CENTER *for* JUDICIAL ACCOUNTABILITY, INC. *

Post Office Box 8220
White Plains, New York 10602

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

E-Mail: *cja@judgewatch.org*
Website: ***www.judgewatch.org***

BY HAND

DATE: May 13, 2008

TO: United States Congress:
Senate Majority Leader Harry Reid
Senate Minority Leader Mitch McConnell
Speaker of the House Nancy Pelosi
House Minority Leader John Boehner

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

RE: Request for Congressional Hearings on the Breyer Committee's Report on the Implementation of the Judicial Conduct and Disability Act of 1980; &, Pending Same, Deferment of Congressional Action on Senate and House Bills, S. 1638 and H.R. 3753, to Raise Judicial Salaries 29%

This is to request congressional hearings on the federal judiciary's implementation of the Judicial Conduct and Disability Act of 1980, reposing federal judicial discipline in the federal judiciary. Such hearings are consistent with Congress' promise, in promulgating the Act, that it would engage in "vigorous oversight".[1]

More than a year and a half ago, on September 19, 2006, Chief Justice John Roberts presented the American People with a report by a judicial committee headed by Associate Justice Stephen Breyer, purporting that the federal judiciary has been "doing a very good overall job in handling complaints filed under the Act". Yet, Congress has held no hearings on the Breyer Committee Report.

By contrast, after Chief Judge Roberts presented his "2006 Year-End Report on the Federal Judiciary" on January 1, 2007, chastising Congress for failing to raise judicial pay and

---

* The **Center for Judicial Accountability, Inc. (CJA)** is a national, nonpartisan, nonprofit 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 See 1993 Report of the National Commission on Judicial Discipline and Removal, p. 4:

> "Congress provided a charter of self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight."

describing it as "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary", Congress held two hearings:

- a February 14, 2007 hearing by the Senate Judiciary Committee on "Judicial Security and Independence", at which the sole witness, Associate Justice Anthony Kennedy, spoke at length about judicial salaries – an issue that consumed more than half of his prepared statement, and

- an April 19, 2007 "Oversight Hearing on Federal Judicial Compensation" by the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property, at which the sole witnesses were Associate Justices Breyer and Samuel Alito.

At the latter hearing, the Ranking Member of the House Judiciary Committee, Congressman Lamar Smith, raised the subject of the Breyer Committee Report in his opening statement, opining that an increase in federal judicial pay should be "part of other judicial reforms". Citing the Report's finding that "roughly 30 percent of all high profile disciplinary cases were mishandled", Ranking Member Smith referred to the Report's "12 recommendations to ensure that the misconduct statute will be used to maximum benefit in future cases", stating:

> "While I understand the judiciary's commitment to implement all 12 recommendations, we are informed that a plan to do so will not be available until the fall of 2007, meaning the Judicial Conference will have taken an entire calendar year just to develop a blueprint with no implementation in sight. It might help efforts to raise judicial pay if better progress can be shown in this effort." (Tr. 5-6).

He then returned to this in questioning Justice Breyer:

> "Mr. SMITH: …Justice Breyer, in my opening statement, I mentioned the Breyer Committee and the recommendations that have come out of the Breyer Committee and the fact that there is a plan that will be, I understand, made public at the end of this year. Do you see any hope that we might actually see implementation of those 12 recommendations, say, by next year or in a relatively, you know, short period of time?
>
> Justice BREYER. Yes. The answer is yes. I have talked—I went over to the meeting of the chief judges of the circuit. And we discussed this. And they agree with all of them. And the Judicial Conference says we agree with all of them, and we will implement them. The key to this, I think, is to get the chief judges now and in the future to recognize that they might during the course of their career have one of these controversial matters. And then they have to have the help to treat it properly. And that means partly technical. It is partly a question

of — well, I see Congressman Sensenbrenner is here. And he was very helpful on this. And we went through it. And it will be implemented.

Mr. SMITH. And the fact that these 12 recommendations are relatively or are non-controversial you think will lead to implementation perhaps in 2008?

Justice BREYER. I would think so. I ask Jim Duff, who is here. He says absolutely. He told me before absolutely. And now he is just saying yes.

Mr. SMITH. Okay. Thank you, Justice Breyer." (Tr. 94).

<u>The view – expressed by Ranking Member Smith – that federal judicial pay increases should be joined with reforms pertaining to federal judicial discipline is supported by the Constitution. The same sentence of Article III, Section 1 as ends with the requirement that compensation of federal judges "shall not be diminished during their Continuance in Office" begins by stating that they "hold their Offices during good Behaviour".</u>

Tellingly, Chief Justice Roberts not only failed to identify the Constitution's "good Behaviour" provision in his "2006 Year-End Report on the Federal Judiciary", but referred to "life tenure" of federal judges as being directly threatened by "[i]nadequate compensation". This, although the Constitution does not confer "life tenure", but tenure that is contingent on "good Behaviour". Likewise, Justices Kennedy, Breyer, and Alito did not examine the Constitution's "good Behaviour" provision during their appearances before the Senate and House Judiciary Committees in February and April 2007. Indeed, the only mention of it at either hearing was by Justice Kennedy in responding to a question of Senate Judiciary Committee Chairman Patrick Leahy about impeachment, unconnected to the judicial compensation issue (see fn. 3, *infra*). As to the Justices' written statements to the Judiciary Committees, only Justice Breyer mentioned "good Behaviour", which he did in passing (Tr. 14) – without identifying that it is in the same sentence of the Constitution as the provision for undiminished compensation, without exploring its relevance to the compensation issue, and without asserting that mechanisms to evaluate complaints against federal judges for violations of "good Behaviour" are properly functioning. [2]

[2] Justice Breyer's written statement, which is part of the April 19, 2007 hearing record, also attaches a March 2007 report of the American College of Trial Lawyers, "*Judicial Compensation: Our Federal Judges Must Be Fairly Paid*". It omits the "good Behaviour" provision in stating:

> "the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) <u>life tenure</u> and (2) a prohibition against diminution of compensation." (Tr. 46 – and then again Tr. 172, underlining added).

Similarly, the hearing record includes other submissions, comparably deficient. There is an April 18, 2007 letter from the American Association for Justice, stating:

It appears that Congress has held no hearings on federal judicial compensation at which members of the public, rather than members of the federal judiciary, have been invited to testify. Had it done so, it would have heard graphic testimony as to the federal judiciary's flagrant and deliberate violations of the "good Behaviour" predicate for "Continuance in Office", for which removal – not compensation – is constitutionally-dictated.

As a result, Congress has not had the benefit of the public's rebuttal of the federal judiciary's self-serving claims as to the supposed threat to judicial independence caused by the supposed inadequate compensation of federal judges – claims that members of Congress, including its leadership, have apparently adopted. On June 15, 2007, Senate bill S.1638 was introduced to "adjust the salaries of Federal justices and judges" and, on October 4, 2007, House bill H.R. 3853 was introduced to "increase the pay of federal judges" – each representing an approximately 29% pay hike. As these two bills have been voted out of their respective Senate and House Judiciary Committees – the Senate bill with various ethics reforms attached – hearings on the Breyer Committee Report are additionally compelled so that Congress can understand the deceit practiced upon it by the federal judiciary in seeking increased compensation when it has eviscerated the "good Behaviour" predicate for federal judges' "Continuance in Office". Such truly is "a constitutional crisis", one which has made a mockery of the very purpose for which judicial independence is intended: ensuring that judicial decisions are based on fact and law and not extraneous influences and pressures.[3]

> "The U.S. Constitution contains two vital provisions addressing Federal Judges: (1) life tenure, and (2) a prohibition against the diminution of compensation." (Tr. 143, underlining added).

Also, an April 2007 report of the Governance Studies program at the Brookings Institution and the American Enterprise Institute, "*How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries*", which, acknowledging that the Constitution provides for judicial service "during good Behaviour" defines this as "(essentially for life)", thereafter using the phrase "life-tenured judges" (Tr. 146).

[3] The federal judiciary continually misleads Congress and the public into believing that judicial decisions are not a proper basis for discipline and impeachment. Illustrative is the following excerpt from the Senate Judiciary Committee's February 14, 2007 hearing:

> "Chairman LEAHY. But Chief Justice Rehnquist said, and said in a very straightforward way, 'Judges judicial acts may not serve as a basis for impeachment,' and then said, 'any other role would destroy judicial independence.' Do you agree with that? Of the judicial acts?
>
> Justice KENNEDY. Of course. The first impeachment of Justice Chase established, again, a good separation of powers rule. The Constitution does not say exactly the grounds of impeachment. It says the judges hold their offices during good behavior. But it has been established and it is part of our constitutional tradition that the decisions of the court, as you indicate, Mr. Chairman, are not the bases for impeachment—it is part of our constitutional tradition." (Tr. 11).

To assist Congress in confronting heinous violations of "good Behavior" within the federal judiciary, covered-up by the Breyer Committee Report, our nonpartisan, nonprofit citizens' organization has rendered a Critique expressly "in support of congressional hearings & disciplinary and criminal investigations." The Critique details that the Breyer Committee Report is "a knowing and deliberate fraud on the public", "methodologically-flawed and dishonest", and that it rests on

> "hiding the evidence – first and foremost, the thousands of judicial misconduct complaints filed under the Act, which the federal judiciary, not Congress, shrouded in confidentiality and made inaccessible to both Congress and the public, so as to conceal what it is doing." (at p. 1).

Additionally, the Critique demonstrates that the federal judiciary's new rules for federal judicial discipline, based on the Breyer Committee Report, "violate and affirmatively

---

This is overbroad. Judicial independence covers only decisions made in good-faith. It does not cover bad-faith decisions, where a judge knowingly and deliberately falsifies and omits the material facts and/or disregards controlling, black-letter law. Such wilful decisions, particularly by lower court judges, are not merely "wrong", "erroneous", and/or "unpopular". They are corrupt – and the distinction was recognized by Justice Chase himself at his impeachment trial. See, *inter alia*, When Courts & Congress Collide, 2006, by former House Judiciary Committee counsel Charles Gardner Geyh, particularly his chapter on impeachment, and his article "*Rescuing Judicial Accountability from the Realm of Political Rhetoric*", September 2006, Legal Studies Research Paper, accessible *via* http://ssrn.com/abstract=933703:

> "It is hard to quarrel with the notion that judges should be accountable for intentional decision-making error: The judge who makes such errors has knowingly violated her oath of office, in which she swore to uphold the law.", citing 28 U.S.C. §453. (p. 15, underlining added);
>
> "With respect to decision-making, most would agree that intentional disregard of the law – regardless of motive – is an indefensible usurpation of power by judges who have sworn to follow the law, for which judges are properly accountable to the public and political branches." (p. 19, underlining added);
>
> "At his Senate trial, Justice Chase drew a distinction between innocent and ill-motivated error that resonates to this day. For Chase, 'ignorance or error in judgment,' is an impeachable offense only if it has 'flown from a depravity of heart, or any unworthy motive.'[fn] Accordingly, if the Senate found that he 'hath acted in his judicial character with willful injustice or partiality, he doth not wish any favor; but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him." – the footnote being "1 Trial of Samuel Chase 102 (statement of Justice Chase)." (p. 26, underlining added)

See also CJA's published article, "*Without Merit: The Empty Promise of Judicial Discipline*", The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997), annexed as Exhibit A-1 to the Compendium of Exhibits substantiating CJA's Critique of the Breyer Committee Report, *infra*.

misrepresent the congressional statute they purport to implement". A copy of the Critique is enclosed, as is our Executive Summary, summarizing the content of the Critique's 20 sections.[4]

More than two months ago, we hand-delivered two copies of the Critique to the Judicial Conference and the Supreme Court. Our March 6, 2008 coverletter to Chief Justice Roberts, as head of the Judicial Conference, stated:

> "...Unless you deny or dispute the Critique's 73-page analysis and the accompanying and referred-to substantiating documentary proof, we respectfully call upon you to take such appropriate steps as Congress empowered the Judicial Conference to take pursuant to 28 U.S.C. §331:
>
> > 'hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority.'
>
> Otherwise, we will turn to the President and Congress for their endorsement of 'congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline' – relief clearly warranted by the Critique." (at pp. 3-4).

We received no response from the Chief Justice, either before or after the Judicial Conference's March 11, 2008 adoption of its new rules for federal judicial discipline. All that we received was a non-responsive five-sentence March 7, 2008 letter from James Duff, Director of the Administrative Office and Judicial Conference Secretary, to which we replied on March 10, 2008. We have heard nothing further.

Evident from this correspondence – a copy of which is enclosed – is the deliberateness with which Chief Justice Roberts and Mr. Duff (reportedly the federal judiciary's "point man for the salary campaign")[5] have turned their backs on this last chance to put the federal judiciary's "house in order" without intervention of the other governmental branches. Such reinforces the necessity that Congress vindicate the public's rights by demanding the federal judiciary's response to each of the Critique's 20 sections, including, under oath, at congressional hearings.

We look forward to assisting you and other members of Congress in discharging your constitutional duties to protect the People of this nation from federal judges who should not be additionally compensated, but, rather, removed from the bench for their corruption and

---

[4] The Critique, Executive Summary, and substantiating documents are all posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal".

[5] "*Judge Pay Hike May Be Running Out of Steam*", Legal Times (Tony Mauro), May 6, 2008.

betrayal of the public trust, as *readily-verifiable* from primary-source documentary evidence.

Thank you.

Enclosures: (1) Executive Summary of CJA's March 6, 2008 Critique
(2) CJA's March 6, 2008 Critique, bound Compendium of Exhibits, & three free-standing file folders of further primary source documents;
(3) Correspondence:
– CJA's March 6, 2008 letter to Chief Justice Roberts
– James Duff's March 7, 2008 letter
– CJA's March 10, 2008 letter to James Duff

cc: Supreme Court Justice John G. Roberts, Jr.
Associate Justice Stephen Breyer
Associate Justice Samuel Alito
Associate Justice Anthony Kennedy
James C. Duff, Judicial Conference Secretary
& Director of the Administrative Office
House Judiciary Committee:
Congressman John Conyers, Jr., Chairman
Congressman Lamar S. Smith, Ranking Member
Congressman Howard L. Berman, Chairman, Courts Subcommittee
Congressman Howard Coble, Ranking Member, Courts Subcommittee
Senate Judiciary Committee:
Senator Patrick J. Leahy, Chairman
Senator Arlen Specter, Ranking Member
Senator Charles E. Schumer, Chairman, Courts Subcommittee
Senator Jeff Sessions, Ranking Member, Courts Subcommittee
President George W. Bush
Presidential Candidates:
Senator John McCain
Senator Barack Obama
Senator Hillary Rodham Clinton
Congresswoman Nita Lowey
The Public & The Press