Subject: **SUPPLEMENT TO STORY PROPOSAL: The Supreme Court's Practices, Policies & Procedures for Recusal**
Date: 3/3/2004, 4:51 PM
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Organization: Center for Judicial Accountability, Inc.

Based on Tony Mauro's "Courtside" column, "*Decoding High Court Recusals*" (3/1/04 Legal Times), the attached memo to him supplements and reinforces CJA's March 1, 2004 story proposal.

Please advise as to your interest as soon as possible. I will call each of you next Monday, unless I hear from you sooner.

Thank you.

Elena Ruth Sassower, Coordinator
Center for Judicial Accountability, Inc. (CJA)
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P.S. Non-substantive and typographic changes have been made to the March 1, 2004 story proposal, which is attached hereto. It is already posted on the homepage of CJA's website, *www.judgewatch.org*, on which all relevant correspondence is posted.

3-1-04-recipents-lubet.doc (41KB) 3-3-04-mauro.doc (50KB)

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DATE: March 3, 2004

TO: Tony Mauro, Accredited Supreme Court reporter for Legal Times
[tmauro@legaltimes.com]

FROM: Elena Ruth Sassower, Coordinator
Center for Judicial Accountability, Inc. (CJA)

RE: Supplementing & Reinforcing CJA's March 1, 2004 story proposal:
your "Courtside" column, "*Decoding High Court Recusals*",
Legal Times, 3/1/04

Your excellent column, "*Decoding High Court Recusals*", confirms the suspicion expressed in my February 25th letter to Professor Steven Lubet – transmitted to you with CJA's March 1st story proposal -- that the Supreme Court does NOT use the word "recuse" or "disqualify" in its summary orders denying cert petitions. Rather, it uses the euphemism "took no part" – from which a justice's "recusal" is presumed.

These summary orders apparently ALSO conceal whether the justice "tak[ing] no part" is doing so *sua sponte* or upon a party's recusal application – or so it would seem from your article. Indeed, absent from the 2816 cumulative "recusals" which you tabulate for the Court's nine justices over their more than 159 plus years on the bench is any "guesswork" as to how many of these were pursuant to a party's recusal application.

Statistical information as to successful recusal applications is critical – as is information as to the Court's practices, policies and procedures with respect thereto. For starters, does the Clerk's office maintain a list of these successful applications? If not, are they entered on the dockets of the individual cases to which they relate so that review of the 2816 dockets would reveal their number? Are these successful recusal applications permanently retained as part of the case file – and can they be requisitioned for examination as to their content?

Whatever the number of these successful recusal applications, they are presumably dwarfed by the number of unsuccessful recusal applications. What are the Court's practices, policies, and

procedures with respect to these? Do the justices issue orders denying the unsuccessful applications – or do they simply not act on them, as with the September 23, 1998 disqualification/disclosure application underlying CJA's *uninvestigated* November 6, 1998 impeachment complaint against the justices. What determines whether a justice will not act on a recusal application, rather than deny it? Are both categories of unsuccessful recusal applications not docketed by the Clerk's office – or is it just the not-acted-on applications? Are not-docketed applications preserved as part of the case file – or are they returned, as the Clerk's office attempted to do with the September 23, 1998 disqualification/disclosure application. Certainly, unless the Clerk's office keeps a list of these undocketed recusal applications – indeed a list of all unsuccessful recusal applications – their numbers cannot be gauged, let alone their contents examined.

That Chief Justice Rehnquist's January 26, 2004 letter to Senators Leahy and Lieberman specifically asserted that "any party to a case may file a motion to recuse" – implying that such are dealt with appropriately – reinforces the importance of ascertaining the number of recusal applications and the manner in which they are handled by the Court.

As for Professor Lubet, nearly a month has passed since my February 6th voice mail message first alerted him to the September 23, 1998 disqualification/disclosure application, posted on CJA's website with the other pertinent documents underlying CJA's November 6, 1998 impeachment complaint. This is more than ample time for him to have formed an opinion about the manner in which the Court handled it. Certainly, one does not need to be a judicial ethics expert to immediately recognize that it is profound misconduct for any court -- not to mention our nation's highest -- to wilfully ignore, without adjudication, an application relating to its disqualification and for disclosure and to conceal such non-adjudication by omitting the very existence of the application from the case docket.

Although your article does not specify Professor Lubet as one of the "Court-watchers" who think "nothing will change", surely "nothing will change" so long as "Court-watchers" and others in leadership in the academic and legal community ALL fail to meet their ethical and professional duty to confront the *readily-verifiable* evidence of corruption presented by CJA's *uninvestigated* November 6, 1998 impeachment complaint.

IF Professor Lubet is NOT willing to publicly comment on this *uninvestigated* impeachment complaint and on CJA's February 12, 2004 letter to Chief Justice Rehnquist based thereon – which is the inference reasonably drawn from his failure to respond to my February 25th letter and my two voice mail messages that preceded it -- you must turn to other "Court-watchers"

for their public comment as to these plainly explosive documents. Such should include Professor Monroe Freedman, referred-to by your article as a judicial ethics expert who "in the past described Scalia as a justice who 'tries pretty hard' to recuse when appropriate."

At the same time, you should clarify from these "Court-watchers" – constitutional scholars doubtlessly among them -- that they do not regard the Court as having a "unique status above review" – which is how your article makes it appear. Obviously, and as evident from CJA's November 6, 1998 impeachment complaint, Congress has the constitutional power to impeach the justices, thereby reviewing their serious official misconduct. Further, Congress has expressly legislated disqualification standards binding upon the justices by its enactment of 28 U.S.C. §455. Indeed, although your article states that the Judicial Conference's Code of Judicial Conduct does "not apply to the Supreme Court" – its Canon 3C pertaining to disqualification and disclosure is essentially 28 U.S.C. §455.

Finally, insofar as your article alludes to the judicial misconduct complaint mechanism under the 1980 Act, which Congress, in deference to the Court, did not make applicable to the justices, the inference is that this disciplinary mechanism for the lower federal judiciary affords review of a judge's decision (or lack thereof) with respect to recusal. Such is NOT the case because the lower federal judiciary, aided and abetted by the justices, have reduced this important statutory remedy[1], as likewise the remedy of judicial disqualification under 28 U.S.C. §§455 and 144, to "empty shells". This is so-reflected and encompassed by CJA's November 6, 1998 impeachment complaint against the justices.

cc: Professor Steven Lubet
Professor Monroe Freedman
Recipients of CJA's March 1, 2004 story proposal

[1] The 1980 Act, originally codified as 28 U.S.C. §372(c), is now codified at 28 U.S.C. §351 *et seq.* by virtue of the "Judicial Improvements Act of 2002". The insignificant modifications therein made do NOT address the federal judiciary's "gutting" of the statute. The brazen hoax perpetrated on Congress and the American People by the House Judiciary Committee in fashioning this "Judicial Improvements Act of 2002" and by its November 29, 2001 "hearing" on the "operations of federal misconduct statutes" that preceded it is chronicled by the primary source documents referred-to in the footnote of CJA's February 17, 2004 covermemo to the indicated congressional recipients of CJA's February 12, 2004 letter to Chief Justice Rehnquist. These primary source documents – all posted on CJA's website (*see* "*Correspondence-Federal Officials*") -- include CJA's July 31, 2001, September 4, 2001, July 30, 2002, and July 31, 2002 correspondence to House Judiciary Committee counsel. *Also,* CJA's June 4, 2003 letter/memo to Senator Kennedy (at pp. 5-10).