

CENTER for JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Coordinator

TO: Academic Contributors to the April 15, 2004 Jurist Online Symposium, "The Judicial Confirmations Process: Selecting Federal Judges in the Twenty-First Century" -- www.jurist.law.pitt.edu/

Professor Michael J. Gerhardt (William & Mary Law School)
Professor Stephen B. Presser (Northwestern University Law School)
Professor John Anthony Maltese (University of Georgia)
Professor Elliot Slotnick (Ohio State University)
Professor Sheldon Goldman (University of Massachusetts/Amherst)
Professor Judith Resnik (Yale Law School)
Professor Nancy Scherer (University of Miami)
Professor Jack M. Balkin (Yale Law School)
Professor Stephen Choi (Boalt Hall School of Law/University of California/Berkeley)
Professor Mitu Gulati (Georgetown University Law Center)
Professor John V. Orth (University of North Carolina/Chapel Hill)
Professor Ahmed E. Taha (Wake Forest University School of Law)

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

DATE: May 4, 2004

RE: Beyond Statistics to Documentary Evidence: The Corruption of Federal Judicial Selection/Confirmation, as Readily Verifiable from Case-Studies of So-Called "Mainstream", "Consensus" Nominations – Including those Engineered by Senator Charles Schumer

This memorandum follows up my unreturned April 22nd voice mail message for Professor Bernard Hibbitts, Director of *Jurist* (412-648-2360), and my unreturned April 26th voice mail message for Professor Jason Mazzone (718-780-7514), editor of its Online Symposium, "*The Judicial Confirmations Process, Selecting Federal Judges in the Twenty-First Century*", who recruited your contributions. These phone messages alerted them to the important primary source materials which our national, non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), has to offer as to the corruption

of federal judicial selection/confirmation. Specifically, my messages brought to their attention the primary source documents posted on our website, www.judgewatch.org, most particularly, those on our homepage under the heading: "Paper Trail Documenting the Corruption of Federal Judicial Selection/Confirmation and the 'Disruption of Congress' Case it Spawned"¹.

Evident from your Symposium articles is that you are in dire need of these primary source materials. Although Professor Hibbett's "Forward" to the Symposium stated that you would be addressing the "overall judicial confirmations process" (emphasis added), it appears that other than statistics, you have NO information about the Senate's confirmation of the vast majority of ideologically "moderate" federal judicial nominees. If anything, you seem to view these as appropriate "consensus" and compromise nominations, whose confirmation by the Senate establishes that the process is not "broken"². Except for a passing comment by

¹ As to this "disruption of Congress" case, whose significance is summarized by my June 16, 2003 memo to Ralph Nader, Public Citizen, and Common Cause, posted at the top of the homepage, I identified that on April 15, 2004 – the very date the Jurist Symposium was published -- the trial was being held in D.C. Superior Court.

² Professor Slotnick:

"...it is ultimately an *empirical* question whether the judicial selection process is working well and, to answer that question, the preponderance of the facts should count rather than the headline grabbing exemplars of acrimonious politics that have dominated public discourse. As an empirical matter, we are far from a crisis... David Savage underscored in the *Los Angeles Times* of November 5, 2003, 'The vacancy rate on the federal bench is at its lowest point in 13 years... The intense partisan battle over a handful of judges aside, Bush has already won approval of more judges than President Reagan achieved in his first term in the White House... Bush has a better record this year than President Clinton achieved in seven of his eight years in office.'

...Also instructive are direct comparisons between Bush's appointment success and that of Clinton before him. Again, assertions that judicial selection processes have escalated through a downward spiral are not borne out by the facts... Empirically, in terms of consummating judicial appointments, the assertion that things have gotten much worse in the Bush years simply does not wash.

Other metrics lend further credence to this claim.

... a preponderance of the evidence suggests that overall the process is working well..."

Professor Gerhardt:

"the Appointments Clause was designed to invite not just conflicts but also accommodation, in which each side makes concessions to the other for the sake of a greater good. Thus, most presidents have filled at least some judgeships with nominees suggested, or supported by, the other party's leaders..."

... President Bush, too, has often achieved quick, widespread consensus, though he has rarely called attention to it. In fact, Democrats have acquiesced to the vast majority of President Bush's judicial nominees. In spite of President Bush's protestations of a crisis in judicial selection, he has achieved, with Democratic help, a record pace in getting his nominees through the Senate and a record number of judicial appointments approved for a president at this point in his presidency."

Professor Maltese:

"Despite these filibusters, the vacancy rate on the federal judiciary has dropped to its lowest point in 13

Professor Resnik that “one might be concerned that the Senate has moved too quickly to approve too many nominees”, you do not suggest that there is anything remotely lacking in the manner in which the Senate Judiciary Committee has been handling these nominations³. Nor do you make any mention of the Committee’s failure to implement critical non-partisan, good-government reform recommendations long ago made by the 1975 book, The Judiciary Committees, of The Ralph Nader Congress Project in its chapter, “*Judicial Nominations: Whither ‘Advice and Consent’?*”, by the 1986 Common Cause report, Assembly-Line Approval, and by the 1988 book, Judicial Roulette, of the Twentieth Century Fund Task Force on Judicial Selection.

Yet, would you not agree that the confirmation process is not just “broken”, but corrupt if you had “hard-evidence” that the Senate Judiciary Committee is NOT scrutinizing the qualifications of these ideologically “mainstream” judicial nominees -- indeed, that it rejects documentary evidence of nominee unfitness, as well as documentary evidence of deficient and fraudulent bar ratings, and abuses and intimidates citizens who come forward to constructively contribute to its nominee evaluations, where it is unable to ignore them entirely? Such state of affairs is precisely what CJA has several times documented since 1992. We summarized this in an extensive July 3, 2001 letter to Senator Schumer, then Chair of the Senate Judiciary Committee’s Courts Subcommittee, which we submitted for the record of his June 26, 2001 hearing on the role of ideology in judicial nominations

years...

“Democrats have confirmed the vast majority of Bush nominees. They have targeted for filibuster only the ones they allege to be the most ideologically extreme.”

Professor Goldman:

“...it is difficult to make a convincing argument that there is currently a confirmation crisis... In the first session of the 108th Congress, 55 district court and 13 appeals court nominees were confirmed. Overall, the vacancy rate on the lower federal courts is the lowest in well over a decade.”

Professor Balkin:

“(It is worth noting that the vast majority of the President’s judicial nominations have been confirmed).”

³

Professor Maltese:

“It is only fitting that judicial nominees who, if confirmed, will enjoy life tenure and possess broad policymaking powers, be subjected to exacting public and political scrutiny.”

Professor Gerhardt:

“Stellar credentials have never immunized judicial nominees from scrutiny or opposition; senators have never hesitated to use whatever means their rules and traditions allow them to defeat nominees with first-rate records...”

– a hearing at which Professor Presser testified and to which his Symposium article refers. This July 3, 2001 letter, published in the appendix to the hearing transcript, is attached for your convenience. It is also posted on our website, together with many of the primary source documents on which it rests⁴. These include our 50-page May 1, 1992 investigative critique, wherein we first established that:

“...a serious and dangerous situation exists at every level of the judicial nomination and confirmation process – from the inception of the senatorial recommendation up to and including nomination by the President and confirmation by the Senate – resulting from the dereliction of all involved, including the professional organizations at the bar”.

Also included on our website are CJA’s May 27, 1996 letter to Senate Judiciary Committee Chairman Hatch, printed in the appendix to the Committee’s May 21, 1996 hearing on the role of the American Bar Association in the selection of federal judges, as well as CJA’s June 28, 1996 letter to Chairman Hatch, printed in the appendix to the Committee’s June 25, 1996 judicial confirmation hearing.

It was based on these and other underlying documents, reflecting nearly a decade of direct, first-hand experience with the Senate Judiciary Committee, that our July 3, 2001 letter asserted, in bold type, that:

“...except when the Senate Judiciary Committee is searching for some non-ideological ‘hook’ on which to hang an ideologically-objectionable nominee – the Committee cares little, if at all, about scrutinizing the qualifications of the judicial nominees it is confirming. Indeed, the Committee wilfully disregards inconvertible proof of a nominee’s unfitness, as likewise, of the gross deficiencies of the pre-nomination federal judicial screening process that produced him.” (p. 3, italics and bold in the original)

Nor is this flagrant misfeasance confined to the Senate Judiciary Committee. As detailed, it involves the Senate leadership, as well.

The accuracy of our July 3, 2001 letter -- including its assessment that the betrayal of the

⁴ CJA’s July 3, 2001 letter to Senator Schumer, with its pertinent underlying documents, is best accessed by the sidebar panel, “*Testimony*”.

public trust by the Senate Judiciary Committee and Senate leadership:

“serves no purpose but to enable Senators to continue to ‘wheel and deal’ in judicial nominations, cavalierly using them for patronage or for trading with their Congressional colleagues and the President for other valuable consideration or promises thereof – to the lasting detriment of the People of this nation.” (at p. 15)

is only reinforced by our subsequent experience, chronicled by the “paper trail” on our homepage.

As your examination of our website will readily reveal, we have made exhaustive efforts to present this documentary evidence of systemic corruption of federal judicial selection/confirmation – as likewise the documentary evidence of the systemic corruption of federal judicial discipline – to those in positions of leadership. This, so that they could *independently* verify it – and take appropriate steps consistent with their professional and ethical responsibilities. Their invariable response has been to refuse to even comment. Among those to whom we turned was the National Commission on Judicial Discipline and Removal⁵, whose 1993 report recognized that a careful federal judicial appointments process acts as a prophylactic by reducing the likelihood of judicial misconduct. The National Commission failed to make any affirmative assertion that such careful appointments process exists – just as your own articles fail to identify whether, with respect to ideologically “moderate”, “consensus” judicial nominees, appropriate scrutiny is undertaken.

Professor Gerhardt was a consultant to the National Commission and authored its underlying report on “*The Senate’s Process for Removing Federal Judges*”. On February 18, 1999, at the conclusion of a program on impeachment at the National Press Club, to which he was a speaker, I introduced myself. I was unceremoniously rebuffed – with no subsequent follow-up by Professor Gerhardt to any of the materials I gave him, *in hand*: my article, “*Without Merit: The Empty Promise of Judicial Discipline*” (The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997)), setting forth respects in which the

⁵ Our correspondence with the National Commission on Judicial Discipline and Removal is posted on CJA’s website, accessible *via* the sidebar panel, “*Correspondence-Federal Officials*”. See, in particular, pages 4-7 of our July 14, 1993 letter as to the significance of our 1992 critique of the federal judicial selection process to its work (at pp. 5-7). Other official study commissions to which we provided the critique have included: The Long-Range Planning Committee of the Judicial Conference (1994) and the Commission on Structural Alternatives for the Federal Courts of Appeals (1998). See sidebar panel, “*Testimony*”

Commission's 1993 report was methodologically-flawed and dishonest, and, as I recollect, the two February 18, 1999 press releases I was then circulating, "*House Judiciary Committee Ignores and Conceals Hundreds of Judicial Impeachment Complaints*" and "*Coming Up Next: The Impeachment of Chief Justice Rehnquist*"⁶.

Many years before that, however, I had spoken by phone with Professor Sheldon Goldman. Reflecting this is my August 21, 1996 letter to him⁷, transmitting for his review the most important primary source materials which, five years later, would be focally presented by CJA's July 3, 2001 letter to Senator Schumer. These materials sufficed to establish, *at that time*, the corruption of federal judicial selection, both pre-nomination and post-nomination – and that his confidence in the American Bar Association's evaluation of candidate qualifications was seriously misplaced. Yet, Professor Goldman never responded, even to the limited extent of returning the materials to us so that, as requested, we might "make them available to other scholars", if he was not going to use them for his own scholarship.

To all of you, Professors Gerhardt and Goldman included, we offer the kind of primary source materials that will enable you to critically examine – rather than statistically laud -- the nomination and confirmation of ideologically "mainstream", "consensus" federal judicial nominees. Indeed, we respectfully propose that Senator Schumer's engineering of New York Court of Appeals Judge Richard C. Wesley's nomination and confirmation to the Second Circuit Court of Appeals -- as featured on our homepage and reinforcing all that our July 3, 2001 letter set forth -- is a powerful case-study upon which scholarship should focus.

Finally, with regard to the Symposium's three articles under the title "*A Little Jousting Over a Tournament of Judges*", discussing markers by which to evaluate judicial performance and suitability for promotion to higher judicial office⁸, altogether missing is how instances of

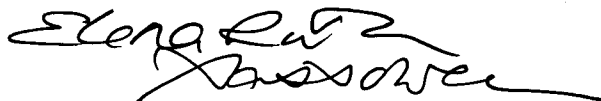
⁶ "*Without Merit: The Empty Promise of Judicial Discipline*" is accessible at a number of points on CJA's website, including *via* the sidebar panel, "*Published Pieces*". CJA's two February 18, 1999 press releases are accessible *via* the sidebar panel "*Test Cases-Federal (Mangano)*" – scroll down to "Illustrative Press Releases".

⁷ This August 21, 1996 letter to Professor Goldman is posted on CJA's website, accessible *via* the sidebar panel "*Correspondence-Academia*".

⁸ Needless to say, the generalized favorable comment about the ABA's "evaluative processes" in the joint article of Professors Choi and Gulati and the generalized favorable comment about the ABA's "approach in evaluating judicial nominations" as being "more qualitative" in Professor Taha's article should be placed alongside the documentary evidence CJA has been compiling since 1992 as to the deficiency and fraudulence of its evaluations. [CJA's fact-specific June 13, 2003 memo to the ABA – posted on the homepage under the "Paper Trial" – is our most recent expose on the subject].

judicial misconduct might be located and examined – let alone that judicial misconduct is something that exists. Likewise missing, except perhaps by Professor Orth's article, is any notion that litigants and those affected by judicial decisions might have an important contribution to make to the evaluation of a judge's performance – or that this contribution might trump other traditional markers. Such glaring omissions underscore that scholarship must finally step out of its cocoon of individual and institutional self-interest to examine the "on-the-ground" manifestations and permeations of judicial misconduct – and the worthlessness of the touted mechanisms and safeguards for restraining it. Here, too, CJA's July 3, 2001 letter to Senator Schumer – with its closing plea (at pp. 16-18) for oversight and investigation into the hoax of federal judicial discipline—reiterated by our July 2001 coverletters to Senate Judiciary Committee members, Senate Majority Leader Daschle and Senate Minority Leader Lott, Senator Clinton, President Bush, House Judiciary Committee Minority Counsel, and House Judiciary Committee General Counsel/Chief of Staff⁹, and which thereafter culminated in a rigged House Judiciary Committee November 29, 2001 "oversight hearing" and superficial and bogus "Judicial Improvements Act of 2002"¹⁰ -- is a powerful starting point for scholarly study.

We look forward to being of service to your scholarship.



cc: Professor Bernard Hibbitts, Director/Jurist
Professor Jason Mazzone, Editor/Jurist Symposium
The Public (*via* Internet)

Attachment: CJA's July 3, 2001 letter to Senator Charles Schumer

⁹ These six separate coverletters, spanning dates from July 9-14, 2001, are all posted on CJA's website, *via* the sidebar panel, "*Correspondence-Federal Officials*".

¹⁰ This is chronicled by CJA's correspondence with the House Judiciary Committee, spanning from July 2001-July 2002, accessible *via* the sidebar panel, "*Correspondence-Federal Officials*". It is summarized at fn. 9 of CJA's June 4, 2003 letter to Senator Edward Kennedy, posted on CJA's homepage as part of the "Paper Trail". It is further identified at footnote 1 of CJA's February 17, 2004 memo to Senator Leahy, among others, posted on CJA's homepage under the heading, "The Supreme Court's impeachable repudiation of congressionally-imposed obligations of disqualification & disclosure under 28 U.S.C. §455 and disregard for the single recommendation addressed to it by the 1993 report of the National Commission on Judicial Discipline and Removal that it consider establishing an internal mechanism to review judicial misconduct complaints against its Justices".

Subject: Jurist Online Symposium: Beyond Statistics to Documentary Evidence

Date: 5/4/2004, 10:51 AM

From: Elena Ruth Sassower <judgewatchers@aol.com>

To: migerh@wm.edu, s-presser@law.northwestern.edu, imaltese@uga.edu,
slotnick.1@osu.edu, sheldon.goldman@polsci.umass.edu,
judith.resnik@yale.edu, nscherer@miami.edu, jack.balkin@yale.edu,
schoi@law.berkeley.edu, jvorth@email.unc.edu

cc: Hibbitts@law.pitt.edu, jason.mazzone@brooklaw.edu

Organization: Center for Judicial Accountability, Inc.

TO: Academic Contributors to the April 15, 2004 Jurist Online Symposium, "*The Judicial Confirmations Proces: Selecting Federal Judges in the Twenty-First Century*"

FROM: Elena Ruth Sassower, Coordinator
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RE: Beyond Statistics to Documentary Evidence: The Corruption of Federal Judicial Selection/Confirmation, as *Readily-Verifiable* from Case-Studies of So-Called "Mainstream" "Consensus" Nominations -- Including those Engineered by Senator Charles Schumer

DATE: May 4, 2004


Attached is my memo to you of today's date, as well as CJA's July 3, 2001 letter to Senator Schumer discussed therein.

I look forward to hearing from you -- and being of service to your scholarship.

Thank you.

P.S. As I do not have the e-mail addresses of Professors Gulati and Taha, I would appreciate if either Professor Hibbitts or Professor Mazzone would forward this on to them. Thanks.

 5-4-04-ltr-professors.doc (76KB)

 7-3-01-schumer.doc (109KB)