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BY E-MAIL

November 17, 2006

Institute for the Study of the Judiciary, Politics, and the Media
Syracuse University
Syracuse, New York

ATT: Keith Bybee, Director

RE: Advancing Scholarship – and Reform – with Primary Source Documentary Evidence

Dear Mr. Bybee,

This follows up our telephone conversation on Tuesday, October 17, 2006 – two days before the Institute's October 19, 2006 symposium "*The Last Umpires? The News Media, the ABA and Other Independent Voices in the Federal Judicial Confirmation Process.*"

I stated to you that our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), has a goldmine of primary source documentary evidence to contribute to the Institute's scholarship on this and other topics that have been, or were going to be, the subject of Institute symposia and lectures. In substantiation, I directed you to CJA's website, www.judgewatch.org, which posts hundreds of primary source documents chronicling our direct, first-hand experiences with the processes of judicial selection and discipline on federal and New York state levels, spanning more than a decade and a half. My question to you was how we could best contribute this primary source evidence to advancing the Institute's scholarship.

To make our discussion most immediately relevant, I pointed out that CJA's primary source documents not only rebutted the implicit assumption of the Institute's October 19th symposium that the "News Media" and "ABA" are "Independent Voices", but established the essential role of citizen participation in the federal judicial confirmation process – a role not explicit in the symposium's title, description, or list of presenters. I further stated that all actors in the process, including the "News Media" and "ABA", had sought to wipe out this decisive "citizen voice". In that regard, I drew your attention to what is perhaps the only case in U.S. history where a citizen's respectful

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* The **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, based in New York, working, since 1989, to ensure that the processes of judicial selection and discipline are effective and meaningful.

request to testify in opposition to a federal judicial nominee at a U.S. Senate Judiciary Committee public confirmation hearing resulted in her arrest, prosecution, conviction, and six-month incarceration for "disruption of Congress" – and that I was that citizen. I further told you that such historic case underlies another historic case: a first-of-its-kind public interest lawsuit against The New York Times for libel and journalistic fraud, arising from its cover-up of the corruption of federal judicial selection, exposed by the "disruption of Congress" case, involving the American Bar Association, the Association of the Bar of the City of New York (City Bar), New York's two home-state Senators, the Senate Judiciary Committee, the Senate leadership, and the President, in addition to a panoply of non-partisan and partisan organizations, both liberal and conservative, that routinely advocate on judicial issues. Indeed, CJA's "Disruption of Congress" webpage DIRECTLY links to our "Suing The New York Times" webpage by a section entitled: "Bringing accountability to The New York Times – & other media that has suppressed, obscured, and falsified the 'disruption of Congress' case".

Although I asked you to bring CJA's website and its significance to the attention of the symposium participants and to professors and students, whether at the Institute or at other academic institutions, I have not heard from you or anyone since. Meantime, I have watched the video of the October 19th symposium, which you had told me would be posted on the Institute's website. Such reinforces the decisive value of our primary source documents, as the symposium was seriously and substantially misleading.

As illustrative, although there is a world of difference between how the federal judicial confirmation process works to the lower federal courts and to the U.S. Supreme Court, none of the panelists identified such fact[1] or corrected statements by fellow panelists that would create misperceptions. Among the most glaring was what Stephen Tober, former Chair of the ABA Standing Committee on Federal Judiciary, said at the outset of his remarks: that the 20-25 page explanation of the Committee's rating of Judge Samuel Alito, Jr. "gives insight into the process". What Mr. Tober did not say, but should have, is that the Committee only provides an explanation for its ratings of Supreme Court nominees. It does not do so when it favorably rates nominees for the lower federal courts. Those ratings are unaccompanied by the slightest explanation – even when they include a "Not Qualified" minority rating.

Had Mr. Tober revealed the completely barebones nature of the Standing Committee's favorable ratings for lower federal court nominees – and confronted the important recommendations addressed to that issue TWENTY YEARS AGO by the 1986 Common Cause report Assembly-Line Approval and TEN YEARS AGO by the Miller Center Commission on Judicial Selection at the Senate Judiciary Committee's May 21, 1996 hearing on "*The Role of the American Bar Association in the*

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[1] This excepts the passing reference by Professor Epstein, approximately half-way through the symposium, that the role of the Senate Judiciary Committee is "a lot more important at lower levels" than is the role of interest groups. She did not expound upon this in any way. Indeed, I believe that none of the speakers, throughout the nearly two-hour symposium, cited ANY examples from confirmations to the lower federal courts to illustrate their points, but rested entirely on examples of Supreme Court confirmations.

the Judicial Selection Process"[2] – his presentation would have advanced understanding of legitimate obstacles to recognizing the ABA as an "independent voice". Certainly this would have been true had Mr. Tober discussed publicly-made challenges to the integrity of ABA ratings made by those who had interacted with the ABA Standing Committee, such as CJA. As CJA can attest, these challenges give scandalous "insight into the process" and how the ABA operates.

As a member of the ABA Standing Committee in 2003, Mr. Tober would have been personally involved in its barebones approval rating for the nominee to the Second Circuit Court of Appeals which underlies the "disruption of Congress" case. Mr. Tober's name, in fact, appears on the Standing Committee's April 28, 2003 letter to then Senate Judiciary Committee Chairman Orrin Hatch, unanimously approving that nominee as "Well Qualified", as well as on the Standing Committee's April 16, 2003 letter to Chairman Hatch, unanimously approving a nominee to the District Court of the Southern District of New York as "Well Qualified". The outrightly fraudulent and indefensible nature of both these ratings is READILY-VERIFIABLE and was the subject of an extensive June 13, 2003 memorandum from CJA to the Standing Committee's then Chair, as well as to the Chair of the City Bar's Judiciary Committee, which had also given barebones approval ratings for these two nominees. Entitled "Bringing accountability to the ABA and City Bar", the fact-specific 22-page memorandum expressly called upon these bar associations: (1) to justify their barebones ratings for the two nominees by "disgorging" their findings with respect to a March 26, 2003 written statement that CJA had addressed to them, outlining the documentary evidence of the unfitness of these nominees – evidence which CJA had transmitted; (2) to respond to the recommendations of the 1986 Common Cause report and of the 1996 Miller Center Commission for "substantiated" bar ratings; and (3) to "confront the fundamental standards disqualifying candidates for judicial office" which CJA's March 26, 2003 written statement had articulated.[3]

Although Mr. Tober purported that there hadn't been a "test" of the ABA since the Robert Bork Supreme Court nomination – and no "logical platform for discussion or explanation" of what the ABA Committee does – CJA's June 13, 2003 memorandum was a most formidable "test". Indeed, so serious and substantial was this "test" that we had requested that it be provided to "each and every member" involved in the Standing Committee's "'investigation' and rating" of the two nominees, as well as to the ABA's President. How did the ABA score? It failed – just as it failed our previous "tests" to its deficient and fraudulent ratings in 1992, 1996, and 1998.[4] Indeed, the Standing Committee's only response to our June 13, 2003 memorandum was to a footnote (#8) which had

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[2] The pertinent pages of the Common Cause report and Miller Center Commission testimony are exhibits C and D to CJA's May 5, 2003 memorandum to the Senate Judiciary Committee, posted on the "Paper Trail to Jail" in the "disruption of Congress" case. The full Common Cause report is also posted as part of CJA's "Library".

[3] The referred-to documents are all posted on the "Paper Trail to Jail" in the "disruption of Congress" case.

[4] See sidebar panel "Judicial Selection - Federal".

commented that the Committee had not returned to us the documents which our March 26,2003 written statement had focally-discussed and identified as sufficient in establishing the unfitness of the two nominees[5]. The Committee then returned these documents, by letters dated June 17 and 18, 2006, enclosing, as well, the further documents we had supplied with the March 26, 2003 written statement to enable the ABA to recognize the DIRECT conflicts of interests it faced in evaluating the nominations.[6]

Of course, it is to be expected that Mr. Tober would tout the ABA and its Standing Committee's evaluation as honest, objective, and unique – with "the resources and ability to put people on the ground and in the field", "work[ing] hard on behalf of the American People to assure that the most qualified and best...get on the bench".[7] But what about academia, as represented by Professor Lee Epstein, and the media, as represented by Lyle Denniston?

As for Professor Epstein – with whom I had spoken briefly on October 17, 2006, alerting her to CJA's website and the "disruption of Congress" case – her response during the symposium was a dodge. She stated that there was "the perception of the ABA as not independent", which was why it had been excluded from the process by President George W. Bush. She then confessed, "Whether it is an independent voice, I don't know". She did not identify why she did not know – as for instance because, as Mr. Tober several times identified, the Standing Committee's investigative and evaluative "peer review" process is "behind the curtain" and "confidential", thereby impeding scholarly examination of it. Nor did she identify the existence of such other information sources as CJA from which assessment could be made about ABA investigations and ratings.

This obviously raises the question as to how Mr. Denniston, who is not a scholar of the confirmation process, as Professor Epstein is, could so emphatically proclaim, as he did repeatedly during the symposium, that the "ABA Standing Committee is wonderfully distinguished"; performing "a

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[5] The June 13, 2003 memorandum was itself preceded by my urgent May 16, 2003 telephone message for the then Chair of the Standing Committee on Federal Judiciary, whose response was not to return my call, but, rather, a May 22, 2003 letter stating:

> "We have afforded you time and courtesy in the Standing Committee's work to rate these two nominees to the federal judiciary. We now ask that you not contact us again, as consideration of these nominations is before the Senate Judiciary Committee.
>
> We will appreciate your honoring this request."

[6] These transmitted documents, establishing the ABA's direct conflicts of interest, were itemized by an inventory annexed to the June 13, 2003 memorandum itself. These documents are posted on our webpage devoted to our history of correspondence with the ABA, accessible *via* the sidebar panel "Searching for Champions (Correspondence): Bar Associations".

[7] The ABA's rank dishonesty and deceit upon the public in matters pertaining to judicial selection, judicial discipline, and the integrity of the legal profession is documentary established by our long history of correspondence with it, going back to 1992, accessible *via* the sidebar panel "Searching for Champions (Correspondence): Bar Associations".

profoundly important wonderful function with great civic virtue" and to bemoan, "would that it be heard". Surely, as a seasoned reporter, Mr. Denniston does not rely on the ABA's word that its barebones ratings for lower federal court nominees are based on appropriate investigation and review. However, Mr. Denniston gave no detail as to the basis for his enthusiastic endorsement of the ABA.

With respect to whether the media is an "independent voice", Professor Epstein was seemingly non-committal. Although she stated, explicitly in contrast to Richard Davis' book, Electing Justice, that the "media has played an extremely useful role in the nominations process", she asserted that this was not because the press was "objective". Rather it was because of the useful information the press can provide and "more information is better, especially when it is reasonably accurate". Yet, she offered no assessment as to whether the information that the press has provided to the public about lower federal court nominations (numbering in the thousands) – as opposed to Supreme Court nominations (a relative handful) – has been "reasonably accurate".

For his part, Mr. Denniston was contradictory about the media. While criticizing it as a "deliverer of information generated by outside groups" and "oriented to the bottom line", and not concerned about process, etc., he nonetheless bestowed some fairly significant accolades upon it. Among these, that the media plays "a magnificent role" and that it does an "excellent job as watchdog"; that "investigative journalism is as good as it has ever been" and that the "American media whatever vices they have, don't lack the capacity to pursue things to the ends of the earth". In so doing, his only references – like Professor Epstein's – were to Supreme Court nominations, not nominations to the lower federal courts.

Here, too, the "disruption of Congress" case – capped by the "Factual Allegations" of the verified complaint in our public interest lawsuit against The Times – is decisive: establishing the news media's refusal to investigate READILY-VERIFIABLE documentary proof of the corruption of the federal judicial selection process, compounded by distorted reporting that deprives the public of even a remotely accurate narrative of events and their significance, including with respect to the judicial process and court proceedings. This, too replicates what we have documented about the news media time, after time, after time.[8]

From the perspective of our direct, first-hand experience with the federal judicial selection process, spanning a decade and a half, Mr. Denniston's greatest contribution lay in his scathing condemnation of the Senate Judiciary Committee and outside interest groups that have it in their grip. Yet, strangely, Mr. Denniston, who described the Committee as run by the majority and primarily by its chairman, did not have harsh words for its longtime former chairman, Senator Hatch, who he instead described as running the Committee in a "reasonably fair way". Again, Mr. Denniston did not identify the evidentiary basis for such claim – and our extensive interactions with Chairman Hatch underlying the "disruption of Congress" case and stretching back to our first interactions with him in 1996, when I was also arrested, resoundingly refutes such description.

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[8] See sidebar panel "Press Suppression", particularly The New York Times.

The foregoing are only an illustrative sampling of the symposium statements made by Mr. Tober, Professor Epstein, and Mr. Denniston which we invite them to retract and/or clarify based on the primary source documentary evidence posted on CJA's website. The starting point of their examination should be the "disruption of Congress" case – whose "Paper Trail to Jail" includes the ABA's letters to the Senate Judiciary Committee, bearing Mr. Tober's name and conveying the barebones "Well Qualified" ratings. Needless to say, CJA would be pleased to assist Mr. Tober, Professor Epstein, Mr. Denniston – and the Institute – by providing hard copies of all posted documents so that a CLEAR AND ACCURATE assessment can be made of the "independent voices" in the federal judicial confirmation process, including the "voice" no one mentioned: that of citizens having no partisan agenda.

As Mr. Denniston proclaimed that it would be "wonderful" if an organization came into being to spearhead reform of the process, we invite him to be the first to answer whether CJA's steadfast devotion to, and sacrifice for, the integrity of the process, demonstrated over and again by our 15 years of painstaking advocacy, does not entitle us to be recognized as such organization – one which, even in face of intimidation, arrest, and incarceration, never once wavered as an "independent voice" for the public's rights and interests.

We trust that the Institute will be using its symposia and lectures to trigger follow-up inquiry and scholarship on the important topics presented. Based on our decade and a half of in-the-trenches experience – virtually all of it "at the intersection of law, politics, and the media" – we can suggest a multitude of critical areas of inquiry and scholarship which we would readily share with you and other scholars and students searching for powerful and relevant topics to develop and explore. We specifically invite students who would like to apply for the Institute's research fellowships and project grants, but don't yet have a topic, to contact us before the December 1st deadline so that we might discuss with them these exciting possibilities, all having the potential to contribute to substantive, imperatively-needed reform for the benefit of ALL our nation's citizens.

Please let us hear from you soon, including as to whether you will be a liaison for us to the other entities within Syracuse University which have collaborated in forming the Institute and whose separate scholarship would also be advanced by our primary source materials. These include: the Maxwell School of Citizenship and Public Affairs, where you hold the Michael O. Sawyer Chair of Constitutional Law and Politics and direct the Sawyer Law and Politics Program, and which co-sponsored the "*The Last Umpires? The News Media, the ABA and Other Independent Voices in the Federal Judicial Confirmation Process*" symposium; the College of Law, where you have a courtesy appointment; the Carnegie Legal Reporting Program at Newhouse, whose Director, Mark Obbie, is an Associate Director of the Institute[9]; the newly-formed Tully Center for Free Speech at Newhouse;

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[9] I believe it was Mr. Obbie who asked the important question as to "what's stopping" the media from covering process and substance, as opposed to focusing on outcome and winners and losers. Mr. Denniston's response, punctuated by his accolades of the press, was that there is a habit among the American media to look for a "fight". Noting that the media's institutional bias is not roused by "good news", Mr. Denniston's position was "stir controversy and the press will return in droves". Yet such claim, like his claims about the press investigating and acting as "watchdog", do not hold up empirically – at least when it comes to reporting on

and, of course, the S.I. Newhouse School of Public Communications, with its Knight Chair in Political Reporting, held by Charlotte Grimes, who will be a panelist at the Institute's March 27, 2007 symposium "*Are Federal Judges Political? Views from the Academy, the Bench, and the Press*", co-sponsored by the College of Law.[10]

Thank you.

Yours for a quality judiciary,

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

cc: Stephen L. Tober, Esq.
Professor Lee Epstein
Lyle Denniston
Staff of the Institute for the Study of the Judiciary, Politics, & the Media
Lisa Dolak, Associate Director
Mark Obbie, Associate Director
Sara Mortimer, Director of Public Relations
Bert Kaufman, Graduate Assistant

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actual judicial corruption and the corruption of the processes of judicial selection and discipline – none of which are "good news". Establishing this is our lawsuit against The New York Times, as well as the hundreds of documents chronicling our interactions with the press on these issues, accessible *via* our "Press Suppression" webpage. Virtually all of this interaction was with newspapers – which Mr. Denniston identified as being "alone" among the media with the capacity to look at a subject in depth. Indeed, Mr. Denniston was himself among the newspaper journalists to whom we turned, unsuccessfully, in 1998, for coverage of our fully-documented impeachment complaint against U.S. Supreme Court Justice William Rehnquist and all eight Associate Justices. The press releases we sent Mr. Denniston at that time and our correspondence with him and other journalists, transmitting the substantiating documents – including the impeachment complaint and its expressly incorporated rehearing petition – are all posted and accessible from the "Press Suppression" webpage, as part of the "SPECIAL TOPIC":

> "TESTING THE PROPOSITION: THAT 'ANY PUBLICLY MADE (NON-FRIVOLOUS) ALLEGATION OF SERIOUS MISCONDUCT...AGAINST A SUPREME COURT JUSTICE WOULD RECEIVE INTENSE SCRUTINY IN THE PRESS...' (1993 Report of the National Commission on Judicial Discipline & Removal, at p. 122)."

[10] Professor Nancy Scherer will be representing academia at that symposium. I take this opportunity to note that Professor Scherer was an indicated recipient of CJA's May 4, 2004 memorandum entitled "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." Such memorandum, which set forth a proposal for scholarship, is posted on the "Paper Trail to Jail" in the "disruption of Congress" case. It is also accessible, together with my June 15, 2004 fax to Professor Scherer, *via* the sidebar panel, "Searching for Champions (Correspondence): Academia". That is where this letter will also be posted.