

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

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By Fax: 212-556-3717
and By Hand

October 1, 1996

Ms. Joyce Purnick
The New York Times
229 West 43rd Street
New York, New York 10036

RE: Being "Black-Balled"

Dear Ms. Purnick:

This letter memorializes the telephone message I left on your answering machine on Friday, September 27, 1996.

In that message, I referred to the fact that we had had no response from either you or Jan Hoffman to our August 27th and September 16th letters or to our September 20th fax. Consequently, I stated it was our intention to follow up this matter with your superiors at The Times and requested their names for such purpose.

We have received no response to our September 27th telephone message request--much we have received no response to our aforementioned three most recent written communications to you and Ms. Hoffman.

Plainly, if you are proud of the record of your "black-balling" behavior--and believe it will withstand the scrutiny of your superiors at The Times--you and Ms. Hoffman should be more than willing to provide us with their names.

We ask that you respond without further delay.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

P.S. Adding to the list of media which have recognized our expertise in judicial selection and discipline issues is Penthouse magazine, which quotes us in its November issue. Parenthetically, Ernest Volkman, who wrote the extensive Penthouse article, "Playing Politics with Justice", at least twice visited our headquarters.

cc: Jan Hoffman

Enclosures: (1) 9/20/96 fax (2) pp. 27-8 of Penthouse article

point perfectly. Although New York's senate delegation is split between Democrat Daniel Patrick Moynihan and Republican Alfonse D'Amato, there is no partisan bickering over judicial appointments. In 1993, D'Amato and Moynihan, needing candidates for two new judgeships created for the Southern District of the state—primarily Manhattan and neighboring counties—came to an arrangement. It called for D'Amato to pay off a political debt by nominating a Republican hack from suburban Westchester County whose principal qualifications for the job seemed to be that he was a hard-line law-and-order conservative and, much more important, had served as county campaign manager for George Bush in 1988. Bush had won a huge plurality in that race, a turnout that also strengthened D'Amato's position in the state Republican organization. The nominee's legal qualifications for the post consisted of his role in a grand total of three minor civil cases during a brief and undistinguished legal career.

associations, raising the question of whether anyone was paying attention.

"Of course they were," says one lawyer involved in the process. "What they were aware of was that these two clowns came with heavy political baggage, and that's what counts. Believe me, the bar associations are just as politicized as anything else. The screening is a joke; what really happens is that the people supposedly doing the screening talk to a few people and find out if the nominee has ever molested little children or tried to blow up the World Trade Center. If not, they're in, because that's the deal. A lot of these people are looking for judgeships someday themselves, and if the Republican or Democratic honchos say this is our nominee, you better believe the lawyers aren't going to queer their own future prospects by blackballing anybody."

In April 1994, Baer's name was formally submitted to the White House as nominee for the federal district court. There, the nomination was rubber-stamped, since Moynihan is a powerful

dozen judicial nominations dropped onto a desk in the Senate chamber late on the day before an August recess when only a few senators were present. Then Senate Majority Leader Robert Dole didn't ask for a roll-call vote or any debate on a single Clinton nominee. They were approved en bloc.

The reason for this rubber-stamp approach was, of course, more politics. The Republicans can fulminate all they want to, but the truth is that behind the scenes they and the White House have been quietly horse-trading judicial nominations, among them a deal that gave the Democrats several female nominees in exchange for a strongly pro-death-penalty candidate the Republicans wanted for an appeals-court post out West. And when Hatch raised hell about Clinton's proposal to name to an appeals-court seat Peter Edelman—the husband of Hillary Clinton's good friend Marian Wright Edelman and a super liberal who has floated the idea of judges ordering cash payments to poor people even if neither Congress nor the voters want it—a deal was worked out. Clinton withdrew Edelman's nomination and proposed him for a lesser District of Columbia district-court post with the blessing of Hatch, who was promised White House support for one of his own conservative judicial nominees.

Clinton has brokered a number of such deals with a Republican-controlled Congress as a way to win congressional approval for some of the nominees the liberals of his party wanted. In addition to Baer, the people of New York state were rewarded with a new federal judge named Shira Scheindlin, one of whose first decisions was to protect New Yorkers from dope dealers by sentencing one, convicted in a case involving 12 kilos of cocaine, to a mere 18 months in prison—in defiance of federal guidelines that call for a ten-year prison sentence. To explain why she threw out a resisting-arrest charge, she unbelievably ruled that the suspect's attempt to wrestle away the arresting officer's gun and flee "evidence[d] a perfectly reasonable fear of consequences."

Bartering judgeships reached an apex of sorts during the Reagan and Bush administrations, when elaborate machinery was set up in the White House and Justice Department to assess candidates for political purity, rather than legal qualifications. The most notoriously bad judge to come out of that process was Daniel A. Manion, a dim-witted right-wing ideologue pushed by the Quayle wing of the Republican Party as the ideal man to "de-liberalize" the federal courts. Noted for his ignorance of the law and inability to spell, Manion was fiercely opposed by Democrats. But he won approval when two Democratic senators who vowed to

The process of selecting judges "is strictly political, from beginning to end," says one legal expert.

In exchange for his support of this nonentity, Moynihan got D'Amato's approval to pay off his own political debt by nominating for the federal bench a state judge named Harold Baer, Jr., who had won his job on the state bench in 1984 as part of a bipartisan reciprocal-endorsement deal.

The son of one of the founders of the Liberal Party in New York, Baer had been a party activist, no small matter in New York Democratic politics. The Liberal Party, which is nominally to the left of the state's Democrats, is an important third force in state electoral politics, and often has played a decisive role in tight primaries. In general elections its line on ballots is avidly sought by Democrats, and the party can play an important role in any election with multiple candidates. Among the beneficiaries of Liberal Party support had been Daniel Patrick Moynihan.

So for one of the most important federal legal jurisdictions in the United States the process had produced two nominees—a nonentity and a political activist, neither of whose legal backgrounds was especially impressive. But the two candidates sailed right through the screening committees of various bar

Senate Democrat whose seat on the Budget Committee—among other things—made the White House eager to please him. Baer passed that hurdle easily, having fulfilled two minor requirements: a six-page questionnaire on his background that apparently nobody read, and a financial-disclosure form, also unread.

Baer's nomination, one of 185 Clinton has made since taking office, was sent over to the Senate. It landed in the Judiciary Committee, whose chairman, Republican Senator Orrin Hatch, has often fulminated against the President's choices for the federal bench, which he said proved that Clinton was "soft on criminals." Hatch has also said, "President Clinton talks about cops on the beat. Yet he appoints some judges who are too willing to put criminals back on the street."

This kind of political rhetoric might sound impressive, except Hatch forgot to mention that he himself had formally opposed only two of Clinton's 185 judicial nominees, neither one of them Baer—who was approved without any hearings by Hatch's committee, or a debate on the floor of the Senate, or a roll-call vote. Baer was among several

• Charges against a man accused of shooting a police officer were dismissed by a Florida appeals court judge because the instructions to the jury had contained several technical errors having nothing to do with the actual charges.

• A federal judge in New Jersey, to the fury of the local community, ruled that a mentally disturbed homeless man could not be removed from the public library despite his disruptive behavior, his use of the facility as a flophouse, and his tendency to stink up the place. To make matters worse the judge lectured local residents for "narrowness" and violating the homeless man's "First Amendment rights."

• A New York judge threw out evidence against a rape suspect that police had obtained with a search warrant because police served the warrant at 5:30 P.M.—which the judge found violated the warrant's restriction that it be served only during "daylight hours."

• A Michigan judge literally gave a slap on the wrist to a defendant who'd been accused of severely beating his wife, an action His Honor explained by saying that the punishment was appropriate because the man's wife was having an extramarital affair.

• A Florida judge gave custody of an 11-year-old girl in a divorce case to her father, a convicted murderer. The mother's plea for custody was rejected, the judge said, because she is a lesbian.

• New York's Court of Appeals, the state's highest court, threw out the conviction of a drug dealer who was caught with 38 vials of crack in his pockets on the grounds that police had no "reasonable cause" to search the man's pockets—despite the fact that he was in a known drug-dealing area, had strange bulges all over his body, and was witnessed actually selling the drugs he removed from his pockets.

These kinds of decisions, argues

Mary Ann Glendon, a Harvard Law School professor, are the inevitable result of a trend that began in the late 1960s, when a new and romantic ideal of activist judges came into being. The idea was that judges, whose traditional role was to maintain the delicate balance between the needs of society and individual rights, must use their power primarily to effect social change. The new model judge was to exercise compassion rather than impartiality, boldness instead of restraint, creativity instead of craftsmanship, and to achieve specific, political goals regardless of their effect on legal order as a whole. As District of Columbia Superior Court Judge Sylvia Bacon, herself a self-described activist judge, summa-

How he became a judge reveals much about how the system works—and why we get so many bad judges.

The story begins in 1993, when Congress, reacting to increased court caseloads in the federal system, authorized the creation of new judgeships, including 15 for three New York judicial districts that serve nearly 20 million people. This immediately set off intense and extensive maneuvering within political power centers, for judgeships have come to be regarded as prime political plums.

The way the system is supposed to work is that each state's U.S. senators ask their state bar association for the names of worthy nominees. Those names are submitted to screening committees, where

they are rated as "qualified" (not too bad), "highly qualified" (likely to make fine jurists, the highest possible rating), or "not qualified." The senators—who are free to ignore the recommendations—then select nominees from this list or elsewhere and forward them to the President, who has usually agreed in advance to accept the senators' candidates. He then submits the candidates to the Senate, where the Judiciary Committee investigates them and reports to the full Senate, which approves or disapproves.

In reality that's not how things work these days. "The process is strictly political,

from beginning to end," says Ruth Sassower, head of the Center for Judicial Accountability, a New York grass-roots organization that has been trying to reform the judicial-nomination process. "A nominee is selected because he or she has political connections. Politicians decide who gets nominated. They trade judgeships like baseball cards. Essentially, the Republicans and Democrats divvy up judgeships; you give me two judgeships and I'll give you two."

The process that brought Baer to the federal bench illustrates Sassower's

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rized it: "There is a sense among judges that there are wrongs to be righted and that it is their responsibility to do it." (In fact the Constitution makes it clear that this function is reserved for the legislative branch.)

In other words a highly politicized judiciary, for such judges will be selected on the basis of political activism rather than legal scholarship. No better example of this tendency exists than a federal judge named Harold Baer, Jr., whose decision in a New York narcotics case so infuriated Commissioner Bratton and many other Americans.