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STATEMENT FOR PRESENTMENT AT THE APRIL 24, 1998 PUBLIC HEARING OF THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

My name is Elena Ruth Sassower and I am the coordinator and co-founder of the Center for Judicial Accountability, Inc. -- known as CJA. CJA is a national, non-partisan, non-profit citizens' organization, with members in over 30 states. Our purpose is to safeguard the public interest in meaningful and effective processes of judicial selection and discipline so as to ensure the integrity of the judicial process. We do this by gathering and analyzing empirical evidence. Where the evidence shows dysfunction and corruption, we provide that evidence to those in leadership positions so that they can *independently* verify it and take remedial action to protect the public. It is to provide this Commission with such evidentiary proof that I am here today.

At the outset, an observation must be made about this Commission. It is unclear to us -- and to everyone else we have asked at the Commission, the Administrative Office, and the House and Senate Judiciary Committees -- how the Commission came to be constituted as it has, consisting of five members *all* of whom have been appointed by the Chief Justice of the Supreme Court. The several bills introduced in the House of Representatives last year -- and the one ultimately passed -- called for a commission with members designated by appointing authorities from the three branches of government. The same is true of the bills that were introduced in the Senate. In each of these bills, the Chief Justice's designees were equal in number to those of the President and even combined they were outnumbered by those designated by Congress.

It has been explained to us that the Commission that emerged was some sort of last-minute compromise at the end of the 105th Congress between the House, which had passed its aforesaid commission bill, and the Senate, which was about to vote to split the Ninth Circuit. Frankly, we don't see the basis upon which a commission with a membership chosen solely by the Chief Justice, with no requirement of diversity[1], could be viewed as a compromise by anyone but the federal judiciary. Yet, the Administrative Office has told us that the federal judiciary was itself

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[1] By contrast, when Congress passed the 1988 bill which created the Federal Courts Study Committee, all of whose 15 members were to be designated by the Chief Justice, it required him to make his selection "in a manner as to be representative of the various interests, needs, and concerns which may be affected by the jurisdiction of the Federal courts". Public Law No. 100-702, 102 Stat. 4642, reprinted as Appendix A of the April 2, 1990 Report of the Federal Courts Study Committee.

surprised by the creation of the Commission since the Judicial Conference had taken *no* position on the split of the Ninth Circuit[2], which had *not* been the subject of any Senate hearing since September 13, 1995, and had *not* requested any congressional studies on that issue or on structural reform.

The Commission members designated by the Chief Justice are four federal judges and the past-president of the American Bar Association, the keynote of whose presidency was the independence of the judiciary. As such, this Commission is going to have an even tougher job of proving its credibility to an already cynical general public -- and to Congress. It can do this only by providing those who are not part of the federal judicial and legal establishment represented by its membership with a meaningful opportunity to be heard and by examining the evidentiary proof presented in opposition to standard establishment claims.

As highlighted by the comprehensive statement of Professor William Richman at the Commission's April 3rd hearing, the simplistic arguments for opposing an increase in the size of the federal judiciary, advanced by what he calls the "Judicial Establishment", are either *not* empirically-supported or are *contradicted* by the empirical evidence. This includes the arguments that there will be a decrease in the quality of the federal judiciary because, with an influx of federal judicial nominees, there will be less scrutiny of their qualifications. This very argument was advanced by former Eleventh Circuit Chief Judge Gerald Tjoflat at the Commission's March 23rd hearing, in a statement quoting from the much-cited 1993 article of then Second Circuit Chief Judge Jon Newman[3], a leading proponent of a small judiciary. As to this argument, Professor Richman's masterful law review article, "*Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*" (Cornell Law Review, Vol. 81: 273-342 (1996)[4]) -- from which his hearing statement was adapted -- also cites Judge Newman's article. Yet, Professor Richman's April 3rd statement (at p. 2) goes beyond his own law review article (at p. 302) to assert: "Judges are confirmed in groups and their hearings are pro forma." That, however, is just the tip of the iceberg.

The travesty of the Senate's confirmation of federal judicial nominees has been the subject of a variety of studies, in addition to published narrative accounts, going back many years before Judge Newman's 1993 article, when the federal judiciary was yet smaller. These include the 1986 Common Cause Study entitled, *Assembly-Line Approval* -- which made a list of salutary recommendations, all or most of which appear to be unimplemented today -- as well as a chapter entitled "*Judicial Nominations: Whither 'Advice and Consent'?*" in the 1975 book on the House and

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[2] In a telephone conversation with John Hehman, Chief of the Appellate Court and Circuit Administration Division of the Administrative Office, we inquired whether the judges of the Ninth Circuit were requesting that the Ninth Circuit be split -- or whether the clamor was from judges outside the Circuit and from politicians. He confirmed the latter to be the case.

[3] "1,000 Judges -- The Limit for an Effective Federal Judiciary", 76 Judicature 187 (1993).

[4] Co-authored by Professor William Reynolds.

Senate Judiciary Committees by Ralph Nader's Congress Project. However, the lack of scrutiny of the qualifications of judicial nominees goes beyond the public spectacle of *pro forma*, assembly-line confirmation hearings[5]. It embraces the closed-door supposed pre-nomination screening.

Back in 1992, CJA pierced the veil of secrecy surrounding the pre-nomination judicial screening process. Comparing the blank questionnaire which the Senate Judiciary Committee requires each federal judicial nominees to complete with the blank questionnaires used by the American Bar Association and the Association of the Bar of the City of New York for their pre-nomination screening, we discovered that they were similar and even identical in their most pertinent parts. Thus, in obtaining the publicly-available responses to the Senate Judiciary Committee questionnaire for a particular case study nominee -- one nominated to the Southern District of New York -- we could infer what his confidential responses had been to those bar associations' similar if not identical questions. And once we investigated those publicly-available responses, we were able to prove that no adequate investigation had been done by these organizations -- since they would have otherwise readily unearthed his innumerable misrepresentations of his qualifications and proof (from the easily-accessible court files of the litigated cases he had identified as his "most significant") that he been an incompetent and unethical practitioner when he practiced law -- which was not for nearly a decade. Indeed, we showed that our case study nominee was "thoroughly unfit for judicial office" and that his true credentials were his political connections. This we documented in a 50-page critique -- the product of six months of investigative research -- which we submitted to the leaders of the U.S. Senate, with a moratorium request to halt all judicial confirmations pending an official investigation of the serious failure of the pre-nomination screening process, established by our critique. In so doing, we beseeched the bar associations, to whom we gave copies of the critique, to give their support and to correct their egregiously faulty procedures which, in the case of the City Bar, included deliberately *screening-out* adverse information so as to confer upon the nominee an "approved" rating.

In 1993, we presented a copy of our groundbreaking critique to the National Commission on Judicial Discipline and Removal and, in 1994, presented a copy to the Judicial Conference's Long-Range Planning Committee, together with three compendia of our correspondence with those in leadership positions in the Senate, at the ABA, and at the City Bar, demonstrating their utter failure to take any corrective steps. Both the National Commission and the Long-Range Committee ignored our critique, issuing final reports which -- like their draft reports -- recognized the critical importance of a careful appointments process, *without* any affirmative representation about whether such process exists in fact[6].

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[5] *See also* Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection, 1988.

[6] Without citing *any* evidentiary support, the 1990 report of the Federal Courts Study Committee asserted that federal judges have been "carefully selected through the process of presidential nomination and senatorial confirmation" (at p. 4). Included in its arguments against more than an incremental expansion of the size of the federal judiciary was its claim that "The

So that this Commission's conclusions may be empirically-based as to how completely dysfunctional the process of federal judicial appointments is -- and the need for systemic reform, *irrespective* of how many additional judgeships are created -- we are providing you with the *identical* materials we presented to the National Commission on Judicial Discipline and Removal and to the Long-Range Planning Committee, as well as further primary source materials, collected in a June 28, 1996 letter to Senate Judiciary Committee Chairman Orrin Hatch in opposition to the confirmation of another politically-connected nominee. These additional materials chronicle, perhaps even more powerfully, the utter dysfunction of the ABA's pre-nomination screening -- in this case, its wilful *screening-out* of information adverse to the candidate it was rating -- as well as the hoax of post-nomination Senate screening[7]. This letter reiterated our prior call for a moratorium and official investigation and was provided to those in leadership in the Senate, at the Justice Department, in the ABA -- with no response, except for Senate confirmation of the nominee who was the beneficiary of the wilful non-scrutiny and cover-up our letter documented.

Obviously, a dysfunctional judicial selections process will increase the likelihood of judges committing substantial "error" or engaging in misconduct. The result is injustice for those litigants who cannot afford appeals -- which is most litigants -- and otherwise needless appeals for the litigants who can. These appellants are not only burdened with appeal costs, but by injury which may be irreparable even if they obtain appellate reversal. But do they obtain reversals of meritorious appeals, where the facts and law are decisively in their favor? Professor Richman does not answer that question either in his April 3rd statement or in his law review article, other than to refer to the diminished quality of appellate decisions resulting from short-cut procedures being used to deal with increased caseload. This is different from saying that the result is incorrect. However, on a statistical level alone, the precipitous drop in reversal rates to half of what they were in 1960[8] should raise alarm.

In developing a methodology, this Commission MUST go behind the statistics[9] and

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process of presidential nomination and senatorial confirmation would become pro forma because of the numerosity of the appointees..." (at p. 7).

[7] The despicable behavior of the ABA, Justice Department, and Senate Judiciary Committee, chronicled by that letter, provides a "reality check" to the Miller Center Commission Report, "*Improving the Process of Appointing Federal Judges*", issued in that same period.

[8] "*Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, Cornell Law Review, *supra*, p. 295.

[9] In testifying at the September 13, 1995 Senate hearing on splitting the Ninth Circuit, Professor Arthur Hellman, who has conducted the critical empirical study on the Ninth Circuit's size and intra-circuit conflict, made a pertinent comment about the limitations of statistics: "...I have been struggling with these judicial caseload management statistics ever since

look at actual appellate files. We suggest that you begin with cases where petitions for rehearing and/or rehearing *in banc* have been filed, as well as where §372(c) complaints have been filed against appellate judges. This will enable the Commission to better evaluate whether, as the federal judiciary has claimed, the appeals given the short-cut treatment, *inter alia*, *no* oral argument, *no* written opinion, *no* published, precedential decision -- were ones deserving of such treatment[10] -- and whether federal appellate decisions otherwise demonstrate the quality, consistency, fairness, and due process that your hearing notice has asked about. Indeed, from the file evidence I will today present: two appeals, each with petitions for rehearing with suggestions for rehearing *in banc*, and the §372(c) complaints against the appellate judges in those appeals, each complaint followed by petitions for Judicial Council review, you will be forced to conclude that the most significant problems are not procedural, but rest with the integrity of the judiciary itself, beginning with its complete disrespect for the ethical rules and statutes designed to ensure impartiality, 28 U.S.C. §144 and §455. This evidence is only a fraction of what CJA's members, individually, have to offer.

The file evidence I am presenting is from Judge Newman's Second Circuit. Presumably, the Second Circuit is the source for many of his claims about smallness lending to the federal judiciary's supposed quality, uniformity of decisions, and respect for Circuit precedence. This evidence blasts those claims to smithereens. And it provides graphic proof of the deliberateness with which the Second Circuit has trashed anything resembling a judicial or appellate process and the §372(c) disciplinary process. Because of its profound seriousness, we long ago provided copies to the Administrative Office for transmittal to the appropriate committees of the Judicial Conference so that they could exercise supervisory oversight, including taking steps to ensure Supreme Court review of the second appeal, now headed to that Court. Such steps would accord with the federal judiciary's exaggerated "independence of the judiciary" claims, where appellate review, whose efficacy is never questioned, is regarded as the sole means for examining judicial decisions and rulings. A copy of the file of that second appeal was also provided to the ABA's current president for action by the appropriate ABA committees, including *amicus* assistance in securing Supreme Court review. Neither have responded to our serious and substantial correspondence, copies of which we are providing to the Commission so that you may further understand why in matters involving judicial integrity and misconduct, no less than in judicial selection, the general public has ample reason to disdain the Judicial and Legal Establishment.

Indeed, at the same time as the Judicial Conference has not addressed the evidentiary

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my work at the Hruska Commission and I can tell you that it is extraordinarily difficult to identify the causes of delay or really any other appellate problems through the use of these statistics." (at p. 106).

[10] "Given the relationship between argument and publication, it seems clear that the focus of concern ought to be on whether cases are being routed appropriately to oral argument or nonargument disposition tracks." (at p. 49, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States, Federal Judicial Center, 1993).

R-46

files we provided it establishing that 28 U.S.C. §372(c), §144, and §455 have been gutted by the federal judiciary, it has been making *false* claims to the House Judiciary Committee as to the efficacy of these statutes to advance its opposition to Sections 4 and 6 of H.R. 1252, which would modify and supplement them. For this reason, we transmitted to the House Judiciary Committee copies of our 2-1/2 year correspondence with the Administrative Office -- and the files it enclosed. Since this Commission -- as part of its hearing notice -- has asked as to "what measures should be adopted by Congress or the courts to ameliorate or overcome perceived problems in the federal appellate system or any of its circuits?", you should particularly examine our two March 1998 memoranda to the House Judiciary Committee, copies of which we are providing you. These memoranda, copies of which we sent to the Administrative Office and to the ABA's current president for their response, highlight the need to legislatively reinforce the goals of judicial integrity which animated passage of 28 U.S.C.§144, §455, and §372(c), as well as to clarify that "judges who, for ulterior purposes, render dishonest decisions -- which they *know* to be devoid of factual or legal basis -- are engaging in impeachable conduct" (3/23/98 Memo, pp. 10-11). As reflected by my published article, "*Without Merit: The Empty Promise of Judicial Discipline*" (The Long Term View (Massachusetts School of Law journal), Vol. 4, No. 1, summer 1997), which is an integral part of these memoranda, it is CJA's view that the disciplining of the federal judges for misconduct must be reposed in a body outside the federal judiciary. This is because -- in the 18 years since Congress enacted §372(c), based on assurances from the federal judiciary that it could and would "police itself", the federal judiciary has not been doing so. As my article details, this was covered-up by the National Commission on Judicial Discipline and Removal in its methodologically-flawed and dishonest report. A copy of that article is annexed to this statement.

Of the two Second Circuit appeal files, the second appeal is the more important. It is singlely focused on the issue of judicial bias, encompassing, in a single litigation, *eight* separate recusal applications: against the district judge, the Chief Judge of the district, the Second Circuit Court of Appeals, the appellate panel, specific Second Circuit Court of Appeals judges -- *all* either ignored *without* adjudication or denied *without* reasons, except in the case of the district judge, whose denial of recusal and of reargument/renewal were for reasons whose utter falsity, both factually and legally, was demonstrated on appeal, but *not* adjudicated by the appellate panel. Moreover, because the petition for rehearing with suggestion for rehearing *in banc* in that appeal incorporated the §372(c) complaints filed against the district judge and appellate panel, subsequently dumped by Second Circuit Chief Judge Ralph Winter as "merits-related", those complaints -- which under the §372(c) statute are not judicially reviewable -- will nonetheless be part of the record before the Supreme Court on the upcoming petition for certiorari. Such a record -- and the anticipated "Question Presented" -- will provide the Court with an unparalleled opportunity to exercise its "power of supervision" not only over the Second Circuit, which has refused to address the bias issues in the case in either a judicial or disciplinary context, but over the Circuit Chief Judges, Acting Circuit Chief Judges, and the Circuit Judicial Councils across the country, who, throughout the 18 years since §372(c) was enacted, have not developed case law on the relationship between appellate and disciplinary remedies, nor defined the "merits-related" ground for dismissal under §372(c), nor the discretion, afforded by the statute, to review even "merits-related" complaints. Ironically, virtually the only case law is from the Ninth Circuit and its few published decisions, from a period extending

before §372(c) was enacted, have undergone no discernible development or refinement in any of the Circuits. As my article points out (at p.95), the federal judiciary has deliberately kept the "merits-related" category vague and all-encompassing so as to dump virtually all §372(c) complaints as "merits-related".

Much as I would, therefore, like the skip directly to the second appeal, the first appeal has unique historical significance. We presented it to both the National Commission on Judicial Discipline and Removal and to the Judicial Conference's Long-Range Committee to demonstrate the fallacy of blind reliance on appellate review as a "fundamental check" for either judicial misconduct or "error" , or the claim that a small judiciary acts to restrain errant judges through informal "peer disapproval". Before each of these bodies -- as before you today -- Judge Newman testified. Consequently, it deserves reiteration that the file of that first appeal not only explodes Judge Newman's keep-the-judiciary-small claims, but exposes his hypocrisy -- since he is the author of the facially-aberrant and lawless appellate decision to which his relatively small Circuit put its imprimatur by failing to rehear it *in banc*. Here, too, the National Commission and the Long-Range Committee simply ignored the tell-tale evidence in their repetition of those claims in their final reports. I would point out that the appeal which my article describes, without identifying details (at pp. 95-97) is this appeal. Likewise, the §372(c) complaint, whose extraordinary pre-filing odyssey the article chronicles, together with its "merits-related" dismissal by dishonest and violative Circuit orders, is a complaint against then Circuit Chief Judge Newman for his biased and knowingly fraudulent conduct in the appeal.

The primary functions of the Circuit Courts of Appeals -- as defined by the Judicial Conference's Long-Range Plan (at p. 41) -- are two-fold: "error correction" and "rule declaration"[11]. The two appeals each presented the Second Circuit Court of Appeals with the duty to fulfil both those functions. They also presented it with a frequently forgotten additional function: safeguarding judicial integrity by taking action against the district judge, as required by the Judicial Conference's own Code of Judicial Conduct for U.S. Judges[12], to wit, disciplinary, if not criminal, referral. Neither appeal was occasioned by "error" of the district judge, but by judicial misconduct, rising to the level of judicial fraud. This was highlighted by the appellants' briefs in each appeal, with meticulous record references establishing that each of the district judges had authored decisions which, in every material respect, they *knew* to be factually false, fabricated, misleading and violative of fundamental black-letter law and rudimentary due process.

At issue in the first appeal was the district judge's imposition of nearly $100,000 counsel fees against two plaintiffs in a housing discrimination case in favor of fully-insured defendants, who had incurred *no* costs and for whom it was a windfall. The plaintiffs tried to obviate

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[11] *See also* Structural and Other Alternatives for the Federal Courts of Appeals, *supra*, at p 7.

[12] Canon 3B(3) of the Judicial Conference's Code of Judicial Conduct. *See also*, Canon 3D of the ABA's Code of Judicial Conduct.

the appeal. They moved to vacate the fee award on the jurisdictional grounds that the defendants were not the "real party in interest" and that the insurer was a "necessary party". Rather than adjudicating that unopposed motion, it was referred by a Circuit judge to the panel hearing the appeal. This then necessitated perfecting the appeal, with the consequent -- and heaviest -- cost and burden falling on the two plaintiffs, who were individual litigants.

The assigned appellate panel consisted of three seasoned Second Circuit judges. Presiding was Judge Jon Newman, who, the following year -- 1993 -- was to become the Circuit's Chief Judge, Judge Ralph Winter, who was to succeed him as Chief Judge (a position he currently holds), and Judge Edward Lumbard, who had long before been the Circuit's Chief Judge. Appellants were given 10 minutes for their oral argument -- and then waited more than half a year for the cover-up appellate decision -- a decision, *per* Judge Newman, which *never* cited the record once and did *not* identify *any* of the appellants' legal arguments or those in the *amicus* brief of the NAACP Legal Defense and Educational Fund. This included appellant's threshold jurisdictional argument -- which the panel denied, *without reasons*, on the pre-typed motion form. *On its face*, the appellate decision -- issued for publication -- was internally contradictory and violative of a litany of bedrock decisional law of the Circuit and the U.S. Supreme Court. *Sua sponte*, it invoked the district judge's "inherent power"[13] to maintain intact the district judge's alternative $100,000 sanctions award against the plaintiffs, which, being arbitrary, uncorrelated, and not the product of any hearing or requisite findings, flouted the standards of Rule 11 and 28 U.S.C. §1927. This *sua sponte* "inherent power" award was not only *without* notice to the plaintiffs, but on a record which was devoid of *any* sanctionable conduct by them. Indeed, the *only* sanctionable conduct was by defendants. They had won the case by sabotaging plaintiffs' discovery rights through a stratagem of fraud and perjury, in which they had been aided and abetted by the district judge. This was particularized by plaintiffs' fully-documented and uncontroverted Rule 60(b)(3) motion to vacate for fraud, which was part of the appeal.

Yet on appellants' petition for rehearing with suggestion for rehearing *en banc*, where the 15-page limit was, with difficulty, sufficient to recite the egregious and unprecedented nature of the appellate decision, not a single one of the judges of Judge Newman's reasonably small, collegial Circuit exercised any "quality control" by requesting a vote on rehearing. For that matter, neither did the Supreme Court exercise its power of supervision when the appellants presented a petition for a writ of certiorari -- or, thereafter, when their supplemental petition for rehearing to the Supreme Court identified the undisclosed bias and retaliatory motive animating the Second Circuit's fraudulent and lawless decision and that of the district judge[14]. By then, Judge Newman had not only become

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[13] Judge Newman rested on the Supreme Court's imprimatur on "inherent power" in *Chambers v. Nasco*, 111 S.Ct. 2123 (1991), reh. denied, 112 S.Ct. 12 (1991) -- *without* adhering to any of the due process prerequisites recognized in the majority opinion, authored by Justice White.

[14] The supplemental petition for rehearing was precipitated by the Supreme Court's granting of review to *U.S. v. Liteky*, involving the interpretation of 28 U.S.C. §455(a), and argued

the Second Circuit's Chief Judge, but was, in that very period, being widely-publicized as a leading contender for the Supreme Court seat being vacated by the retiring Justice White!

The second appeal came before the Second Circuit five years later, in 1997. Here too, the plaintiff-appellant sought to obviate the appeal. She insisted on a case management conference, which was duly called by a Circuit staff attorney. The conference was sabotaged by counsel for defendants, the New York State Attorney General, himself a defendant. In violation of the notice and order announcing the conference, the Attorney General sent an assistant to the conference who knew nothing about the case and had no authority to do anything, even to agree to the most minimal and legally-compelled stipulations, including those suggested by the Staff Attorney. This necessitated perfecting the appeal. A three-judge Circuit panel thereafter approved such sabotage by denying, *without* reasons, appellant's fully-documented motion for sanctions against the Attorney General for this and other misconduct in the case management phase of the appeal. Encompassed in its one-word denial was a denial of appellant's particularized application for the Circuit's recusal and to transfer the appeal to another Circuit, which prefaced the motion.

The panel thereafter assigned also consisted of a former Second Circuit Chief Judge, Thomas Meskill[15]. Joining him was Second Circuit Judge Dennis Jacobs, who presided, as well as a Second Circuit district judge, Edward Korman. The utter inappropriateness of the panel's allocation of only five minutes for oral argument -- and its not-for-publication, no citation Summary Order, which it rendered less than two weeks later -- cannot be recognized without examining the appellate record since it is not apparent from the Summary Order, which bears little resemblance to the record. You need look no further than the verified complaint. It suffices to establish the transcending importance of the underlying action under 42 U.S.C. §1983 for civil rights violations and for a declaration of the unconstitutionality of New York's attorney disciplinary law, as written and as applied. The particularized allegations include -- and they are *all* expunged from the Summary Order -- that high-ranking New York state judges had retaliated against a judicial whistle-blowing attorney who was challenging the political manipulation of state judicial elections by issuing an "interim" order suspending her law license, immediately, indefinitely, and unconditionally, *without* written charges, *without* a hearing, *without* findings, *without* reasons, thereafter denying her *any* post-suspension hearing or *any* appellate or independent review[16]. This was all in knowing and deliberate

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that the appellants' case was a companion case that would provide the Court with the opportunity to more fully explore the bias issues. *See* fn. 17, *infra.*

[15] In fact, he had been its Chief Judge in the period of the first appeal -- thereafter succeeded in that position by Judge Newman.

[16] So extraordinary were the particularized allegations of the verified complaint that they overcame *all* pleading defenses, including the seemingly insurmountable hurdle to judicial immunity articulated by Justice White's majority opinion in *Dennis v. Sparks*, 98 S.Ct. 1099 (1978), a point emphasized before the district judge and on appeal. For a discussion of how the facts alleged -- and documented -- brought this case within the analysis of *Dennis v. Sparks, see*

violation of *express* requirements of the state's disciplinary law and of clear and controlling decisional law of the state's highest court, depriving plaintiff of fundamental due process and equal protection, and designed to silence her for legitimate exercise of her First Amendment rights. In this, the State Attorney General was alleged to be an active collusive participant, as were the at-will judicial appointees who are part of the attorney disciplinary mechanism that is entirely controlled by the state judiciary. These extraordinary allegations not only appear over and over in the record -- including in CJA's $16,770 New York Times ad, "*Where Do You Go When Judges Break the Law?*" (Op-Ed page, 10/26/94), reprinted in the New York Law Journal (11/1/94, p. 9) -- which was part of the record [R-606]-- but were all supported by uncontroverted evidentiary proof.

Likewise of transcending significance was the posture of the case on appeal, because what was involved was the integrity of the proceedings in the district court. Appellant's brief highlighted this, presenting a SOLE transcending issue: the disqualifying "pervasive bias" of the district judge, as evidenced by his rulings and failures to rule on the motion submissions before him[17]. This included his denial of appellant's fully-documented and uncontroverted motions for his recusal under 28 U.S.C. §144 and §455 [Point I], his failure to adjudicate *any* of plaintiff's repeated and fully-documented and uncontroverted sanctions applications against defendants [Point II], his *sua sponte* and *without* notice conversion of defendants' dismissal motion -- the subject of one of plaintiff's unadjudicated sanctions applications -- into a motion for summary judgment in their favor, based on *no* evidence whatever [Point IV], and his simultaneous denial, *without* reasons, of plaintiff's fully-documented and uncontroverted summary judgment application [Point V]. Appellant's brief demonstrated that the appeal was not about good-faith conduct by the district judge, but fraud by him, in concert with the defendants, and requested disciplinary and criminal referral of them "based upon their filing of false, fraudulent, and deceptive instruments, obstruction of justice, collusion, corruption, and other official misconduct" (Brief, at p. 76).

Indeed, because of the transcending public importance of the case, CJA ran a $3,000 ad, entitled "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", in The New York Law Journal (8/27/97, pp. 3-4), two days before oral argument, which invited the public to be present. In fact, appellant did not have even five minutes for her intended presentation. She was interrupted, within 30 seconds, by the Circuit judges, who insisted that she answer their questions -- questions, which, at best, reflected their complete ignorance of the case, if not a deliberate attempt by them to impede her presentment of the key issues[18]. These issues, included the Circuit's

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the Record on Appeal, pp. 479-483].

[17] On the issue of "pervasive bias", the appellant's brief argued that the case not only met the standard recognized by the Supreme Court in *Liteky*, 510 U.S. 540, 114 S.Ct. 1147 (1994), but posited the possibility that it would be the first in the Circuit where such "pervasive bias" was established. *See* Appellant's brief, pp. 32-33.

[18] The transcript of the oral argument is Exhibit "K" to appellant's post-appeal recusal/vacatur for fraud motion and is extensively discussed and analyzed at pp. 15-32 of the

disqualification for bias. In reiterating her prior written motion for the Circuit's disqualification, the presiding judge cut appellant off, mid-sentence, with no ruling.

The panel's not-for-publication Summary Order, signed by each of its three judges, also did *not* rule on appellant's recusal application. Nor did it even identify that such application had been made. *Without* citing the record once, and *without* identifying the SOLE transcending issue raised by appellant's brief: the district judge's "pervasive bias", the panel *expressly* stated that it was *not* ruling on the district judge's adjudications of the motion-submissions before him. Instead, the panel fashioned its own *sua sponte* dismissal of appellant's verified complaint on grounds of *Rooker-Feldman* and *unspecified* preclusion principles -- grounds shown by her brief to be *inapplicable* to her complaint's pivotal pleaded allegations -- *all* of which allegations the Summary Order expurgated.

All this was pointed out in appellant's petition for rehearing with suggestion for rehearing *in banc*, whose first paragraph explicitly posed the question:

> "...whether -- and to what extent -- appellate review and 'peer disapproval' are 'fundamental checks' of judicial misconduct, as claimed by the National Commission on Judicial Discipline and Removal in its 1993 Report -- and whether a remedy for such judicial misconduct exists under 28 U.S.C §372(c)..."

Incorporated by reference in appellant's petition were two rather extraordinary documents: (1) a motion to recuse the panel and the Second Circuit, to which was joined a motion to vacate for fraud the panel's Summary Order and the district judge's Judgment; and (2) §372(c) complaints against the Circuit panel and district judge, which also sought recusal of the Circuit and transfer. These juxtaposed for the Circuit two available, though not mutually exclusive options: a judicial/appellate remedy or a disciplinary one to address corruption on two levels of the federal judiciary, wholly subverting the judicial process and protecting defendant state judges -- and the Attorney General -- whose corrupt conduct was not only alleged with particularity, but documented by the uncontroverted record.

Again, the response of Judge Newman's collegial Second Circuit was that not a single one of its supposedly excellent, high-quality judges requested a vote on appellant's *in banc* petition. Appellant's fact-specific, fully-documented, and uncontroverted recusal/vacatur for fraud motion was denied by the panel in a one-word order, which none of the judges saw fit to sign. As to appellant's §372(c) complaints, likewise fact-specific and fully-documented, Second Circuit Chief Judge Winter dumped them as "merits- related" in a conclusory order, whose dishonesty included failing to address -- or identify -- appellant's specific contention that he -- and the Circuit -- were disqualified for bias and self-interest from adjudicating the complaints. Appellant's petition for review to the Second Circuit Judicial Council is pending.

The final question posed to witnesses by this Commission's hearing notice is "what

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motion. *See* file marked POST-APPEAL PROCEEDINGS.

is working well in the federal appellate courts?" Based on these two Second Circuit appeals, there is nothing working well in this Circuit -- a position echoed by CJA members having Second Circuit experience. The same is echoed as to other Circuits by CJA members, who relate stories of judicial lawlessness in the Circuit Courts of Appeals. Although CJA does not yet have the staff and resources to verify their claims, based on these two fully-documented cases, we have no reason to discount the horrors they describe to us. Our members routinely use words like dishonest, fraudulent, perjurious, cover-up, conspiracy to describe what goes on in the federal courts -- which, of course, is the kind of judicial misconduct these two cases show[19].

This Commission, composed of four federal judges and a former ABA president, is bound by the ethical codes of the Judicial Conference and the ABA to take corrective action[20]. Moreover, the situation herein documented is too dangerous to defer remedial action for the many, many months until you render your report to Congress. As soon as you verify what is documented in these appeal files, in the files of the judicial misconduct complaints, and in our submissions on the federal judicial screening process, we urge you to protect the public and the rule of law in any and every way you can devise. Can there be any doubt but that that is what a representative citizens' commission would do?

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[19] At your April 3rd hearing, John Meites, appearing on behalf of the Chicago Council of Lawyers brought to your attention that organization's evaluation of the Seventh Circuit, appearing in 43 DePaul Law Review, pp. 672-857 (1994). It includes description of decisions not based on facts in the record, etc. Such appellate level dishonesty is graphically described by Professor Anthony D'Amato in his gripping law review article, "*The Ultimate Injustice: When the Court Misstates the Facts*", Cardozo Law Review, Vol 11: 1313 (1989), which includes Professor Monroe Freedman's memorable quote about dishonest federal appellate decisions, particularly of the no-citation, not-for-publication variety.

[20] *See* footnote 12, *infra.*