BEFORE THE JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

MATTER No. DC-13-90021

IN RE CHARGES OF JUDICIAL MISCONDUCT

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Amici Ethics Bureau at Yale, et al. respectfully pray for leave to file the accompanying Brief of Amici Curiae for the following reasons:

1. Amici Curiae, a law school legal clinic dedicated to lawyer and judicial ethics and five concerned and experienced ethics teacher/practitioners, have prepared the annexed brief addressing the critical questions raised by the pending petition for review in the above-captioned matter.

2. The brief focuses on concerns raised by both the adjudicative process that dismissed the underlying complaint as we well as the substance of the judicial ethics issues raised by the complainants.

3. Amici hope that the content of their brief might assist the judges in addressing the impending review.

4. Amici understand that the decision whether to grant this motion is in the sole discretion of the panel.

Wherefore, amici respectfully pray that their motion be granted.

Respectfully submitted,

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Dated: November 26, 2014

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF *AMICI CURIAE*

The Ethics Bureau at Yale[1] is a clinic composed of fifteen law school students supervised by an experienced practicing lawyer, lecturer and recognized ethicist. The Bureau has drafted amicus briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools. Because the integrity and credibility of the disciplinary process for federal judicial officers has been placed at issue, the Bureau believes it might assist this Committee in the resolution of the important issues presented by the pending Petition. Additional amici curiae are lawyers and scholars whose interests include the conduct of the judiciary and the codes that regulate judicial conduct. They too have the background and interest in the important topics at stake here, to lend their experience and background to this submission.[2]

Robert P. Cummins was American Judicature Society Advisor to ABA Joint Commission to Evaluate Model Code of Judicial Conduct and Chairman, ABA Judicial Division Lawyers Conference Committee on Judicial Performance and Conduct.

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or the Yale Law School.

[2] This brief is the work product of amici and their lawyer, who are responsible for its content. Complainants were consulted during the drafting process solely to clarify factual matters and the legal basis for the original Complaint. Institutional designation of amici is for identification purposes only.

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ARGUMENT

Introduction

"An independent and honorable judiciary is indispensable to justice in our society."

The importance of the independence, integrity and impartiality of the judiciary cannot be overstated. Without those critical characteristics the public's faith in the rule of law is undermined, and without respect for our system of justice, the legitimacy of our legal system is compromised, if not destroyed. Equally important is the system of adjudicating judicial transgressions. Establishing standards for judicial conduct would be a meaningless exercise if the adjudication of complaints about ethical lapses of federal judges was not only transparent, independent and impartial, but also maintained that appearance.

Both of these critical aspects of the rule of law are at stake in this proceeding. Judge Edith Jones gave a speech at the University of Pennsylvania Law School on February 20, 2013. Six attendees provided affidavits describing in great detail the content and tone of her speech. Those affidavits became the basis for a duly filed complaint that resulted in an adjudication of the complainant's charges when on August 12, 2014, the Judicial Council of the District of Columbia entered a dismissal order based on the July 7, 2014 Report of a Special Committee (hereinafter "the Report").

It is the view of amici that both of these preconditions to an impartial system of justice are at stake in the review of the original decision. First, the proceedings leading to the Report of the Special Committee lacked transparency. Respondent asserts a commitment to "confidentiality." Yet, a large portion of the record, including key documents such as Judge Jones' speech notes and her declaration, remain undisclosed. Rather, the Committee based the dismissal of these serious charges of ethical misconduct on selective quotations from and

citations to the withheld documents. As a result, the Report raises serious questions about the integrity of the federal judicial disciplinary process. How can the public have confidence in a process that hides from public view the complete record surrounding serious charges of bias, racial discrimination and other assertions of misconduct? It is the view of amici that neither the public nor the complainants can possibly know (let alone understand) how the Special Committee can excuse alleged public statements of bias and discrimination and multiple other alleged violations of the applicable standards without full disclosure of the record leading to the disposition of the complaint.

Second, the Special Committee Report, in the view of amici, fails to recognize how serious an assault Judge Jones' alleged remarks were on the integrity of the judiciary. To emphasize this latter point, amici have explicated more fully the role and substance of the standards Judge Jones is alleged to have violated.

The Proceedings before the Special Committee Lack Transparency

The Petition is replete with instances where the Special Committee selectively relied on undisclosed "evidence" in rejecting the allegations of the June 2013 Complaint. But when Complainants requested a copy of the materials submitted by or on behalf of Judge Jones pursuant to Rule 23 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, complainants were informed that Judge Jones declined to give her consent to release the documents. That action left the public with an incomplete and potentially biased presentation, making it impossible to understand how the Committee made its determination.

Such selected disclosure undermines a core purpose of the Judicial Conduct and Disability Act of 1980: establishing visible and transparent procedures to investigate alleged judicial misconduct and thereby provide judicial accountability. Without full disclosure of the

record considered by the Special Committee, the public cannot have confidence that the Act and its procedures were administered impartially and independently.

The 1980 Act established mechanisms to evaluate claims of judicial misconduct with the goal of holding federal judges accountable for their conduct and thereby maintaining public confidence in the judiciary. *See* S. Rep. No. 96-362, at 7 (1979) ("The perception of a viable healthy judiciary is of critical importance to our system of justice. With this thought in mind, the committee is of the view that a statutory procedure be implemented to assure the public that valid citizen complaints are being considered in a forthright and just manner."); 126 Cong. Rec. S13858 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini) ("The Federal courts must remain free from doubt in order to be effective . . . the problem addressed in this legislation is more one of perception than actuality—the need to assure the public that formal procedures are in place to deal with the rare instance justifying a disciplinary inquiry.").

The continued ability of the 1980 Act to provide this accountability rests on public confidence that the Act is being administered with complete integrity. Transparency in the processes for investigating and disciplining judges must be crucial to ensuring these procedures achieve the Act's goal of judicial accountability. By creating "uniform, known procedures" for evaluating complaints of judicial misconduct, the Act gives citizens confidence that complaints filed "will receive fair and serious attention throughout the process." Presidential Statement on Signing the Judicial Conduct and Disability Act of 1980, 16 Weekly Comp. Pres. Docs. 2239-40 (Oct. 15, 1980); *see* 126 Cong. Rec. S13858 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini). Without visibility in the availability and results of the procedures to investigate complaints of judicial misconduct, the system is susceptible to both biases and suspicions of

biases that taint its integrity. Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 325, 360 (2008).

The Act's provisions requiring public disclosure of judicial council written orders, accompanied by written reasons, reflect legislative intent to provide visibility and transparency in its procedures to investigate complaints of judicial misconduct. 28 U.S.C. § 360(b). This statutory provision was added by the enacting Senate to an earlier House draft of the Act to "require[e] the procedures and institutions involved [in the process] to be more open to public scrutiny" and to serve the "goal of insuring public access to the [complaint] process." 126 Cong. Rec. S. 13854, 13860-13861 (daily ed. Sept. 30, 1980); 126 Cong. Rec. H. 10188, 10190-10191 (daily ed. Oct. 1, 1980). The Judicial Conference of the United States' Rules for Judicial Conduct Proceedings similarly stipulate that all orders entered by the chief judge and judicial council must be made public to "provide additional information to the public on how complaints are addressed under the [1980] Act." Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 24(b) (2008). These public disclosure provisions indicate that transparency is a key component of the judicial misconduct complaint procedures, and the enacting Congress and Judicial Conference understood visibility as essential to maintaining the integrity of the process.

In contrast, the Special Committee Report presents and relies upon an incomplete excerpt from an undisclosed record to justify its dismissal of the complaint against Judge Jones. For example, throughout the Special Committee's Report, there are numerous short quotations from and citations to the undisclosed materials submitted by Judge Jones, including her own notes and recollections. The Special Committee thus relied on an undisclosed record to dismiss the Complaint, raising serious questions about the integrity of the process used to investigate and evaluate the allegations of misconduct. While the 1980 Act envisioned a visible and transparent

process to promote public confidence in judicial accountability, the Special Committee concealed the full record from the public and only selectively revealed certain items it reviewed.

Amici are mindful of the confidentiality provisions of the 1980 Act[3] and the Rules for Judicial Conduct Proceedings.[4] But here, any applicable confidentiality requirement was implicitly or explicitly waived. The Special Committee Report is publicly available online without any redactions;[5] however, the undisclosed and selectively disclosed information that the report relies upon to discredit the affidavits submitted by complainants is not available, even though that information formed the basis for the Report and dismissal of the Complaint.

The evils inherent in this piecemeal waiving of the requirement of confidentiality are the same as those identified in the context of selective waiver of the attorney-client privilege. Courts, grappling with the situation presented when selected items of privileged communications are made public by a litigant and used to support that side in a judicial proceeding, uniformly conclude that fairness dictates that privilege, with respect to all documents related to the subject matter, is waived. *See Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) (holding that the "attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some affirmative act for his own benefit'") (quoting Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to . . . invoke the privilege as to communications whose

[3] 28 U.S.C. § 360(a) ("[A]ll papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding").

[4] Rules for Judicial-Conduct and Judicial-Disability Proceedings, R. 23(a) ("The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules.").

[5] Amici accessed a full copy of the Report, including the name of Judge Jones and identifying facts, through a simple search on Westlaw.

confidentiality he has already compromised for his own benefit"); Restatement (Third) of the Law Governing Lawyers § 79 cmt. f ("General waiver of all related communications is warranted when a party has selectively offered in evidence before a factfinder only part of a more extensive communication or one of several related communications, and the opposing party seeks to test whether the partial disclosure distorted the context or meaning of the part offered. All authorities agree that in such a situation waiver extends to all otherwise-privileged communications on the same subject matter that are reasonably necessary to make a complete and balanced presentation . . . .").

In the instant case, Judge Jones' pre-speech notes, her after-the-fact recollections, and the transcript of her testimony have yet to be produced. Moreover, the affidavit of the Federalist Society attendee—also crafted months after the fact—is similarly unavailable. As a result, Complainants cannot determine whether the partial disclosure distorted the record, or even how the Special Committee reached its conclusions. This lack of transparency thus undermines respect for the integrity of this disciplinary process.

The Allegations of Misconduct Asserted Against Judge Jones

The six affidavits assert that Judge Jones engaged in the following unacceptable conduct:

1. Judge Jones denigrated convicted murderers and invoked personal religious beliefs in her condemnation of them.

2. Judge Jones also criticized the Supreme Court's death penalty jurisprudence in such strong terms as to raise doubts in reasonable minds about whether she impartially follows and applies the case law established by the Court.

3. Judge Jones expressed overt antipathy toward minority groups, including African Americans, Hispanics, and the intellectually disabled.

4. Judge Jones discussed in detail several capital cases, some still sub judice at the time, in which she had authored the Fifth Circuit's opinion, gratuitously explaining in non-judicial terms why the accused deserved to die in those instances.

The Petition alleges that these affidavits were credible and that the Special Committee erred in the application of controlling authority. As a result of the appeal of the Judicial Council of the District of Columbia Circuit's August 12, 2014 Order, the Committee on Judicial Conduct and Disability of the Judicial Council of the District of Columbia Circuit will address important issues of judicial ethics thereby raised. Amici offer the following to emphasize the implications if, in fact, the Complainants' affidavits are substantially correct.

The Ethical Standards Applicable to the Asserted Misconduct

An independent and impartial judiciary is essential to the effective functioning of our legal system. This standard is so fundamental that it is considered a basic requirement of Due Process under the Fourteenth Amendment.[6] Furthermore, this principle is enshrined in the U.S. Code; judges are required to disqualify themselves "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," 28 U.S.C. § 455(b). Federal judges are also governed by the Code of Conduct for United States Judges ("the Code of Conduct"), which was adopted by the United States Judicial Conference. The Code of Conduct "provides guidance for judges on issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or even its appearance." *Rules and Policies: Codes of Conduct*, U.S. Courts (June 2, 2011), http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx.

[6] *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

Although the Code of Conduct does not carry legal force, much of the case law concerning judicial discipline relies on both § 455 and pertinent provisions of the Code of Conduct.[7]

The law concerning judicial discipline for federal judges is heavily informed by the American Bar Association ("ABA") Model Code, which establishes standards for maintaining and enhancing public confidence in state court judges. Model Code of Judicial Conduct Preamble (2011).[8] The Model Code consists of four Canons, which together "state the overarching principles of judicial ethics that all judges must observe." Model Code of Judicial Conduct Scope cmt. 2. Each Canon is supported by implementing enforceable Rules, which are accompanied by Comments that include aspirational references and provide guidance on the application of the Rules, *Id.* cmt. 3; the Rules of the Model Code, however, do not become enforceable until they are adopted by a state.[9] Taken together, these Model Code provisions provide a basic framework of ethics principles for state judges. The Model Code and the Code of Conduct reflect the same underlying principles of judicial integrity, impartiality and

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[7] *See*, *e.g.*, *United States v. Microsoft*, 253 F.3d 34, 107-16 (D.C. Cir. 2001) (relying on § 455(a) and Canons 2, 3A(4) and 3A(6) to disqualify judge who spoke to reporters about the merits of a pending case); *In re School Asbestos Litigation*, 977 F.2d 764, 783-85 (3d Cir. 1992) (disqualifying a judge whose conduct created the appearance of partiality in violation of the Canons and § 455).

[8] Forty-nine states and the federal judiciary have adopted some version of the Code, which establishes standards for the ethical conduct of judges as well as judicial candidates. Model Code of Judicial Conduct Preamble (2011). The ABA's House of Delegates adopted the Model Code of Judicial Conduct in 1990, and subsequently amended it several times; in light of the ABA's 2007 revisions, forty-five jurisdictions reviewed their versions of the Code and twenty-seven approved a revised Judicial Code. *ABA Model Code of Judicial Conduct (2011 Edition)*, AM. BAR ASS'N (2010), http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html; *Status of State Review of ABA Model Code of Judicial Conduct (2007)*, AM. BAR ASS'N 1 (Jan. 10, 2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicial_status_chart.authcheckdam.pdf.

[9] *See* Model Code of Judicial Conduct Scope cmt. 7; Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1229 (2002).

independence, and the case law relating to the conduct of federal judges relies upon the standards in the Model Code, including each of the provisions cited in this Brief.[10]

Accordingly, this Brief discusses both the Canons contained in the Code of Conduct and the parallel Rules in the Model Code, as well as the case law interpreting § 455. Because the Code of Conduct is in some sense aspirational and not enforceable, it arguably imposes greater responsibility on federal judges who must adhere to the applicable principles, not so much because of a fear of discipline as because these principles are inherently critical to the integrity of the judicial process.

A. If the affidavits submitted by complainants are substantially correct, Judge Jones' alleged remarks violated Canons One and Two of the Code of Conduct and Canon One of the Model Code as they would undermine the independence, integrity and impartiality of the Judiciary

Under the Code of Conduct, judges must "uphold the integrity and independence of the judiciary," Code of Conduct for U.S. Judges Canon 1, and "avoid impropriety and the appearance of impropriety in all activities," Code of Conduct for U.S. Judges Canon 2A. Canon One of the Model Code also provides that a judge has an obligation to "uphold and promote the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." Model Code of Judicial Conduct Canon 1 (2011). Section 455 similarly recognizes the importance of an impartial judiciary, stipulating that a judge should disqualify himself in any proceeding in which he has a "personal bias or prejudice concerning a party" or in which "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a)(b)(1). The test under both the Model Code and the Code of Conduct essentially is whether reasonable people might see and hear the presentation and conclude "the judge's honesty, integrity,

[10] *See* Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* (2d ed. 2011); Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* (2003).

impartiality, temperament, or fitness to serve as a judge is impaired." Code of Conduct for U.S. Judges Canon 2A Commentary; Model Code of Judicial Conduct R. 1.2 cmt. 5; *see United States v. Microsoft*, 253 F.3d 34, 115 (D.C. Cir. 2001) ("Appearance [of impartiality] may be all there is, but that is enough to invoke the Canons and § 455(a)."). Thus, it is essential to examine not only whether a judge has demonstrated actual partiality or other impropriety, but also whether, to a reasonable outside observer, it *appears* that the judge has behaved inappropriately.

Judges must expect to be "the subject of constant public scrutiny," and consequently must accept "restrictions that might be viewed as burdensome by the ordinary citizen." Code of Conduct for U.S. Judges Canon 2A Commentary. Such a rigorous standard for the appearance of impropriety is essential because the public cannot maintain confidence in the courts—a crucial component of the rule of law—if it does not believe the courts to be models of independence, integrity, and impartiality. *See* Code of Conduct for U.S. Judges Canon 2A Commentary ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 Minn. L. Rev. 1914, 1962-63 (2010) ("[T]he judicial branch survives only because the public trusts the system . . . [and public] confidence is undermined by any conduct which diminishes society's belief in, or respect for, the independence, impartiality, fairness, integrity, honesty, uprightness, dignity or moral character of judges.").

As the Special Committee recognized, Judge Jones' alleged remarks concerning African Americans and Hispanics, if accurately reported, violated the Code of Conduct for U.S. Judges by reflecting adversely on Judge Jones' impartiality and eroding public confidence in the integrity and impartiality of the judiciary. Special Committee Report at 26. A judge who articulates a bias against ethnic groups raises significant ethical issues because such remarks can

cause a reasonable observer to believe that the judge will not fairly decide cases involving minorities. *See* Charles Gardner Geyh et al., *Judicial Conduct and Ethics* § 10.06(2) (5th ed. 2013). The affidavits supporting the Complaint show that Judge Jones proclaimed that blacks and Hispanics "sadly . . . do get involved in more violent crime" than other racial groups. Decl. A (Marc Bookman) ¶ 27; Decl. B (Joseph Sengoba) ¶ 13; Decl. C ¶ 13[11]; Decl. E (Chanel Lattimer-Tingan), ¶ 13, and that African Americans and Hispanics are "prone" or "predisposed" to commit more violent acts. *See* Decl. C ¶ 13; Dec. F ¶ 11. Furthermore, affiants attest that Judge Jones remarked it was a fact that there were a lot of Hispanics involved in drug trafficking, which in turn involved a lot of violent crime. Decl. A (Bookman) ¶ 28; Decl. B (Sengoba) ¶ 28; Decl. C, ¶ 13; Decl. D ¶ 12; Decl. E (Lattimer-Tingan) ¶ 13; Dec. F ¶ 11. The affidavits confirm that many event attendees were dismayed and offended by these remarks. *See*, *e.g.*, Decl. B (Sengoba) ¶ 35; Decl. E (Lattimer-Tingan) ¶ 14, 18; Decl. C ¶ 14; Decl. D ¶ 12; Decl. F ¶ 11. If accurately reported, Judge Jones' alleged generalizations about racial and ethnic groups would indicate, or at least give the impression, that she may be more inclined to find African American and Hispanic defendants guilty of these crimes.

Affiants' reports of Judge Jones' statements concerning intellectually disabled persons would similarly violate judicial ethical obligations to maintain impartiality. *See* Report p. 30. The affidavits accompanying the Complaint allege that Judge Jones condemned the "mentally retarded," for whom she believes it does a "disservice" to exempt from death sentencing. Decl. A (Bookman) ¶ 18; Decl. E (Lattimer-Tingan) ¶ 8. Furthermore, affiants allege Judge Jones discussed multiple cases involving "mentally retarded" defendants and expressed disgust at how

[11] Three of the students who provided declarations asked that their names not be publicly revealed. The complainants provided fully un-redacted versions to the Circuit Council, but for all others, including amici, those declarations are known by their letter designation.

these defendants "were using mental retardation" to avoid execution. Decl. A (Bookman) ¶ 19; Decl. B (Sengoba) ¶ 18; Decl. E (Lattimer-Tingan) ¶ 7; Decl. C, ¶ 9; Decl. D ¶ 9. The Special Committee recognized the serious ethical implications of these alleged remarks, leading the Committee to conclude that "if a judge were to say that all claims of intellectual disability are invalid or abusive, or were to 'express[] disgust at the use of mental retardation as a defense in capital cases,' there would be good reason to doubt that judge's ability to decide such cases impartially." Special Committee Report at 30. Indeed, in the mind of a reasonable person, if the affidavits supporting the Complaint are substantially correct, Judge Jones' words would reflect adversely on her impartiality, temperament and fitness to serve as a judge. Code of Conduct for U.S. Judges Canon 2A Commentary; Model Code of Judicial Conduct R. 1.2 cmt. 5 (2011).

B. If the affidavits submitted by complainants are substantially correct, Judge Jones' remarks would indicate that she is not performing her judicial duties impartially, competently, or diligently as required by Canon 3A(6) of the Code of Conduct and Canon Two of the Model Code

Impartiality and a lack of pre-judgment with respect to cases pending or impending before a sitting judge is an unassailable requirement of an impartial judiciary, as reflected in Canon 3A(6) of the Code of Conduct, which states that a judge "should not make public comment on the merits of a matter pending or impending in any court."[12] Rule 2.10 of the Model Code similarly prohibits judges from "mak[ing] any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending[] or impending[] in any court, or make any nonpublic statement that might substantially interfere with a fair trial or

[12] Unlike the Model Code Rule, the parallel federal Canon stipulates that "[t]he prohibition on public comment on the merits does not extend to . . . scholarly presentations made for purposes of legal education." Code of Conduct for United States Judges Canon 3(6). But the Commentary to this Canon also specifies that "[i]f the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A." *Id*. Commentary.

hearing." This principle is essential to the "maintenance of the independence, impartiality, and integrity of the judiciary." Model Code of Judicial Conduct R. 2.10 cmt. 1 (2011). A public comment by a judge concerning the facts, applicable law or merits of a case that is *sub judice* in her court "raise[s] grave doubts about the judge's objectivity and [her] willingness to reserve judgment until the close of the proceedings." William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 Geo. J. Legal Ethics 589, 598 (1989). Recognizing the significance of this ethical obligation, other circuit courts have disqualified federal judges for making public comments about cases pending before them, comments that put these fundamental values at risk.[13]

The Special Committee concluded that during her lecture, Judge Jones commented on five matters that were pending or impending in the Fifth Circuit, the U.S. Supreme Court, and Texas state courts. Special Committee Report at 52-59. The Special Committee, however, declined to discipline Judge Jones, arguing that the exception to Code of Conduct for U.S. Judges Canon 3A(6) for "scholarly presentations made for purposes of legal education" applies to Judge Jones' lecture. Special Committee Report at 65-68.

The Special Committee's reasoning on this point is problematic. The Committee acknowledged that the Code does not define "scholarly presentations" or "legal education." *Id.* at 65. Instead, the Committee focused on the lecture's venue and legal topic rather than the question of whether its substance was balanced or one-sided. *Id.* at 66. But applying the

[13] *See*, *e.g.*, *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *Hathcock v. Navistar International Transportation*, 53 F.3d 36, 41 (4th Cir. 1995) (disqualifying judge who gave a speech expressing hostility toward defendants and defense counsel in auto torts suits while a jury trial was pending against an automobile company); *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (noting that judge who stated that abortion protesters were breaking the law on national television "unmistakably conveyed an uncommon interest and degree of personal interest in the subject matter" such that it "created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters . . .").

Committee's construct, *any* presentation related to a legal subject at a venue related to the legal practice could be exempt from scrutiny under Canon 3A(6), enabling judges to freely comment on the merits of impending cases—regardless of whether the presentation is an objective and balanced presentation, or partisan advocacy, as long as it is presented in a university setting. The concern of amici is that by interpreting the scholarly presentation exception this broadly, the exception ends up swallowing the rule about extra-judicial comment—a rule critical to maintaining impartiality and the appearance of impartiality.

C. If the affidavits submitted by complainants are substantially correct, Judge Jones' statements would also conflict with the obligations of her judicial office and would consequently violate Canon Four of the Code of Conduct and Canon Three of the Model Code

Canon Four of the Code of Conduct stipulates that a judge should not "participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties . . . [or] "reflect adversely on the judge's impartiality." Code of Conduct for U.S. Judges Canon 4 (2011). Rule 3.1(C) similarly provides, in relevant part, that a judge engaging in extrajudicial activities shall not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." Model Code of Judicial Conduct R. 3.1(C). Although both the Model Code and the Code of Conduct expressly permit judges to participate in speaking engagements concerning the law,[14] "[d]iscriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality." Model Code of Judicial Conduct R. 3.1 cmt. 3. The comments to Rule 3.1 of the Model Code demonstrate that the Rule was intended to prohibit

[14] Model Code of Judicial Conduct R. 3.1 cmt. 3; Code of Conduct for U.S. Judges Canon 4(A)(1) ("A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.").

prejudicial statements, such as Judge Jones' alleged comments, described *supra* Part A; the examples in the comment include "remarks demean individuals based upon their race, . . . ethnicity, [or] disability." Model Code of Judicial Conduct R. 3.1 cmt. 3. If Judge Jones made discriminatory comments as alleged, these remarks would cast serious doubt about whether she could be impartial and act with integrity in deciding cases involving African Americans, Hispanics or the intellectually disabled.

Judge Jones' alleged remarks about the death penalty would also call into question her ability to decide capital cases impartially. Affiants assert that during her lecture, Judge Jones described the death penalty as "a service" for the "convicted killer." Decl. A (Bookman) ¶ 9. And using insulting terms to describe our adversary system, affiants testify that she stated it is a "complete joke" that the federal government has expended so much "time, money and effort . . . on capital cases," yet has secured only two death sentences under the federal death penalty statute. Decl. A (Bookman) ¶ 24; Decl. F ¶ 10; Decl. B (Sengoba) ¶ 23; Decl. D ¶ 11; Decl. E (Lattimer-Tingan) ¶ 11. If these comments were offered, they would reveal a strong personal bias in favor of the death penalty and would thus cast doubt on Judge Jones' ability to impartially decide capital cases.

Judge Jones' alleged remarks, if in fact accurately described, would also cast doubt on her impartiality by invoking and exploiting religion to support her legal positions. Affiants report that Judge Jones alluded to the death penalty's "ancient roots in Deuteronomy" and described how "a killer is only likely to make peace with God and the victim's family in that moment when the killer faces imminent execution, recognizing that he or she is about to face God's judgment." Decl. A (Bookman) ¶¶ 6, 9; Decl. B (Sengoba) ¶¶ 7, 10; Decl. C ¶ 7. They assert that Judge

Jones attempted to bolster the credibility of her own beliefs by announcing that the Vatican has taken the same position on capital punishment, Decl. A (Bookman) ¶ 9; Decl. D ¶ 5.

These are not the first allegations that Judge Jones has openly discussed religion as part of her legal philosophy. For example, at a 2003 Federalist Society event at Harvard Law School, Judge Jones reportedly stated that the Framers created our government with the understanding that the rule of law "was dependent on transcendent religious obligation" and that she hoped for a "revival of the original understanding of the rule of law and its roots." Geraldine Hawkins, *American Legal System is Corrupt Beyond Recognition, Judge Tells Harvard Law School*, MassNews (Mar. 7, 2003), http://www.massnews.com/2003_Editions /3_March/030703_mn_american_legal_system_corrupt.shtml.

Furthermore, in a June 2005 interview with *The American Enterprise* magazine, she remarked, "If you are responsible to God, no matter what religion you are in, you learn moral standards that transcend the dictates of the law." *"Live" with TAE: Edith Jones and Theodore Olson*, The American Enterprise, June 2005, at 17. These comments suggest that Judge Jones' religious beliefs unduly inform her legal outlook, thereby creating a perception that she decides cases based on personal predilections rather than upon logic, precedent or facts. *See* William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 Geo. J. Legal Ethics 589, 615 (1989). As a result, if true, Judge Jones' alleged statements, as reported in the affidavits accompanying the Complaint would damage public confidence in judicial impartiality.

CONCLUSION

The forgoing close analysis of the implications of the Special Committee's procedures and the asserted conduct of Judge Jones trigger amici's interest and concern that there must be even-handed application of the rules to all judicial conduct, but especially to those in leadership

positions like Judge Jones. When that analysis is viewed in light of the multiple infirmities in the adjudicatory process to date—the hidden documents and affidavits, the undisclosed investigation, the over use of the educational exception, and other matters raised persuasively in the principal brief—one can understand why amici viewed this situation of such importance as to submit this brief. In light of the flawed and opaque procedures used to evaluate the Complaint and the severity of the complainants' allegations against Judge Jones, amici request that the Special Committee produce the entire record and re-open the matter for the presentation of additional evidence.

Respectfully submitted,

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November 26, 2014

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
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December 10, 2014

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RE: In the Matter of Judge Jones (DC-13-90021)

Dear Mr. Fox:

The Committee on Judicial Conduct and Disability is in receipt of the Motion for Leave to File an Amicus Brief and Brief of Amici Curiae in Support of Petition for Review filed by the Ethics Bureau at Yale, et al. in connection with the above-captioned matter and transmitted to the Committee on November 26, 2014. The Committee would like to thank you and the additional amici curiae for your interest in assisting the Committee in considering this matter.

The Judicial Conduct and Disability Act precludes the Committee from granting any person the right to appear as amicus curiae in this matter. *See* 28 U.S.C. § 359(b) ("No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter."); *see also id.* § 331 (authorizing the Judicial Conference to exercise its authority regarding complaints against judges "through a standing committee" and providing that "all petitions for review shall be reviewed by that committee"). Accordingly, the Committee denies the Motion for Leave to File an Amicus Brief.

Sincerely,

Anthony J. Scirica