STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
DAVID M. BORDEN
SENIOR ASSOCIATE JUSTICE

231 CAPITOL AVENUE
HARTFORD, CT 06106

Testimony of Senior Associate Justice David M. Borden Government Administration and Elections Committee Public Hearing March 16th, 2007

Senate Joint Resolution 32, Resolution Proposing An Amendment To The State Constitution Concerning The Practices and Procedures Of The Courts

Good afternoon, Senator Slossberg, Representative Caruso, members of the Committee. I am David Borden, and I am the Senior Associate Justice of the Connecticut Supreme Court. I come before you today to discuss the Judicial Branch's concerns with **Senate Joint Resolution 32**, ***Resolution Proposing An Amendment to the State Constitution Concerning the Practices and Procedures of the Courts***.

The Judicial Branch strongly opposes this resolution, which would transfer from the judiciary to the legislature the power to make the procedural rules that govern court practice and procedure in the courts, including their openness and accountability to the public. We believe that the rule-making power should remain within the province of the judiciary, where it has been for

nearly two hundred years, since 1818 when our first Constitution created a separate and independent Judicial Department of government.

It is useful to this debate to understand just what we mean when we refer to the rule-making power. Rule-making is a detailed and arduous undertaking. There are more than 1100 rules of civil, family, juvenile, criminal and appellate procedure. These rules, which are published in the Connecticut Practice Book and are available on the Judicial Branch's website, are sets of instructions to the lawyers and judges that are designed to ensure a level playing field in the litigation process. Most of them involve specific matters that are of great importance to the fair and efficient operation of the litigation process but of limited interest to the general public, such as the procedures and time limits for a litigant to amend a complaint filed with the court.

The rules of practice are adopted by a vote of all our state judges at the Annual Meeting of the Judges of the Superior Court, which is open to the public. Prior to this vote, however, the Rules Committee of the Judges of the Superior Court – which also meets openly – holds a public hearing on proposed rules or amendments to rules. This hearing provides an opportunity for members of the public to appear and to voice their support for, concerns with, or opposition to the proposed rules. In fact, it is very similar to the procedure I am participating in here today. It affords a meaningful opportunity for the public, including the media, the bench, and the bar, to make suggestions or offer criticisms.

I believe that this framework ought to be maintained. Because the judges are the people who work with the rules every day, they have the detailed knowledge and every-day courtroom experience that is necessary for proper procedural rule-making. In addition, I believe that transferring the rule-making power to the legislature would subject that power to potential political factors that should not be involved in the formulation of our rules of court.

Does this mean that the judges have not, on occasion, made mistakes? No. We are human, and therefore we are fallible. But when that happens, we generally recognize our mistakes and take prompt action to correct them. I trust you have seen evidence of this over the past year.

This brings me to another reason why the state should not take the extreme step of enacting a constitutional amendment -- it is unnecessary. It has often and rightly been said that a constitutional amendment should be a remedy of last resort. I strongly urge to you that we are nowhere near that point of last resort. Recent issues, such as the super-sealing of cases and the delayed release of the GA 7 case, were not the result of any rules. And they have been appropriately addressed and resolved.

The reason often given by those who argue for a constitutional amendment on the rule-making power is to ensure that the courts are accountable to the people of our state. I submit that the courts *are* accountable to the people. Recently, the Judicial Branch has undertaken historic and unprecedented steps to enhance that accountability by increasing the openness,

transparency, and public accessibility of the courts. These steps will ensure that the courts are and remain appropriately accountable to the public that we serve, without compromising the courts' independence as the only non-political branch of government.

This past year, I created the Judicial Branch's Public Access Task Force and charged the members with making concrete recommendations for the maximum degree of public access to the courts, consistent with the needs of the courts in discharging their core functions of adjudicating and managing cases. My goal then, as it is now, was to ensure that our court system is open, transparent and accountable.

On September 15th, I was presented with 38 recommendations designed to maximize public access to the courts, 35 of which I subsequently endorsed. Since that date, many of the recommendations have been implemented, with still more to follow. For instance:

- The judges have voted overwhelmingly to open a number of judicial committees to the public. As noted above, these meetings include the Annual Meeting of the Judges of the Superior Court and the Rules Committee of the Superior Court. In addition, meetings of the Executive Committee of the Superior Court, the Appellate Rules Committee, and the Code of Evidence Oversight Committee, among others, have also been opened to members of the public. Furthermore, we have recognized that a number of other judicial committees and boards are subject to the Freedom

of Information Act, and we have taken steps to ensure that they comply with that legislation.

- Online access to the daily criminal dockets is now available on the Judicial Branch website.
- A Judicial-Media Committee consisting of judicial officials and electronic and print media representatives, designed to foster and improve the basic understanding and relationships between the media and the Judicial Branch, has been created and has recently met.
- Justices and judges of the Supreme and Appellate Courts have endorsed the task force recommendation that calls for increased electronic coverage of oral arguments. Furthermore, the Supreme Court has adopted a revised protocol for televised proceedings that is already in effect and makes them more easily viewable.
- Judges of the Superior Court will soon be considering a recommendation for greatly expanded electronic coverage of criminal proceedings, and greatly expanded television coverage of civil proceedings.

These are but a few of the many changes that have occurred over the last several months. I believe that the actions taken by the Judicial Branch generally, and the judges specifically, demonstrate our willingness to make our courts more accessible. I am confident that this movement will continue. Progress once started is difficult to derail.

In this connection, if there be any question that this momentous institutional and cultural change in the Judicial Branch will continue, I would like to put that question to rest. Although I, in my capacity as Senior Associate Justice--in effect, Acting Chief Justice--since April of last year, began this process of openness and accessibility, I am authorized by Judge Rogers, whom the Governor has nominated to be our next Chief Justice, to tell you that she fully supports this change and direction, and intends to continue it. Thus, there should no fear that this is a temporary thing. I am confident that it will be permanent and healthy--both for the Branch and for the public that we serve. At the least, I urge you to give us time to prove this to you and to that public.

Thus, I respectfully suggest that the adoption of a constitutional amendment now, in the immediate aftermath of last year's events, would be an unwise overreaction. I believe that a period of reflection and observation would be the wiser course. I urge you to wait and watch how the Judicial Branch operates in an open, transparent and accessible fashion.

The Judicial Branch's mission is to resolve matters brought before it in a fair, timely, efficient and open manner. We are committed to fulfilling this mission to the best of our abilities, and believe that in order to do so we must maintain the authority to adopt our Rules of Practice. Therefore, I respectfully request that the Committee not act favorably on this resolution.

Thank you for the opportunity to testify.