ELENA SASSOWER'S MEMO IN PROGRESS
To Be Submitted in Support of a Motion to Stay Sentence Pending Appeal & on the Appeal

D.C. Code §10-503.16(b)(4) is unconstitutional, as *written and as applied*

The Statute is Unconstitutional as Written

Thirty-two years ago, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), thereafter cited in relevant decisions of the District of Columbia Court of Appeals[1], the United States Supreme Court articulated 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." (at 116).

This "crucial question" 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 – at issue herein – is reflected in the record[2]. It contains references to, and quotes from, a variety of sources: the 1986 Common Cause report, Assembly-Line Approval, the 1988 Twentieth Century Fund book, Judicial Roulette, as well as the 1975 book by the Ralph Nader Congress Project, The Judiciary Committees, whose chapter, "*Judicial Nominations: Whither 'Advice and Consent'?*", describes a confirmation hearing at which the presiding chairman inquired "if anyone in the room wished to speak on behalf of or against the nominee" (at p. 234) – a hearing not represented to be atypical in that -- or any other -- respect.

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[1] In reverse chronological order, these include: *Armfield v. United States*, 811 A.2d 792, 796 (2002); *Berg v. United States*, 631 A.2d 394, 398 (1993); *Farina v. United States*, 622 A.2d 50, 56 (1993); *Wheelock v. United States*, 552 A.2d 503, 506 (1988); *Carson v. United States*, 419 A.2d 996, 999 (1980); *District of Columbia v. Gueory*, 376 A.2d 834, 837 (1977); *Leiss v. United States*, 364 A.2d 803, 806, 808 (1976).

[2] See Elena Sassower's May 21, 2003 fax to Senate Judiciary Chairman Hatch and Ranking Member Leahy – which is also part of her 39-page May 21, 2003 fax to U.S. Capitol Police Detective Zimmerman. [posted on CJA's homepage under the heading "Paper Trail Documenting the Corruption of Federal Judicial Selection/Confirmation & the 'Disruption of Congress' Case it Spawned."]

Ex "D"

From *Grayned*, it is clear that D.C. Code §10-503.16(b)(4) is unconstitutional, *as written* – being both vague and overbroad. As to vagueness, the Court in *Grayned* stated:

> "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).

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 as follows:

> "(b) It shall be unlawful for any person or group of persons willfully and knowingly:
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> * * *
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> (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". Whereas the "normal activity" of the sessions of Congress and either House, as likewise their committee/subcommittee deliberations, consists of communications between and among

the members of these bodies – with the public having no role[3] – not so a public committee/subcommittee hearing. There, the "normal activity" is the taking of testimony from non-members of Congress – frequently members of the public.

Evident from *Grayned* is that the facial unconstitutionality of D.C. Code §10-503.16(b)(4) by its combination of places with disparate "normal activity" is exacerbated by the absence of any interpretive caselaw. Indeed, neither the District of Columbia Court of Appeals' decision in *Smith–Caronia v. United States*, 714 A.2d 764 (1998), upholding the constitutionality of the language that has since been recodified as D.C. Code §10-503.16(b)(4), nor its decision in *Armfield v. United States*, 811 A.2d 792 (2002), resting thereon, have anything to do with committee/subcommittee hearings – or any conduct which, as here, would be compatible with same. *Smith-Caronia* and *Armfield* involved disruptive conduct in the galleries of the Senate and House, while in session -- which, had it been committed during a committee/subcommittee hearing, might also have been deemed disruptive[4]. Those cases, because they deal with 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.

Obvious too, is that under *Grayned*, a respectful request to testify, by definition, is not a "disturbance" or "disruption" because it is compatible with the "normal activity" of a public congressional hearing – and that, once the hearing was adjourned, its "normal activity" had ceased. As such, there could be no "actual or imminent interference with the 'peace or good order'" thereof (at 112)[5].

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[3] "The public is admitted to the gallery to observe, nothing more", *Smith-Caronia*, 714 A.2d 764, 765 (1998).

[4] That there is a **VERY** subjective standard as to what is disruptive at Committee hearings is dramatically demonstrated by the fact that the protestors at the May 7, 2004 Senate Armed Services hearing, who unfurled a banner "FIRE RUMSFELD" and similarly shouted out, were NOT ARRESTED for "disruption of Congress" -- as would have objectively been expected. Nor does this appear to be unique. Two weeks earlier, on April 27, 2004, a protestor interrupted the Senate Foreign Relations Committee hearing to confirm John Negroponte to be Iraq ambassador, by objecting to his response to a question. He, too, was NOT ARRESTED. Indeed, this same protestor was also NOT ARRESTED after he interrupted a September 13, 2001 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".

[5] This "actual or imminent interference' standard was incorporated into D.C. Code §10-503.16(b)(4) in *Smith-Caronia*, where the D.C. Court of Appeals quoted its decision in *District of Columbia v. Gueory*, 376 A.2d 834 (1977), "sustain[ing] against First Amendment challenge an almost identically worded Commissioner's Order". *Gueory* (at 837) not only relies on *Grayned* for the proposition of "actual or imminent interference", but makes clear (at 839) that "normal activity" cannot be actually or imminently disturbed unless it is in progress, in other words, not adjourned.

As to unconstitutionality for overbreadth, it was in this context that the Court in *Grayned* stated:

> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (at 116).

Indeed, the Court's phrase as to the "crucial question" was a repetition of its more particularized comment:

> "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.

The Statute is Unconstitutional as Applied

The instant case is unprecedented. No decisions have been located with any facts remotely ressembling 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".

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 the U.S. Capitol Police in materially false and misleading prosecution documents in which the U.S. Attorney was complicitious. Such concealment and falsification is established by the videotape of the Senate Judiciary Committee's May 22, 2003 "hearing" and is further buttressed by defendant's "Paper Trail" of documentary proof, most specifically, by her 39-page May 21, 2003 fax to U.S. Capitol Police and her May 28, 2003 memo to Senate Judiciary Committee Chairman Hatch and Leahy[6].

[6] This was highlighted at pages 7-20 of defendant's October 30, 2003 motion to enforce her discovery rights, the prosecution's disclosure obligations and for sanctions. Judge Holeman's profound dishonesty with respect to this motion was the basis for defendant's February 23, 2004 and March 22, 2004 motions for his disqualification, leading to her April 6, 2004 petition for a writ of mandamus/prohibition against him.

The U.S. Attorney never came forward with any decisional law ciminalizing 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's adjournment. Nor did the U.S. Atttorney make any production with respect to the very first item in defendant's August 12, 2003 First Discovery Demand 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))"[7].

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

The record of this case establishes each of the three aspects, cited by the Court in *Grayned*, for which a law may be stricken for vagueness:

Firstly, 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. Indeed, reflecting defendant's good-faith, reasonable belief as to what was permissible is her 39-page May 21, 2003 fax to U.S. Capitol Police[8] – also sent to Senate Judiciary Committtee Chairman Hatch and Ranking Member Leahy, and New York Home-State-Senators

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[7] The prosecution's non-production with respect to this first item, as likewise with respect to virtually every other item of the August 12, 2003 First Discovery Demand, was the subject of defendant's October 30, 2003 motion to enforce her discovery rights, the prosecution's disclosure obligations, and for sanctions.

[8] Defendant's 39-page May 21, 2003 fax consists of her 2-page covermemo to Detective Zimmerman, followed by (1) her 2-page May 21, 2003 memorandum to Chairman Hatch and Ranking Member Leahy; (2) her 4-page May 21, 2003 letter to Home-State Senator Schumer; and (3) her 1-page May 21, 2003 fax letter to Home-State Senator Clinton. There is also a fourth component part, defendant's 18-page July 3, 2001 letter to Senator Schumer. All are posted on CJA's homepge under the heading "Paper Trail Documenting the Corruption of Federal Judicial Selection/Confirmation & the 'Disruption of Congress' Case it Spawned".

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, 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), defendant should have been arrested at the June 25, 1996 hearing for her respectful request to testify with "citizen opposition". That she was not only reinforced defendant's 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.

Secondly, 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 comparison of incidents of protestors disrupting "hearings" in-progress – NONE OF WHOM WERE ARRESTED: (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, in September 13, 2001, interrupting a Senate ~~Armed Services~~ 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". Each of these incidents was disruptive – in contrast to what defendant did in respectfully requesting to be permitted to testify in opposition to Judge Richard Wesley's confirmation to the Second Circuit Court of Appeals – which she did not do until the presiding chairman had already adjourned the Senate Judiciary Committee's May 22, 2003 confirmation "hearing". Such palpably selective arrest and prosecution of defendant 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 defendant'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.

Yet, the "lack of explicit standards" in D.C. Code §10-503.16(b)(4) was evidenced at trial by the testimony of the two police officers at the Senate Judiciary Committee's May 22, 2003 "hearing": Officer Jennings, purported to be the "arresting officer" by the underlying prosecution documents, and Sergeant Bignotti, the true arresting officer. On cross-examination, Officer Jennings not only conceded that it was Sergeant Bignotti who had arrested defendant, but testified that his response to defendant had not been – as Sergeant Bignotti's was – to order her from the hearing room, but, rather, to tell her to sit down. Since their testimony as to defendant's conduct did not materially diverge, their incompatible responses as to whether defendant's arrest was warranted must 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 defendant for filing a police misconduct complaint against her in 1996, based on her role in defendant's arrest in the hallway outside the Senate Judiciary Committee on June 25, 1996 on a trumped-up "disorderly conduct" charge[9]. 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 defendant – 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 defendant who not only did nothing more than respectfully request to testify with "citizen opposition" at the Senate Judiciary Committee's May 22, 2003 "hearing", but 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 defendant lest her appearance at the "hearing" and publicly-made request to testify pierce the Senators' "insulation" from culpability afforded by the staff underlings, whose misfeasance she had so resoundingly documented. Indeed, the videotape suggests that such motive was actualized: as defendant was plainly "set up" to be arrested[10].

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[9] This was particularized at pages 19-20 of defendant's October 30, 2003 motion to enforce her discovery rights, the prosecution's disclosure obligations, and for sanctions.

[10] *See*, the last two pages of defendant's analysis of the video, posted at the top of CJA's homepage. Such is taken from her July 7, 2003 memo to the American Civil Liberties Union, analyzing the underlying prosecution documents [posted under the "Paper Trail"].