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BY FAX: 215-573-2025 (10 pages)

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BY CERTIFIED MAIL/RRR: 7003-1680-0001-8617-1122

April 28, 2008

Professor Stephen B. Burbank  
University of Pennsylvania Law School  
3400 Chestnut Street  
Philadelphia, Pennsylvania 19104

RE: Building Evidence-Based Scholarship on Federal Judicial Discipline  
(& Selection) – CJA’s March 6, 2008 Letter to the Chief Justice &  
Accompanying Critique of the Breyer Committee Report

Dear Professor Burbank:

Thank you for your e-mail response, confirming that, to your knowledge, The New York Times did not publish your May 27, 2004 letter to the editor about the committee appointed by Chief Justice Rehnquist to examine implementation of the 1980 Act. Enclosed is a copy of CJA’s April 25, 2008 letter to Mr. Sulzberger, highlighting the clarifying significance of your excellent letter, which I quoted in full, in addition to annexing a copy of the letter as it appears on American Judicature Society’s website.

It is now more than 1-1/2 years since Chief Justice Roberts released the Breyer Committee Report on the Implementation of the 1980 Act. What is your assessment of the Report? Have you done any critique of it?

As reflected by CJA’s letter to Mr. Sulzberger, we have done a critique of the Report, which we delivered to Chief Justice Roberts under a transmittal letter. On April 22, 2008, at the annual shareholders’ meeting of The New York Times Company, I publicly presented a copy of both the Critique and letter to Mr. Sulzberger to enable him to take action, consistent with The Times’ First Amendment responsibilities to inform the American People of what is therein

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\* The **Center for Judicial Accountability, Inc. (CJA)** is a national, nonpartisan, nonprofit citizens’ organization, documenting, by *independently-verifiable* empirical evidence, the dysfunction, politicization, and corruption of the processes of judicial selection and discipline on federal, state, and local levels.

chronicled: the corruption of federal judicial discipline and the pivotal role of our Supreme Court Justices.

CJA's Critique is expressly "in support of congressional hearings & disciplinary and criminal investigations" and demonstrates that the Breyer Committee Report is "a knowing and deliberate fraud on the public" and "no less methodologically-flawed and dishonest than the 1993 Report of the National Commission on Judicial Discipline and Removal, on which it substantially draws". It also shows that the federal judiciary's new rules for federal judicial discipline, based on the Breyer Committee Report, "violate and affirmatively misrepresent the congressional statute they purport to implement". Our accompanying March 6, 2008 letter to Chief Justice Roberts called upon him, as head of the Judicial Conference, to take corrective action to keep the federal judiciary's "house in order" without intervention of the other two governmental branches. To this, we received no response from the Chief Justice, either before or after the Judicial Conference's adoption of its new disciplinary rules on March 11, 2008. Rather, the only response we received was a non-responsive March 7, 2008 letter from Judicial Conference Secretary James Duff, to which we replied on March 10, 2008.

As one of this nation's leading scholars on federal judicial discipline and member of the now defunct National Commission on Judicial Discipline and Removal, would you be willing to give The Times the benefit of your expertise as to the significance of CJA's Critique and letter to the Chief Justice?

A copy of our letter to the Chief Justice is enclosed. It is also posted, with the Critique, on CJA's website, [www.judgewatch.org](http://www.judgewatch.org), accessible *via* the sidebar panel "Judicial Discipline-Federal". Upon your confirmation that you will confront the Critique's detailed factual and legal showing, I will forward you a hard copy, including of its Compendium of Exhibits and three free-standing file folders of further primary-source documents so that you can more conveniently answer the questions which, based on our letter to the Chief Justice and Critique, The Times should be asking scholars and organizations promoting judicial independence:

- (1) Do you agree that the federal judiciary's new rules for federal judicial discipline "violate and affirmatively misrepresent the congressional statute they purport to implement<sup>[fn]</sup>, 28 U.S.C. §§351-364, and do not comply with its requirement of 'appropriate public notice and an opportunity for comment' (§358), at least not in a meaningful, good-faith way"?

If so,

- (a) What is your view of the Judicial Conference's adoption of the rules on March 11, 2008?;
- (b) Do you agree that this is a matter properly brought to Congress'

attention?

(2) Do you agree that the Breyer Committee Report is superficial, “methodologically-flawed and dishonest”, and “a knowing and deliberate fraud on the public”?

If so,


(a) Do you agree that such warrants “congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline that currently exists”?;

(b) Isn't action by our other government branches, Congress and the President, even more compelled in light of the Chief Justice's failure to respond to CJA's March 6, 2008 letter – including by taking such action as Congress empowered the Judicial Conference to take, pursuant to 28 U.S.C. §331, to “hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority”?

If, due to conflicts of interest or other reasons, you are unable to answer these straight-forward, evidence-based questions, would you kindly furnish the names of other scholars who you believe would do so? Additionally, do you know of any scholars and/or organizations which have done their own critiques of the Breyer Committee Report? Certainly, The New York Times and the other recipients of my April 25, 2008 letter to Mr. Sulzberger should be interested in this information, as well.

Thank you.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Director  
Center for Judicial Accountability, Inc. (CJA)

cc: Arthur Sulzberger, Jr. & other recipients of CJA's April 25, 2008 letter

Enclosures: (1) CJA's April 25, 2008 letter Arthur Sulzberger, Jr.  
(enclosures by e-mail & mail)  
(2) CJA's March 6, 2008 letter to Chief Justice Roberts  
(by e-mail & mail)

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BY HAND: 4/28/08

April 25, 2008

Arthur Sulzberger, Jr., Publisher & Chairman  
The New York Times  
The New York Times Company  
620 Eighth Avenue  
New York, New York 10138-0258

RE: First Amendment Responsibilities:  
Informing the Public of the Corruption of Federal Judicial Discipline  
& the Pivotal Role of our Supreme Court Justices

Dear Mr. Sulzberger:

This is to reiterate my public request at the April 22, 2008 112<sup>th</sup> annual meeting of The New York Times Company shareholders for your supervisory oversight of Linda Greenhouse and the Washington Bureau, in discharge of the Times' First Amendment responsibilities to inform the public as to matters of legitimate public concern. At issue is systemic corruption of federal judicial discipline and the pivotal role therein of the Supreme Court Justices, as independently-verifiable from primary source documentary evidence.

The pertinent facts were publicly stated by me at the meeting. They are also reflected by my April 22, 2008 letter to Jeffrey Toobin, to which you are an indicated recipient and which I handed to The New York Times Company employee who approached me to take them on your behalf. I also handed her CJA's Critique of the Breyer Committee Report<sup>1</sup> and our transmittal

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<sup>1</sup> This includes the substantiating Compendium of Exhibits. Not included, but available upon request, are the Critique's three free-standing file folders of further primary source documents. The contents of these three folders, which are especially time-consuming to reproduce and assemble, are all posted on CJA's website, [www.judgewatch.org](http://www.judgewatch.org), as part of the Critique, accessible *via* the sidebar panel "Judicial Discipline-Federal". That is where this letter will also be posted, together with its substantiating enclosures pertaining to Times' news and editorial coverage of the Breyer Committee and its Report.

letter to Chief Justice Roberts – documents I publicly identified when I spoke.

For the benefit of Mr. Toobin and the other indicated recipients of my April 22, 2008 letter to him, I will reconstruct what I said at the shareholders meeting, based on my notes and recollection:

“Good morning. My name is Elena Sassower. I am one of the stockholders who bought Times stock not to realize a profit, but to have a voice in its promise of quality journalism, giving the news ‘without fear or favor’, in discharge of its First Amendment responsibilities to inform the public as to issues of legitimate public concern, so that it might intelligently self-govern in our democracy.

For more than a dozen years before that purchase in 2005, I demonstrated that commitment to the Times’ promise of quality journalism. In my capacity as coordinator of the Center for Judicial Accountability, Inc., a nonpartisan, nonprofit citizens’ organization, I alerted you, over and over, to the misconduct of your reporters and editors by their knowing and deliberate refusal to report on evidence of systemic governmental corruption involving judicial selection and discipline and our highest public officers. I continued to do that upon becoming the director of the Center for Judicial Accountability, and I do so here today.

Mr. Sulzberger, on January 13<sup>th</sup> of this year, in this very auditorium, there was a Times Talk lecture on the Supreme Court featuring Jeffrey Toobin in a conversation led by Linda Greenhouse. At the end of the conversation between the two, there was a question and answer period. Addressing myself to Ms. Greenhouse and Mr. Toobin, both, I asked the following question – which is short:

‘For nearly ten years there has been an impeachment complaint against the Supreme Court Justices pending, uninvestigated, in the House Judiciary Committee, detailing their cover-up of the corruption of federal judicial discipline. Would either of you consider writing about that impeachment complaint – and about the fraud on the public committed by Associate Justice Breyer by his 2006 committee report, presented to Chief Justice Roberts and by both of them to the American People, purporting that federal judicial discipline, reposed in the federal judiciary is – with the exception of ‘highly-visible’ complaints – working very well.’

Ms. Greenhouse would not respond – either to this straight-forward question or to my follow-up question as to whether she would be ‘open-minded’ enough to examine the evidence. She would not respond. There is a videotape of the exchange and you should view it, because it must be seen to be believed.

Last month, I delivered a critique of the Breyer Committee Report down to Washington with a transmitting coverletter to Chief Justice Roberts. I alerted both Ms. Greenhouse and the Times' Washington Bureau to these, but there has been no response. I have a copy of the Critique and letter for you – and I ask that you review them with reporters and editors and take steps so that the American People are properly informed.”

Consistent with my remarks at the April 22, 2008 shareholders meeting, I also ask that you examine the Times' news and editorial coverage of federal judicial discipline – both at the Supreme Court level and for the lower federal judiciary – so that you can make your own determination as to whether it delivers on the Times' promise of quality journalism. Certainly, it does not with respect to the Breyer Committee and its Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980, for which I believe the following marks the extent of coverage:

(1) an un-bylined seven-sentence article entitled “Rehnquist Orders Study on Ethics” (May 26, 2004), identifying its source as an announcement “in the May issue of the newsletter of the federal courts”, The Third Branch, and quoting Chief Justice Rehnquist's statement therein:

“There has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented and I decided the best way to see if there are any real problems is to have a committee look into it.”

The article does not explain anything about the 1980 Act, other than, inferentially, that it is about “federal judicial ethics”. The anonymous author's ignorance of the Act is then further manifested by his two-fold implication that the Breyer Committee would be reviewing the recusal practices of the Supreme Court Justices and that the “recent criticism” that elicited the Committee's creation was Justice Scalia's decision not to recuse himself from the case involving the Vice-President, with whom he had gone duck-hunting. In fact, the 1980 Act does not apply to the Justices and any competent reporter who did not already know this could have learned it by picking up a telephone to obtain more information about The Third Branch newsletter announcement, whose clear-as-a-bell title was “*Chief Judge Appoints Committee to Evaluate Judicial Discipline System*”<sup>2</sup> and whose text said nothing about “federal judicial ethics”;

(2) an editorial entitled “Judicial Ethics Under Review” (May 27, 2004), identifying no source for its implication that Chief Justice Rehnquist's

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<sup>2</sup> The Breyer Committee Report includes the announcement as its Appendix A and quotes its pertinent language at pages 1, 11, 122-123.

appointment of the Breyer Committee resulted from “widespread outrage” over Justice Scalia’s duck-hunting trip with Vice-President Cheney, thereafter exacerbated when Justice Scalia “was allowed to remain” on the Vice-President’s case. Nor does it identify any source for its claim that the Committee had been appointed to “look broadly at federal judicial ethics” and that this would reasonably encompass the Justices and their recusal practices. Certainly, from the editorial’s failure to mention the 1980 Act, it would seem that the editorial board never looked at the Times’ un-bylined May 26, 2004 article, let alone the referred-to announcement in The Third Branch;

(3) a letter to the editor by House Judiciary Committee Chairman F. James Sensenbrenner entitled “Judicial Ethics” (June 2, 2004), which, without expressly contesting the explanation in the editorial as to the origin of the Breyer Committee, stated that Chief Justice Rehnquist’s “appointment of a committee to review judicial ethics and discipline” was a response to Chairman Sensenbrenner’s “remarks before the Judicial Conference in March” (remarks which made no reference to Justice Scalia and the Supreme Court’s recusal practices).

Chairman Sensenbrenner’s published letter provided no clarification of the important issue of the scope of the Breyer Committee’s study<sup>3</sup> – unlike an unpublished letter by Professor Stephen Burbank<sup>4</sup> which meaningfully did, in a way so cogent as to make evident how off-base the Times editorial was:

“To the Editor,

‘Judicial Ethics Under Review’ (NYT, May 27, 2004)  
appears to proceed from an erroneous premise. Although the  
editorial states that Chief Justice Rehnquist appointed the

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<sup>3</sup> Chairman Sensenbrenner’s letter was less a response to the May 27, 2004 editorial than an excuse for him to chastise the Times for an editorial more than a year earlier and to posture that the House Judiciary Committee would “continue to fulfill its constitutional oversight of the federal judiciary”. Indeed, his claim that the Times’ earlier editorial had criticized the House Judiciary Committee for inquiring into a judge’s “admittedly illegal sentencing practices”, resulted, four days after the Times published his letter, in its publishing a further letter, “*A Judge’s Record*”, on June 6, 2004, this one from the judge’s attorney, denying that the judge had made any such admission.

<sup>4</sup> Professor Burbank’s proposed letter to the editor, dated May 27, 2004 – the same date as the editorial – included his credentials as follows: “The writer is David Berger Professor for the Administration of Justice, University of Pennsylvania Law School, was a member of the National Commission on Judicial Discipline and Removal, whose report was made in 1993, and serves as chair of the Judicial Independence and Accountability Task Force of the American Judicature Society.”

committee ‘to look broadly at federal judicial ethics,’ my understanding is that the committee’s inquiry will concern chiefly, if it is not confined to, experience under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. That statute does not apply to Justices of the Supreme Court of the United States; moreover, its intended reach (conduct harmful to the administration of justice) only partially overlaps with ‘judicial ethics’ as commonly understood.

The Chief Justice’s remarks upon appointing the committee specifically refer to the 1980 Act and to recent criticism of its implementation by members of Congress. In any event, it is inconceivable (at least to me) that the Chief Justice would appoint a committee composed primarily of members of lower courts to look into the practices of the Supreme Court or the Justices thereof.

There may be good reason to inquire about the recusal practices of the Justices, but I do not believe that your readers should expect any recommendations on that subject from this committee.”

(4) a five-sentence item by Linda Greenhouse in “National Briefing-Washington” entitled “Judicial Complaint Committee Meets” (June 11, 2004), not identifying its source, but seemingly drawn from the Supreme Court’s June 10, 2004 press release announcing the Breyer Committee’s organizational meeting. Ms. Greenhouse purported that “When the committee was announced last month, its mission was widely misunderstood to be a review of judicial ethics”. She neither explained why its mission should have been “widely misunderstood” – nor acknowledged that such characterized both the Times’ May 26, 2004 article, “*Rehnquist Orders Study on Ethics*”, and its May 27, 2004 editorial, “*Judicial Ethics Under Review*”, or that these had doubtlessly widened the misunderstanding. She then quoted Justice Breyer as saying that the Committee’s task was the “narrow but important one” of evaluating the efficacy of the 1980 Act for handling complaints of judicial misconduct, which she took from the press release, without including its further clarification that the Act does “[not] apply to the Supreme Court”, thereby continuing the misimpression that it does;

(5) an article by David D. Kirkpatrick entitled “*Republican Suggests a Judicial Inspector General*” (May 10, 2005),<sup>5</sup> containing a single sentence, at the very

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<sup>5</sup> It appears that The Times did not publish further articles on this important issue of an inspector general for the federal judiciary – not a year later, when Chairman Sensenbrenner and Senator Charles Grassley actually introduced bills in the House and



end of the article, paraphrasing and quoting Chairman Sensenbrenner as stating that he “was working with a panel led by Justice Stephen G. Breyer of the Supreme Court to review ‘the ethical state of the judiciary’ and ensure that judges were ‘properly policing their behavior’ as previous Congressional action intended.”

(6) an article by Linda Greenhouse entitled “Federal Judges Take Steps to Improve Accountability” (September 20, 2006), whose first half described two remedial Judicial Conference actions, noting that the Judicial Conference’s “jurisdiction does not extend to the Supreme Court”. Only then did Ms. Greenhouse give 11 sentences to the Breyer Committee Report and its recommendations for improving the handling of complaints filed under the 1980 Act, without revealing that the 1980 Act does not apply to the Justices. Identifying the Report as 183 pages long and quoting Chief Justice Roberts as stating that it is a “very important step on the judiciary’s behalf in responding to criticism”, Ms. Greenhouse conveyed the impression that the Report is a substantial, credible document. Indeed, none of Ms. Greenhouse’s 11 sentences analyze the Report’s methodology, findings, or recommendations, let alone contain the slightest critical or even skeptical comment. Most likely, Ms. Greenhouse wrote these 11 sentences without even reading the Report – but, rather, drawing upon the Supreme Court’s September 19, 2006 press release, supplemented by what Chief Justice Roberts and Justice Breyer said about the Report at the press briefing, held at the Supreme Court.

Despite the Times’ powerful words in its May 27, 2004 editorial:

“Judicial ethics are too important to fall prey to self-protectionism or to partisanship. Congress and the public should watch closely and insist that any changes raise the standard of judicial conduct.”,

Times coverage of the Breyer Committee Report – including by its March 12, 2008 four-sentence A.P. item, “*More Information on Judges*”, in its “National Briefing-Washington” – has prevented the public from understanding the fraud committed upon it by the federal judiciary – and that, fundamentally, in the average case garnering no press scrutiny, there are no enforceable standards of judicial conduct and federal judicial discipline is non-existent. Indeed, in the more than 1-1/2 years since release of the Breyer Committee Report, Ms.

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Senate, which was on April 27, 2006, not two months later, when the House Judiciary Committee held a June 29, 2006 hearing on the House bill – at which three scholars testified, two in favor – and not on January 31, 2007, when Chairman Sensenbrenner and Senator Grassley re-introduced amended bills. Nonetheless, on May 18, 2006, the editorial board weighed in with an editorial in opposition, “*Judges Should Police Themselves*”, followed, on May 22, 2006, by a supportive letter to the editor, “*A Blind Eye on Judges*”, by Professor Monroe Freedman.

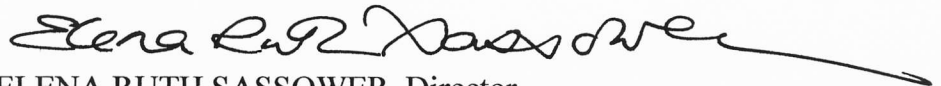
Greenhouse and the Times have NOT seen fit to examine its content, have NOT interviewed any members of Congress about it, have NOT interviewed any of the usual scholars and organizations, and, of course, have NOT contacted CJA for our document-supported perspective. Certainly, I have found no Times articles or editorials providing Congress and the public with the information they most need as to federal judicial discipline.

As I have done repeatedly in the past, I again offer to meet with you and/or such Times reporters and editors as you may designate. I would welcome the opportunity to answer questions and to facilitate your understanding of CJA's March 6, 2008 Critique and letter to the Chief Justice, so that the Times may discharge its First Amendment responsibilities to the American People to inform them of the corrupted state of federal judicial discipline, imperiling our democracy and destroying the rule of law and countless innocent lives.

Law Day, May 1, 2008 – less than a week away – marks a milestone: the 50-year anniversary of that national celebration of our nation's dedication to the rule of law in a free society. I would appreciate the courtesy of hearing from you by then.

Thank you.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Director  
Center for Judicial Accountability, Inc. (CJA)

Enclosures: referred-to New York Times items, articles, editorials  
& unpublished letter of Professor Stephen Burbank,  
along with:

The Third Branch newsletter announcement: May 2004

Supreme Court press releases: June 10, 2004 & September 19, 2006

House Judiciary Committee Chairman Sensenbrenner's March 17, 2004  
remarks to the Judicial Conference

cc: The New York Times:

Bill Keller, Executive Editor

Jill Abramson, Managing Editor for Newsgathering

Andrew Rosenthal, Editorial Board Editor, for the Editorial Board

Dean Baquet, Washington Bureau Chief

Outgoing Supreme Court Reporter Linda Greenhouse

Incoming Supreme Court Reporter Adam Liptak

Jeffrey Toobin, Esq.

David Margolick, Esq.

Institute for the Study of the Judiciary, Politics, and the Media