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BY FAX & E-MAIL (3 pages)

DATE: June 26, 2007

TO: American Civil Liberties Union of the National Capital Area
ATT: Johnny Barnes, Executive Director
Arthur B. Spitzer, Legal Director

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

RE: Championing Basic Citizen Rights, the Vital Importance of Citizen Participation in Federal Judicial Selection, and Fundamental Judicial Accountability by Your A*micus Curiae* Support for U.S. Supreme Court Review of the Cert Petition in the "Disruption of Congress" Case *Elena Ruth Sassower v. United States of America*

This follows up my several telephone calls since June 13th (202-457-0800) – including on June 20th, when I briefly spoke to Mr. Barnes about my request for an *amicus curiae* brief from the American Civil Liberties Union of the National Capital Area in support of U.S. Supreme Court review of the petition for a writ of certiorari in the "disruption of Congress" case *Elena Ruth Sassower v. United States of America*, to be filed on August 17, 2007. Specifically, I requested an *amicus* brief as to the unconstitutionality of the disruption of Congress statute – D.C. Code §10-503.16(b)(4) – *as written and as applied*, so as to vindicate:

> "the elementary proposition that 'a citizen's respectful request to testify at a public congressional hearing is not – and must never be deemed to be – 'disruption of Congress'".

This proposition is at the heart of our democracy and the First Amendment – and it was to vindicate it that I sought your legal assistance back in 2003, when I was first arrested and the case was in D.C. Superior Court. Likewise, when I sought your *amicus* assistance in 2005, when I was perfecting my appeal to the D.C. Court of Appeals.[1]

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* The **Center for Judicial Accountability, Inc. (CJA)** is a national, non-partisan, non-profit 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.

[1] You don't have to search your files to review my correspondence with you pertaining to these requests. It is conveniently posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Searching

That my challenge to the "disruption of Congress" statute is dispositive of its unconstitutionality, both *as written and as applied*, may be seen from the most cursory comparison of Point III of my appellant's brief, a copy of which I attach, and the D.C. Court of Appeals' December 20, 2006 Memorandum Opinion and Judgment. These two documents – indeed the entire appellate record in the D.C. Court of Appeals – are posted on CJA's website, www.judgewatch.org, where they are accessible *via* the sidebar panel "'Disruption of Congress'-The Appeal". A summary of the fraud committed by the D.C. Court of Appeals to conceal that it could not meet this constitutional challenge appears at pages 7-10 of my petition for rehearing and rehearing *en banc* of the Memorandum Opinion and Judgment, which was combined with a motion to vacate it for fraud and lack of jurisdiction, for disqualification and disclosure by the D.C. Court of Appeals judges, and for transfer of the case to the U.S. Court of Appeals for the District of Columbia.

My already drafted cert petition chronicles how the D.C. Court of Appeals – like the D.C. Superior Court before it – abandoned ALL cognizable legal standards to avoid adjudicating that my respectful request to testify with "citizen opposition" at the Senate Judiciary Committee's May 22, 2003 public hearing, as established by a videotape,[2] could not possibly be deemed "disruption of Congress" without rendering the statute unconstitutional. I attach the draft petition to assist you in further evaluating the transcending importance of this case and your *amicus curiae* role before the Supreme Court. This includes with respect to the issues of judicial misconduct and corruption in D.C. Superior Court and at the D.C. Court of Appeals, entitling me to venue in the U.S. District Court for the District of Columbia pursuant to D.C. Code §10-503.18 – the subject of Point II of my appellant's brief – as well as the legality and constitutionality of the trial judge's probation conditions and of the superseding six-month jail sentence he imposed upon me when I exercised my right to decline probation under D.C. Code §16-760.

Needless to say, I would greatly welcome the benefit of your guidance, suggestions, and expertise in making necessary revisions and improvements.[3]

In the event you will not provide me with either an *amicus curiae* brief or legal assistance in revising and improving the cert petition, I request your recommendations of other organizations, prominent law professors, and/or attorneys who might be favorably disposed to champion the public interest by an *amicus* brief. I also request that you alert your abundant media and academic contacts to this case so that it can more promptly and fully meet its history-making and law-making potential.

Please let me have your response by no later than July 5, 2007 so that there will be sufficient time for me to contact the ACLU's national leadership and for them to undertake appropriate review.

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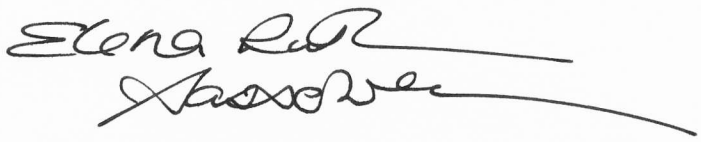
for Champions (Correspondence) – Organizations".

[2] The videotape has long been in your possession. I sent it to you, at your request, under my July 21, 2003 coverletter to support my request for legal assistance and my July 7, 2003 memo-analysis of the underlying prosecution documents.

[3] The draft petition is a "work in progress", being constantly revised. Check CJA's website for the latest superseding revised draft – accessible *via* "Latest News" and "'Disruption of Congress'-The Appeal".

Thank you.



E-Mail Enclosures: (1) Point III of appellant's brief
(2) draft cert petition

cc: Fritz Mulhauser, Staff Attorney
Dahlia Lithwick/Slate
Lyle Denniston/Scotusblog
Professor Jonathan Turley
Professor Andrew Horwitz

Sassower's rights under D.C. Code §10-503.18 were presented for the first time by her March 22, 2004 motion [A-375]. Her interpretation of D.C. Code §10-503.18 was drawn from the plain meaning of its language [A-401-2] and not denied or disputed by the prosecution's March 23, 2004 opposition [A-464]. Judge Holeman's March 29, 2004 order [A-466] disposed of the issue by falsely purporting that Sassower had presented "no...change in substantive law, nor citation of any legal authority supportive of the requested relief" [A-466-7].

ISSUE III

D.C. CODE §10-503.16(B)(4) IS UNCONSTITUTIONAL, AS WRITTEN & AS APPLIED

The Statute is Unconstitutional as Written

In *Armfield v. United States*, this Court quoted the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), as to the standard by which speech and expressive conduct in public places might be restricted, consistent with the First Amendment:

> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

This "crucial question" – which Judge Holeman quoted in his "Elements of the Offense", citing *Armfield* [A-1403] -- makes obvious that a citizen's respectful request to testify at a public congressional hearing – as at bar -- cannot be prosecuted under D.C. Code §10-503.16(b)(4). Quite simply, such request is compatible with the "normal activity" of a public congressional hearing, *to wit*, the taking of testimony, including from members of the public.

The essential and necessary role of citizen participation in this "normal activity" as relates to the Senate Judiciary Committee's public hearings to confirm federal judicial nominees

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what it did on her motions for release from incarceration pending appeal, on her perfected emergency appeal, *[and on the motions and en banc petition she filed in connection with her June 28, 2005 brief – all chronicled by her October 14, 2005 motion]*.

– at issue herein – was reflected in the record before Judge Holeman, including Sassower's 39-page May 21, 2003 fax to Detective Zimmerman [A-102]. That fax, the dispositive document in Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-39], referenced and quoted from a variety of sources with respect to citizen participation [A-122, 128 (fn. 6)]: the 1986 Common Cause report, Assembly-Line Approval [A-1587], the 1988 Twentieth Century Fund book, Judicial Roulette [A-1595], and the 1975 book by the Ralph Nader Congress Project, The Judiciary Committees [A-1579] whose chapter, "*Judicial Nominations: Whither 'Advice and Consent'?*", described a confirmation hearing at which the presiding chairman inquired "if anyone in the room wished to speak on behalf of or against the nominee" [A-1584, 128 (fn. 6)] – a hearing not represented to be atypical in that or any other respect.

From *Grayned*, it is clear that D.C. Code §10-503.16(b)(4), as written, is unconstitutional. Whereas the anti-noise statute upheld in *Grayned* involved noise "adjacent" to a school while in session – in other words, was explicitly restricted to a single "particular place at a particular time" -- D.C. Code §10-503.16(b)(4) is not narrowly-tailored to a public congressional hearing. Rather, it reads:

> "(b) It shall be unlawful for any person or group of persons willfully and knowingly:
>
> * * *
>
> (4) To utter loud, threatening, or abusive language, or to engage in any disorderly or disruptive conduct, at any place upon the United States Capitol Grounds or within any of the Capitol Buildings, with intent to impede, disrupt, or disturb the orderly conduct of any session of the Congress or either House thereof, or the orderly conduct within any such building of any hearing before, or any deliberations of, any committee or subcommittee of the Congress or either House thereof."

It thus combines more than a single "particular place at a particular time". More significantly, it combines places having divergent "normal activity". The "normal activity" of sessions of Congress and either House, as likewise of their committee/subcommittee

deliberations, consists of communications between and among the members of those bodies – with the public having no role [14] . By contrast, the "normal activity" of public committee/subcommittee hearings is the taking of testimony from non-members of Congress – frequently members of the public.

Exacerbating this facial unconstitutionality of D.C. Code §10-503.16(b)(4) is the absence of any caselaw with respect to its combination of places with disparate "normal activity". Indeed, neither this Court's decision in *Smith–Caronia v. United States*, 714 A.2d 764 (1998), upholding the constitutionality of the language thereafter recodified as D.C. Code §10-503.16(b)(4), nor its decision in *Armfield* resting thereon, have anything to do with committee/subcommittee hearings – or any conduct which would be compatible with same. *Smith-Caronia* and *Armfield* involved conduct in the galleries of the Senate and House respectively, which had it been committed during a committee/subcommittee hearing, may also have been deemed disruptive. Those cases, because they arise from conduct in the galleries where citizens are invited only to observe, never participate, do not control and have little to do with the constitutional challenge to D.C. Code §10-503.16(b)(4) here presented arising from a public congressional hearing. Nor do they control for a further reason: in *Smith-Caronia* and *Armfield*, the respective "disruptions" occurred while the Senate and House were in session.

Obvious from *Smith-Caronia* and *Armfield* (at 798) is that there can be no "disruption of Congress" if the congressional body is adjourned because its "normal activity" has then ceased. *Smith-Caronia* explicitly rests on this Court's decision in *District of Columbia v. Gueory*, 376 A.2d 834 (1977). It describes that case as one in which the Court "sustained against First Amendment challenge an almost identically worded Commissioner's order", construing its

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14 "The public is admitted to the gallery to observe, nothing more", *Smith-Caronia*, at 765.

language as "prohibiting only 'actual or imminent interference' with the peaceful conduct of governmental business." As evident from *Gueroy* (at 837), the standard of "actual or imminent interference' with the peaceful conduct of governmental business" is derived from *Grayned*, where the Supreme Court upheld a statute which unambiguously contained a time restriction for school while "in session".

To the extent there is ambiguity that the language "any session of the Congress or either House thereof" means "in session", with proceedings in progress and not adjourned – and that this applies, as well, to the language "any hearing before...any committee or subcommittee of the Congress or either House thereof", D.C. Code §10-503.16(b)(4) is facially deficient.

From the discussion in *Smith-Caronia* as to why the language that is now D.C. Code §10-503.16(b)(4) "comfortably meets" the standards of facial constitutionality (at 766) – a discussion largely resting on *Gueory* -- it is evident that D.C. Code §10-503.16(b)(4), is unconstitutional as applied to the facts of this case. Thus, although the statute is "viewpoint-neutral on its face", it can, as here, readily lend itself to being utilized for discriminatory, selective, and retaliatory purposes. Although the statute also "leav[es] open ample means of communication not calculated to disrupt the orderly conduct of the legislature's business", no effective alternative means of communication is, in fact, available. Nor does this case support the proposition that the statute only prohibits "loud speech and other acts both of a nature to and specifically intended to disrupt the businesses of Congress". Moreover, as stated in *Gueory* (at 838), "It has long been recognized that a requirement of knowing conduct can serve to narrow a statute attacked on overbreadth and vagueness grounds" and "Intent requirements have also narrowed statutes attacked specifically under the First Amendment on overbreadth and vagueness grounds." That being the case, this Court's admission in *Armfield* (at 797-8) that it has "not squarely addressed the question of what kind of evidence is required to establish the specific intent necessary for

conviction" under the "disruption of Congress" statute means that D.C. Code §10-503.16(b)(4) has been not been appropriately narrowed.

The Statute is Unconstitutional as Applied

The instant case is unprecedented. No decisions have been located with any facts remotely resembling those at bar: a citizen arrested and prosecuted under the statutory provision that is now D.C. Code §10-503.16(b)(4) for respectfully requesting to testify at a public congressional hearing, where, additionally, the request is made after the hearing has been "adjourned" and where the record shows that "alternative channels of communication" to the pertinent members of Congress and congressional offices were exhausted prior thereto.

Precisely because the facts of this case do not support a prosecution under D.C. Code §10-503.16(b)(4), they were concealed and falsified by Capitol Police in materially false and misleading prosecution documents in which the U.S. Attorney was complicitous. Such concealment and falsification is established by the videotape of the Senate Judiciary Committee's May 22, 2003 hearing and further buttressed by Sassower's "paper trail" of correspondence [A-102-140, 1431-1539, 142-148], most specifically, by her 39-page May 21, 2003 fax to Detective Zimmerman [A-102] and her May 28, 2003 memorandum to Senate Judiciary Committee Chairman Hatch and Leahy [A-142] – each pivotal documents in her October 30, 2003 discovery/disclosure/sanctions motion [A-39].

The U.S. Attorney never came forward with any decisional law criminalizing what the videotape and substantiating "paper trail" evidentiarily establish -- a citizen's respectful request to testify at a public congressional hearing, made after the hearing was announced "adjourned" and against a record establishing that her repeated efforts to communicate with the Senators and/or supervisory staff by alternative means were all unavailing. Nor did the U.S. Attorney

make any production with respect to the very first item in Sassower's August 12, 2003 first discovery demand [A-70] for:

> "(1) Any and all records of arrests by Capitol Police of members of the public for requesting to testify in opposition to confirmation of federal judicial nominees at Senate Judiciary Committee hearings -- particularly where the arrestee was charged with 'disruption of Congress' (10 D.C. Code Section 503.16(b)(4))".

Indeed, the precedent for Capitol Police's handling of a citizen's respectful request to testify at a Senate Judiciary Committee confirmation hearing was supplied by Sassower herself: the Committee's June 25, 1996 confirmation hearing at which, prior to adjournment, Sassower had risen to respectfully request to testify with "citizen opposition". She was neither arrested nor even removed from the hearing room.

In *Grayned*, the Supreme Court laid out three grounds for striking a law as unconstitutionally vague:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[fn. 3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[fn. 4] A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[fn. 5] Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,'[fn. 6] it 'operates to inhibit the exercise of those freedoms.'[fn. 7] Uncertain meanings inevitably lead citizens to ''steer far wider of the lawful zone'...than if the boundaries of the forbidden areas were clearly marked.'[fn. 8]" (at 108).

The record of this case establishes each of these three grounds.

First, D.C. Code §10-503.16(b)(4) is plainly an impermissible "trap [for] the innocent". There is nothing in its generic language that would lead "a person of ordinary intelligence" to believe that a respectful request to testify at a public congressional hearing – made at an

appropriate point of the hearing -- is prohibited conduct. Reflecting Sassower's good-faith, reasonable belief as to what was permissible[15] is her 39-page May 21, 2003 fax to Detective Zimmerman [A-102] – also sent to Senate Judiciary Committee Chairman Hatch and Ranking Member Leahy, and New York Home-State-Senators Schumer and Clinton. Such fax presented her contention, based on prior Senate Judiciary Committee precedent cited in the 1975 book of The Ralph Nader Congress Project [A-1584], that the presiding chairman at the May 22, 2003 hearing could and should inquire whether anyone present wished to testify and that, if he did not, she had "a citizen's right in a democracy to peaceably and publicly request to testify in opposition". None of the recipients of the May 21, 2003 faxes denied or disputed this – let alone responded that she would be liable for arrest and prosecution if she made such respectful request – and that D.C. Code §10-503.16(b)(4) would furnish a legal basis therefore.

Certainly, if such respectful request warranted arrest under D.C. Code §10-503.16(b)(4), Sassower should have been arrested at the June 25, 1996 hearing for her respectful request to testify with "citizen opposition". That she was not arrested only reinforced her good-faith, reasonable belief as to the lawfulness of any similar request as she would make at the May 22, 2003 hearing -- and here too the recipients of the May 21, 2003 faxes did not respond to the contrary.

Second, D.C. Code §10-503.16(b)(4) lends itself to arbitrary and discriminatory enforcement by its failure to "provide explicit standards for those who apply [it]." This is evident from the incidents to which Sassower referred at the June 28, 2004 sentencing [A-1721], of

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[15] A defendant's "bona fide belief" in the lawfulness of his actions "may negate criminal intent, and thereby exonerate behavior which otherwise contravenes the [criminal] statute", *Leiss v. United States*, 364 A.2d 803, 809 (1976).

protestors who, having disrupted hearings in-progress, had not been arrested[16]. Each of the cited incidents was disruptive – in contrast to what Sassower did in respectfully requesting to testify in opposition to Judge Richard Wesley's confirmation to the Second Circuit Court of Appeals – which she did not do until presiding chairman Chambliss had announced the Senate Judiciary Committee's May 22, 2003 hearing "adjourned" [A-1246-49, 1265-67, 1574]. Such palpably selective arrest and prosecution of Sassower is precisely the kind of arbitrary, discriminatory, disparate treatment that runs afoul of the equal protection guarantees of our Constitution.

Tellingly, the U.S. Attorney supplied NO documents in response to the second item in Sassower's August 12, 2003 first discovery demand for

> "(2) Any and all documents pertaining to the protocol and/or guidelines of Capitol Police for responding to 'disruptive' conduct by members of the public and for evaluating when arrest is appropriate",

except for a copy of D.C. Code §10-503.16 itself. This, notwithstanding it was clear from Detective Zimmerman's testimony upon Sassower's cross-examination that such protocol exists [A-857-8].

The "lack of explicit standards" in D.C. Code §10-503.16(b)(4) was evidenced at trial by the testimony of Officer Jennings, purported to be the "arresting officer" by the underlying prosecution documents [A-88, 89], and Sergeant Bignotti, the true arresting officer. On cross-

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[16] The particulars of these incidents were set forth in Sassower's draft memorandum of law on the unconstitutionality of the "disruption of Congress" statute, as written and as applied – which, as evident from the face of the document, she had intended to hand up to Judge Holeman in support of her request for a stay pending appeal. [See October 14, 2005 motion, Exhibit F (Ex C thereto, ¶29(b); Ex. D thereto)] These incidents were (1) the eight or nine protestors at the May 7, 2004 Senate Armed Services Committee hearing, who unfurled a banner "FIRE RUMSFELD" and similarly shouted out; (2) the protestor at the April 27, 2004 Senate Foreign Relations Committee hearing to confirm John Negroponte as ambassador to Iraq, who objected to Mr. Negroponte's response to a question; and (3) this same protestor interrupting, on September 13, 2001, a Senate Foreign Relations Committee hearing to confirm Mr. Negroponte to be U.S. ambassador to the United Nations by holding a small sign and telling Mr. Negroponte that "the People of Honduras consider you to be a State terrorist".

examination, Officer Jennings not only conceded that it was Sergeant Bignotti who had arrested Sassower [A-954-5], but testified that his response to Sassower had not been – as Sergeant Bignotti's was – to order her from the hearing room, but, rather, to tell her to sit down [A-953]. Since their testimony as to Sassower's conduct did not materially diverge [A-888-960 / A-961-1023], their incompatible responses as to whether Sassower's arrest was warranted may reasonably be attributed to the "lack of explicit standards" of D.C. Code §10.503.16(b)(4). At bar, such permitted Sergeant Bignotti to give reign to her vindictive, personal *animus* against Sassower for filing a police misconduct complaint against her in 1996, based on her role in Sassower's arrest in the hallway outside the Senate Judiciary Committee on June 25, 1996 on a trumped-up "disorderly conduct" charge [A-59-60]. Such was over and beyond any directive Sergeant Bignotti may have received, as the senior officer assigned, from Capitol Police and/or the Senate Judiciary Committee to arrest Sassower – an arrest whose retaliatory purpose could easily be concealed within the vague, overbroad language of D.C. Code §10.503.16(b)(4).

Third, D.C. Code §10-503.16, as applied, unconstitutionally "abut[s] upon sensitive areas of basic First Amendment freedoms" because it has sustained an arrest, prosecution, and conviction of a person who not only did nothing more than respectfully request to testify with "citizen opposition" at the Senate Judiciary Committee's May 22, 2003 hearing – after the hearing was already announced "adjourned" -- where the record shows that her opposition testimony would have exposed not only Judge Wesley's "documented corruption" as a New York Court of Appeals judge, but the official misconduct of Home-State Senators Schumer and Clinton and the Committee's leadership under Chairman Hatch and Ranking Member Leahy with respect thereto. As the "paper trail" of evidence establishes, these Senators were motivated to intimidate and arrest Sassower lest her appearance at the confirmation hearing and publicly-made request to testify pierce the Senators' "insulation" from culpability afforded by the staff

underlings, whose misfeasance and nonfeasance she had so resoundingly documented. Indeed, it appears that such motive was actualized and that she was "set up" to be arrested. Sassower's analysis of the videotape describes the "tell-tale" signs [A-1576-7].

As applied, D.C. Code §10-503.16 is also unconstitutional for overbreadth. As the Supreme Court recognized in *Grayned*:

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. [fn.27] ... overbroad laws, like vague ones, deter privileged activity... The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." (at 114-115).

A respectful request to testify at a public congressional hearing – particularly, at a Senate Judiciary Committee hearing to confirm a "lifetime" federal judicial nominee – cannot be other than "constitutionally protected conduct", squarely within First Amendment free speech and petition rights. As this Court stated in *Matter of M.W.G.*, 427 A.2d 440 (1981) "[T]he circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed.", citing *Williams v. District of Columbia*, 419 F.2d 638, 645 (1979).

Finally, D.C. Code §10-503.16 is unconstitutional, as applied, because this Court, by its own admission, has "not squarely addressed the question of what kind of evidence is required to establish the specific intent necessary for conviction", *Armfield*, at 797-8. As a consequence, Judge Holeman was able to blithely ignore Sassower's 39-page May 21, 2003 fax to Detective Zimmerman [A-102] – whose two-fold significance in establishing that her intent was to respectfully request to be permitted to testify and that the prosecution had no case to prosecute by reason thereof – was focally presented by her October 30, 2003 discovery/disclosure/sanction motion [A-48-58].