constitutional document reveals many examples of the connections and blending and as well underscores where the Framers placed the responsibility for fleshing out the government they had created. Article I contains fairly detailed provisions setting out the structure and organization of the legislative branch and sets out in some detail the powers assigned to Congress. In contrast is the paucity of specific provisions defining and empowering the President and the courts; rather, the power to develop the potentialities vested in Articles II and III is, within limitations, placed with Congress.

Thus, for example, the executive power is vested in the President and Article II, §2, confers a number of express powers ranging from the authority to command the armed forces to the surprisingly enumerated power to require the opinion in writing of his principal executive officers. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have

envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-635 (1952) (concurring opinion).

In the face of this vagueness, the Court has managed to divine some standards of decision. In Myers v. United States, 272 U.S. 52 (1927), Chief Justice Taft, himself a former President, held unconstitutional a law requiring senatorial concurrence in the removal of postmasters. He found in the grant of "the executive power" a conferral of all executive power as to which the succeeding more specific grants merely elaborated and in some cases limited, rather than a specification of a locus of the residency of executive power, and in the authorization to execute the laws a necessity that the President alone control his subordinates through whom he executed the laws. But even this most latitudinarian interpretation of presidential powers was laced with a recognition of congressional authority. "To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation - all except as otherwise provided by the Constitution." Id., 129. And in Youngstown Sheet & Tube Co. v. Sawyer, supra, 587-588, it was observed that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise

and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States....'

What is true of the executive is even more the case of the judiciary. In Article III, the "judicial power of the United States" is vested in one supreme court "and in such inferior Courts as the Congress may from time to time ordain and establish." Separately, Congress is specifically authorized in Article I, §8, cl. 9, to "constitute Tribunals inferior to the Supreme Court." Article III, §2, cl. 1, defines and describes the jurisdiction which may be devolved on the courts by Congress. A small class of cases is made subject to the original jurisdiction of the Supreme Court, but "[i]n all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Id., cl. 2. And that is all that Article III provides. It does not say anything about the makeup of the Supreme Court (that there will be a chief justice appears from the provision directing that he preside over the Senate when the President is tried on impeachment), nor does it place any limitation upon Congress' discretion in deciding whether to create lower federal courts or instead to rely on state courts.

In the Judiciary Act of 1789, 1 Stat. 73, Congress provided not only for the size and composition of the Supreme Court but also for the times and place for sitting, its internal organization, and other matters. It created inferior courts and prescribed membership, terms, places of sitting, and jurisdiction.

The history of the courts in this country is one of continuous legislative provision with respect to every aspect of the conduct of business. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court (1928).

Resulting from Article III's generality and its vesting of authority in Congress is the fact that federal courts have only such jurisdiction and consequently such power to act as Congress devolves upon them; it may give or withhold any or all jurisdiction from the lower federal courts and may leave the Supreme Court with but a shadow of its present burgeoning docket. See, e.g., Turner v. Bank of North America, 4 Dall. (4 U.S.) 8 (1799); Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807); Cary v. Curtis, 3 How. (44 U.S.) 236 (1845); Sheldon v. Sill, 8 How. (49 U.S.) 441 (1850); Ex parte McCordle, 7 Wall. (74 U.S.) 506 (1869); Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922); South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). A corollary of the power to create is, of course, the power to abolish courts, again in Congress' discretion. Stuart v. Laird, 1 Cr. (5 U.S.) 299, 308-309 (1803); F. Frankfurter & J. Landis, *supra*, 25-32, 153-175; W. Carpenter, Judicial Tenure in the United States (1918), 78-94.

Extending beyond creating courts and providing for their jurisdiction are congressional enactments which prescribe and regulate the procedure of federal courts and empower with limitations the courts to alter procedure. Wayman v. Southard, 10 Wheat. (23 U.S.) 1, 21 (1825); Bank of the United States v. Halstead, 18 Wheat. (23 U.S.) 51, 53 (1825); Beers v. Houghton, 9 Pet. (34 U.S.) 329, 359, 361 (1835); Fink v. O'Neil, 106 U.S. 272, 280 (1882); Sibback v. Wilson, 312 U.S. 1, 9-10 (1941). Moreover, Congress has long provided for the

recusal or disqualification of judges in order to guarantee fairness to litigants, a regulation directly bearing upon judges who have constitutionally protected tenure and compensation. See Act of May 8, 1792, ch. 36, §11, 1 Stat. 278, now codified at 28 U.S.C. §455; and see 28 U.S.C. §144. Cf. United States v. Berger, 255 U.S. 22 (1921). The standards thus statutorily imposed have been recognized to be more stringent than the Constitution demands, e.g., United States v. Haldeman, 559 F.2d 31, 130 n. 276 (C.A.D.C. 1976) (en banc), cert. den., 431 U.S. 933 (1977), and thus come in congressional discretion to regulate.

In 1922, Congress, responding to the urging of Chief Justice Taft, the American Bar Association, and others, created the Conference of Senior Circuit Judges, comprising the chief judges (then called senior judges) of each of the Circuits, with the Chief Justice presiding.<sup>4/</sup> Act of September 4, 1922, 42 Stat. 837, 838. The Conference was directed to meet annually and to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and [to] submit such suggestion to the various courts as may seem

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<sup>4/</sup> Creation of the Conference is discussed in F. Frankfurter & J. Landis, The Business of the Supreme Court (1928), 217-254; P. Fish, The Politics of Federal Judicial Administration (1973), 3-39; Chandler, "Some Major Advances in the Federal Judicial System - 1922-1947," 31 F.R.D. 307 (1963); F. Wheeler & A. Levin, Judicial Discipline and Removal in the United States (FJC, 1979), 28-32.

in the interest of uniformity and expedition of business."<sup>5/</sup> The Conference, now termed the Judicial Conference of the United States, comprises the Chief Justice, the chief judges of each Circuit, a district judge from each Circuit, the chief judges of two special courts, and two bankruptcy judges. It is still charged with making comprehensive surveys of the conditions of business in the federal courts and preparing plans, but in addition it studies the operation and effect of the general rules of practice and procedure in use in the federal courts and prepares and transmits to the Supreme Court for promulgation changes in and additions to those rules. 28 U.S.C. §331. In the Administrative Office Act of 1939, 53 Stat. 1223, 28 U.S.C. §§601-611, Congress created the Administrative Office of the United States Courts with responsibility for the personnel, budgetary, and management duties concerned with administration of the courts.

The Conference has an extensive committee system and deals in a great number of areas of judicial administration. It promulgated standards of judicial ethics applicable to federal judges prior to congressional enactment of an Ethics Act and in March, 1979, it adopted a resolution setting forth principles for judicial discipline to be followed by the Judicial Councils of the

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<sup>5/</sup> "The idea of a judicial council aroused constitutional fulminations. The doctrine of the separation of powers was voluminously invoked. To create an annual conference with the Chief Justice at its head was interpreted as a political device involving the exercise of authority in no wise judicial. ... 'In making a survey,' protested Lea of California, 'they will perform a legislative function that belongs to a committee of Congress and not to a judicial body.'" F. Frankfurter & J. Landis, *op. cit.*, N. 4, 240.

Circuits. It regularly takes positions on legislation of concern to the judiciary and performs a host of other functions.<sup>6/</sup>

Also in the Administrative Office Act of 1939, Congress created the Judicial Councils of the Circuits, composed of the active circuit judges of the circuit, and authorized them to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district court shall promptly carry into effect all orders of the judicial council." 28 U.S.C. §332(d). Pursuant to this authorization, the Circuit Councils have undertaken extensive regulation of the activities and conduct of judges, recently adopting procedures to be followed when complaints are made of judicial behavior. The federal courts have proceeded on the basis that the authorization is broad-ranging and valid. In re Rodebaugh, 10 F.R.D. 207 (Jud. Coun. of 3d Cir., 1950); In re Imperial "400" National, Inc., 481 F. 2d 41 (C.A. 3), cert. den., 414 U.S. 880 (1973); Hilbert v. Dooling, 476 F. 2d 355 (C.A. 2) (en banc), cert. den., 414 U.S. 878 (1973). While the exercised powers have not yet been tested on the merits in the Supreme Court, the Court in dictum has recognized both the propriety and the necessity for congressional regulation of the judicial process and for

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<sup>6/</sup> See P. Fish, op. cit., N. 4, 269-300; Judicial Conference of the United States, Report on the Powers and Responsibilities of the Judicial Councils, Issued by the Committee on the Judiciary, House of Representatives, H. Doc. 201, 87th Congress, 1st sess. (1961); Proceedings of the Judicial Conference, March 7-9, 1979, H. Doc. 96-158, 96th Congress, 1st sess. (1979), 4-6; Proceedings of the Judicial Conference, September 19-20, 1979, H. Doc. 96-255, 96th Congress, 2d sess. (1980), passim.

authorization to a body to act to effectuate those regulations. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970). Additionally, the Councils possess the power under 28 U.S.C. §372(b) of certifying to the President that a judge is disabled, enabling the President to appoint an extra judge who would be senior to the disabled judge.<sup>7/</sup>

These judicial entites have been created and empowered by Congress under its constitutionally delegated powers to flesh out the institutions of the other two branches of government. The Constitution itself did not provide a detailed checklist of authorizations and instructions to those departments. "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all must have been seen dimly, and which can be best provided for as they occur." McCulloch v. Maryland, 4 Wheat (17 U.S.) 316, 415 (1819). Inasmuch as the Constitution is not a prolix code, the power must reside somewhere to provide for the exigencies as they occur and to make the rules guiding governmental action. "[T]he constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added

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<sup>7/</sup> See, S. Flanders & J. McDermott, Operation of the Federal Judicial Councils (FJC, 1979); R. Wheeler & A. Levin, op. cit., N. 4, 32-42; P. Fish, op. cit., N. 4, 379-426.

that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof," Id., 411-412. Article I, §8, cl. 18 thus confirms the role of Congress in legislating to effectuate not only its own powers but those powers reposed in other branches of government as well. "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution." And the Chief Justice continued with the passage so much quoted it seems trite but which remains the standard for judging such exercises of congressional power. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id., 421. The Court has on numerous occasions recognized the authority of Congress under the necessary and proper clause to regulate the courts. E.g., Wayman v. Southard, 10 Wheat. (23 U.S.) 1, 22 (1825); Bank of the United States v. Halstead, 10 Wheat. (23 U.S.) 51, 53-54 (1825); Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 721 (1838); Embry v. Palmer, 107 U.S. (1882); Hanna v. Plumer, 380 U.S. 460, 472 (1965). The authority conferred by the clause appears to be as sweeping with respect to the powers of the executive and the judiciary as it has been with respect to the enumerated powers of Congress. See Van Alstyne, "The Role of Congress in Determining

Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of 'the Sweeping Clause,'" 36 Ohio St. L.J. 788 (1975). Of course, it would violate the separation of powers doctrine and unconstitutionally intrude into the province of the judiciary were Congress to attempt to dictate the disposition of cases before the courts, United States v. Klein, 13 Wall. (80 U.S.) 128 (1872), and the courts as an independent branch undoubtedly have spheres of power not touchable by Congress. See National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-591 (1949). But when Congress deals not with the merits of decisions nor with respect to the independence of decision-making, its power to regulate affairs within the judicial branch appears to be as well settled as the exercised of the same power in the executive branch.

Thus, when Congress applied the Ethics Act to judges, with its requirement that judges file annual financial statements available for public inspection, a court determined that Congress had acted well within constitutionally permissible confines in promoting public confidence in the judiciary and in deterring conflicts of interests. Duplantier v. United States 606 F.2d 654 (C.A. 5, 1979).

As was noted earlier, the pending bill applies not to courts but to entities created in the judicial branch by Congress to provide assistance to courts and to judges and to implement policies Congress has enacted.<sup>8/</sup> In creating and

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<sup>8/</sup> The distinction is not drawn based upon any premise that Congress would lack the power to enact similar provisions addressed to the courts themselves but merely to emphasize the degree of regulation of the judicial branch which the bill would encompass. The question of Congress' power in this regard over the courts is not addressed.

empowering such entities to carry out their mandates, Congress also possesses under its necessary and proper power the authority to prescribe the manner in which such entities function. In this respect, the Judicial Conference and the Judicial Councils stand in the same relationship to Congress that agencies in the executive branch stand in relationship to Congress. And just as Congress has acted upon the power to open executive proceedings and executive papers to public view, with the constitutional endorsement of the Supreme Court, EPA v. Mink, 410 U.S. 73, 83 (1973); Nixon v. Administrator of General Services, 433 U.S. 425, 445 (1977); see also Administrator, FAA v. Robertson, 422 U.S. 255 (1975), so it would appear that Congress may similarly mandate the public transaction of essentially administrative and legislative business by those judicial agencies.<sup>9/</sup> No good distinction suggests itself that would appear to constitutionally separate executive and judicial agencies from each other with respect to the pronounced congressional concern to increase public confidence in and understanding of the decision-making process and to promote accountability by the simple device of opening the process to public view. See, S. Rept. No. 354, 94th Congress, 1st sess. (1975), 4-5; H. Rept. No. 880 (pt. 1), 94th Congress, 2d sess. (1976), 2; *id.* (pt. 2), 12. Being addressed, of course, is not the merits of treating the two branches similarly but rather the issue

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<sup>9/</sup> In Chandler v. Judicial Council of the Tenth Circuit, *supra*, 86 n. 7, the Court viewed the Judicial Councils as administrative bodies, although Justices Harlan, Douglas, and Black believed them to be courts, at least when they act in a disciplinary fashion. *Id.*, 89, 95-111, 129, 133-135.

of congressional power so to act, and in that regard the power appears identical.<sup>10/</sup>

It is apparent that all the powers which the Judicial Conference exercises, it derives from Congress. Its authority to develop rules of procedure which the Supreme Court then orders into effect is authority that Congress delegated to it through the Supreme Court directly and Congress could withdraw that authority or alter the product of its exercise at any time. Indeed, when the Court sent to Congress proposed rules of evidence for federal courts, Congress by statute suspended them, 87 Stat. 9 (1973), and the following year enacted a revised code itself, 88 Stat. 1926 (1974). See also the congressional action on habeas corpus rules, 90 Stat. 1334 (1976).<sup>11/</sup> Conversely, it appears that Congress has delegated the power to the Court, with its Conference assistance, to supersede statutory law in developing rule changes. 18 U.S.C. §3771 provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." See Davis v. United States, 411 U.S. 233, 241 (1973).

It thus appears that pursuant to its necessary and proper power to carry into execution the powers vested by the Constitution in the other departments of

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<sup>10/</sup> With respect to the executive branch, Congress in recent years had enacted a number of provisions regulating and mandating disclosure of documents and opening up processes. Freedom of Information Act, 5 U.S.C. §552; Privacy Act, 5 U.S.C. §552(a); Government in the Sunshine Act, 5 U.S.C. §552b; Federal Records Act, 44 U.S.C. §2101 et seq. See also, 13 U.S.C. §§8-9 (census data); 26 U.S.C. §6103 (tax returns).

<sup>11/</sup> See Hungate, "Changes in the Federal Rules of Criminal Procedure," 61 A.B.A.J. 1203 (1975); Lesnick, "The Federal Rule-Making Process: A Time for Reexamination," 61 A.B.A.J. 579 (1975).

government, Congress could, in addition to delegating the powers that it has, prescribe the manner in which the other departments are to carry out the delegations and just as it has imposed a considerable degree of openness on executive agencies Congress has the power to open to public view the operation of these judicial branch agencies.

#### Separation of Powers

That Congress facially possesses the power to act does not finally determine the issue. The McCulloch standard still requires that the Constitution be examined to ascertain that a particular exercise is not prohibited and is consistent with the letter and spirit of the Constitution. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." Williams v. Rhodes, 393 U.S. 23, 29 (1968). While there are no specific prohibitions that appear to impede Congress in the proposed regulation of these judicial entities, the principle of separation of powers could be interposed.

While the doctrine of separation of powers does not wholly preclude one branch from having some say in the performance of another branch and does not impose a barrier to general congressional legislation respecting the affairs of either the executive or the judiciary, the doctrine is not irrelevant when legislation is considered on its merits. In Nixon v. Administrator of General Services, *supra*, 441-446, the Court set out the standard for judging a claim of invalidity based on separation of powers, a standard that appears to be

equally applicable when the judicial branch claims immunity. See Duplantier v. United States, supra, 666-668. Congress had provided for custody of the papers and tapes of former-President Nixon to be in GSA and for the sorting, cataloging, and disposition of them, with eventual public access to some. Rejecting an argument of impermissible interference in the affairs of another branch, the Court said: "Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Supra, 433 U.S., 443. Inquiry consists of a searching study of, first, whether and to what degree there is an actual or a potential disruption of the functions of the other branch, and, second, whether the encroachment is justified by legitimate congressional objectives. The Court did not reach the second part of the inquiry, inasmuch as it determined that because the executive branch retained full control of the presidential papers affected by the Act, there was no actual and little potential disruption. Id., 443-444. The Court did observe that "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. [Citing the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and several others.] Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." Id., 445.

The pending bill does not appear to contain any actual or potential disruptive force with respect to the judiciary, either. It applies to entities within the judicial branch which have no responsibility for adjudica-

tion and which perform administrative and legislative functions, connected with the courts, that Congress has delegated to them and that Congress could itself implement through legislation. The process that will be opened to public view will be those that Congress has already opened to public view in the executive branch, with the sanction of the courts. It seems unlikely then that enactment of this legislation would be found to invade the autonomy of the judicial branch.

#### The Judicial Enforcement

In one respect, however, a certain reservation may be found to exist, although on examination that reservation may too be found not to present a barrier. The bill provides for judicial enforcement of its provisions. That is, any person may bring an action in federal District Court to compel the Judicial Conference or the Judicial Councils to abide by the provisions, such as the requirement that regulations be issued, that meetings be announced a certain time before they are held, that meetings be open to the public, that if meetings are closed certain procedures must be followed. May Congress authorize a district judge to issue compulsory orders to judges of higher courts?

This issue appears to have bothered the courts in Mrotek v. Nair, 4 Conn. Cir. 313, 231 A. 2d 95 (1967), although it was not passed upon. Nonetheless, there may be less of a problem here than first appears.

First, the hierarchy of federal courts is entirely a creation of congressional legislation. The Constitution, it will be remembered, provided only for a Supreme Court and such other courts as Congress chose to create. And the present system under which decisions of district judges are usually but not always routed to a court of appeal and from a court of appeal to the Su-

Supreme Court is a relatively recent invention. From the Judiciary Act of 1789 until 1912, although there were three sets of courts, there were only two sets of judges. That is, district judges sat in the District Courts, but they also sat in rotation on the circuit courts, upon which Supreme Court Justices also sat. Thus, appeals from one judge often went to the same judge. Additionally the District Courts and the circuit courts were both courts of original jurisdiction with respect to different matters. See, F. Frankfurter & J. Landis, sup. cit., N. 4, 11-12, 86-88, and passim. In other words, the conviction that one judge is jurisdictionally inferior to another is derived solely from familiarity with the existing system and is not all inherent in the federal judicial system generally.

As has been observed above, Congress possesses the power to create federal courts and to parcel out the judicial power conferred by the Constitution among them. If it should choose to empower a district judge to enjoin a court of appeals judge to compel him to perform a certain duty, this action might have certain practical inconveniences, especially in the context of appeals of such orders, but it is not evident that any constitutional considerations are thereby implicated. No provision in Article III would seem to stand out as a bar to congressional authorization of such a suit.

Second, it must be remembered that in any event the pending bill is not directed to courts nor to judges qua judges but rather to entities in the judicial branch that are made up of judges. These administrative and legislative bodies are obligated to issue regulations and to conduct most of their business in public and failure to follow the dictates of an enacted bill would draw a

declaratory judgment or an injunction directed to the Judicial Conference or to a Judicial Council. If it be objected that this distinction is merely fictive, one should note that since Ex parte Young, 209 U.S. 123 (1908); persons in federal courts have been enabled to obtain judgments against state officials which mandated the execution of certain actions by the State and on its behalf, while the Eleventh Amendment precluded those persons from suing the State itself. See Edelman v. Jordan, 415 U.S. 651 (1974). The designation of the defendant may seem a minor matter but on it has hung most of the federal constitutional jurisprudence of this century.

It does not appear, therefore, that the provision for judicial enforcement presents a constitutional difficulty that would result in a court's invalidating it.<sup>12/</sup>

#### The Congressional Veto

Regulations to implement the required openness are mandated by the bill to be developed within one year of enactment by the Judicial Conference and each

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<sup>12/</sup> Some objection might be directed to the conferral of standing on "any person" to bring an action to enforce the bill. Standing is an element of justiciability under Article III and is thus a constitutional requirement in part. To have standing, a party must demonstrate "injury in fact." Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 72-74 (1978); Werth v. Seldin, 422 U.S. 490, 498-499 (1975). One does not have standing to assert the same "generalized grievances" everyone else has. United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Committee, 418 U.S. 206 (1974). But Congress may create an interest the denial of or violation of which will enable a person to bring an action in federal court to vindicate that interest. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Traffiesnte v. Metropolitan Life Inc. Co., 409 U.S. 205 (1972). In any event, the "any person" language in the bill tracks the same provision in the Government in the Sunshine Act and the Freedom of Information Act which have not occasioned any constitutional controversy.

of the Judicial Councils. The regulations are to be transmitted to Congress and to lay before Congress for 60 days, during which either House may prevent them from going into effect by passing a resolution of disapproval. This provision raises, of course, the on-going controversy with respect to the constitutional validity of the congressional veto device.

When Congress authorized the Supreme Court to promulgate rules of civil and criminal procedure, it provided that the rules and amendments thereto should be reported to Congress and should not go into effect until 90 days after they had been reported, 28 U.S.C. §2072; 18 U.S.C. §3771. No authorization for Congress to prevent rules from going into effect was made and Congress had to act through its regular lawmaking powers. As a result of the dispute with respect to the proposed rules of evidence, which Congress by law modified in several important respects, a new statutory authorization for amending the rules of evidence was enacted, reserving to Congress the power to disapprove by resolution of either House during the 180 days the amendments would lay before Congress. 28 U.S.C. §2076.

Resolution of the constitutional questions concerning the congressional veto device is not possible at this point. It is a matter of considerable dispute between the President and Congress, because it is generally perceived as a measure to give Congress greater control over the execution of its delegated powers. Constitutional opponents of the veto device argue that it violates the presentation clause, Article I, §7, inasmuch as the resolution of disapproval is not submitted to the President, and that those measures which have only a one-House veto in them do not even comport with the bicameral

scheme of passage of legislation. Proponents counter that the legislation containing the congressional veto is presented to the President and that his approval of the overall bill, or its passage by Congress over his veto, satisfies the presentation argument. Opponents too insist that the doctrine of separation of powers is violated by the device because it allows Congress to intrude upon the administration of the laws it enacts, contrary to the constitutional scheme whereby the President is authorized and obligated to execute the laws. Proponents observe that it is permissible for Congress to utilize the veto with regard to legislative authority that it has delegated to the President and to other executive officers and as to which it retains supervisory authority.

Obviously, utilization of the congressional veto with respect to the judicial branch does not raise these issues and arguments in the same way. The courts play no role in the enactment process so that any support derived from the different ways of looking at the presentation clause argument becomes confused. The separation of powers problem remains, however, and even though the judicial entities covered by the bill are exercising authority delegated to them by Congress, it is not at all clear that this is a sufficient response to the objection.

To date, the Supreme Court has refrained from passing upon the issues thus raised. In Sibbach v. Wilson, 312 U.S. 1, 15 and n. 17 (1971), the Court spoke approvingly of the congressional lay-over of the rules of civil procedure in language which more broadly seemed to include actual veto devices. The question was reserved in Buckley v. Valeo, 424 U.S. 1, 140 n. 176 (1976), al-

though Justice White in a separate opinion expressed the view that the veto device was constitutional. Id., 257, 282-286. An attack upon the congressional salary scheme which includes a one-House veto was rejected on the merits by a lower court, Pressler v. Simon, 428 F. Supp. 302 (D.C.D.C. 1976) (three-judge court), and the decision was summarily affirmed by the Supreme Court. Pressler v. Blumenthal, 434 U.S. 1028 (1978). Since the case was within the obligatory jurisdiction of the Court, its action was on the merits and is thus binding on all other courts. Hicks v. Miranda, 422 U.S. 332 (1975). But the Court has cautioned that summary affirmances approve only the result below and not necessarily the reasoning, Mandel v. Bradley, 432 U.S. 173 (1977); Illinois Bd. of Elec. v. Socialist Workers Party, 440 U.S. 173 (1979); see also Fusari v. Steinberg, 419 U.S. 379, 388 n. 15 (1975), and id., 391 (Chief Justice Burger concurring); Edelman v. Jordan, 415 U.S. 651, 671 (1974). It is perhaps significant that Justice Rehnquist attached a memorandum to the summary affirmance in Pressler explaining that affirmance could have been based upon the Court's disagreement with the lower's court's ruling on the plaintiff's standing. Review has been denied in other cases. Atkins v. United States, 556 F.2d 1038 (Ct. Cl. 1977) (4-3 decision sustaining congressional veto), cert. den., 434 U.S. 1009 (1978); Clark v. Valeo, 559 F. 2d 642 (C.A.D.C. en banc) (issue not ripe for decision), aff'd. 431 U.S. 950 (1977); McCorkle v. United States, 559 F.2d 1258 (C.A. 4, 1977) (veto issue not reached), cert. den., 434 U.S. 1011 (1978).

With the question in such a state of controversy, it is possible only at this point to point out the problem.



