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April 21, 2008

Professor Charles Gardner Geyh
Indiana University School of Law
211 South Indiana Avenue
Bloomington, Indiana 47405-7001

RE: Building Evidence-Based Scholarship on Federal Judicial Discipline
(& Selection) – CJA’s March 6, 2008 Letter to the Chief Justice &
Accompanying Critique of the Breyer Committee Report

Dear Professor Geyh:

This follows up our last exchange together, nearly ten years ago.¹ It is specifically occasioned by your testimony before the House Judiciary Committee at its June 29, 2006 hearing on H.R. 5219 to establish an inspector general for the judicial branch and at its September 21, 2006 hearing on the resolution to impeach U.S. District Judge Manuel Real.

In opposing the proposed inspector general as a threat to judicial independence, you stated that such “may ultimately be necessary, but not now” and that “The first step is to hear what the judiciary has to say” (Tr. 48):

“The preferred approach is to await the report of Justice Breyer’s Commission together with results of related efforts by Judicial Conference Committees on the Judicial Branch and the Codes of Conduct, and then work cooperatively with the Judicial Conference to meet Congress’s remaining concerns. If the judiciary is

* The **Center for Judicial Accountability, Inc. (CJA)** is a national, non-partisan, non-profit 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 Such is chronicled by the correspondence between us, posted on CJA’s website, www.judgewatch.org, accessible *via* the sidebar panel “Searching for Champions (Correspondence) - Academia”

unwilling to reform itself in the teeth of evidence that further reform is necessary, that may be the time to consider stronger medicine. But not now." (Tr. 51, underlining added).

Similarly, three months later, you opposed Judge Real's impeachment by urging that Congress await the federal judiciary's action on the Breyer Committee Report, released just two days earlier:

"...one desirable outcome of this would be for the Subcommittee to take a look at the Breyer Committee report, in its oversight capacity, to work with the Judicial Conference to make sure that they promptly adopt the recommendations of the Breyer Committee." (Tr. 154. underlining added).

It is now more than 1-1/2 years since Chief Justice Roberts released the Breyer Committee Report on September 19, 2006. What is your assessment of the Report? Have you done any critique of it? How about the organizations in which you are actively involved at policy-making levels, including:

(1) the American Bar Association, where you serve, *inter alia*, as a member of the Academic Advisory Board of its Standing Committee on Federal Judicial Improvements and were co-reporter to its Joint Commission to Evaluate the Model Code of Judicial Conduct; much as you were reporter to three prior ABA Commissions, including its Commission on the Separation of Powers and Judicial Independence;

(2) the Justice at Stake Campaign, where you serve as a member of its Board of Directors;

(3) The Constitution Project, where you serve as a member of the Steering Committee of its Courts Initiative and for whom, prior thereto, you were a reporter to its Citizens for Independent Courts' Task Force on the Distinction between Intimidation and Legitimate Criticism of Judges;

(4) the Brennan Center for Justice, whose just-released report "*Fair Courts: Setting Recusal Standards*" acknowledges you on its first page.

As for the American Judicature Society, of whose Center for Judicial Independence you were director at the time of our interaction 10 years ago, it has done no critique substantiating its October 28, 2006 editorial "*Politics and progress in federal judicial accountability*", whose description of the Breyer Committee Report is as "an impressive document – clear, candid, and based upon...a methodologically sound research protocol...".

By contrast, the Center for Judicial Accountability, Inc. (CJA) has done a 73-page Critique of the Breyer Committee Report, expressly “in support of congressional hearings & disciplinary and criminal investigations”. It demonstrates that the Report is “a knowing and deliberate fraud on the public” and “no less methodologically-flawed and dishonest than the 1993 Report of the National Commission on Judicial Discipline and Removal, on which it substantially draws”. The Critique also shows that the federal judiciary’s new rules for federal judicial discipline, based on the Breyer Committee Report, “violate and affirmatively misrepresent the congressional statute they purport to implement”.

We presented this Critique to Chief Justice John Roberts under a March 6, 2008 letter, calling upon him, as head of the Judicial Conference, to take corrective action to keep the federal judiciary’s “house in order” without intervention of the other two governmental branches. We received no response from the Chief Justice, either before or after the Judicial Conference’s adoption of its new disciplinary rules on March 11, 2008. Rather, the only response we received was a non-responsive March 7, 2008 letter from Judicial Conference Secretary James Duff, to which we replied on March 10, 2008. A copy of this exchange of correspondence is enclosed.

As a consultant to the National Commission on Judicial Discipline and Removal, whose 1993 Report relied on your underlying research study, and as a scholar of federal judicial discipline – giving public comment in testimony before Congress, in law review articles and other publications, including your book, When Courts & Congress Collide, at symposia and panel discussions, and to the press – the public depends upon you for accurate, unbiased information. Would you be willing to evaluate CJA’s Critique and letter to the Chief Justice so as to give Congress, the President, the presidential candidates, and the public the benefit of your expertise as to whether they evidentiarily establish that the time for “stronger medicine” is NOW and that what is needed is “radical overhaul of the façade of federal judicial discipline that currently exists”?

The Critique is posted on CJA’s website, www.judgewatch.org, accessible *via* the sidebar panel “Judicial Discipline-Federal”. Upon your confirmation that you will confront its detailed factual and legal showing, I will forward you a hard copy, including of its Compendium of Exhibits and three folders of further primary-source documents so that you can more conveniently answer the following questions, dispositive of the necessity for “radical overhaul” of federal judicial discipline:

- (1) Do you agree that the federal judiciary’s new rules for federal judicial discipline “violate and affirmatively misrepresent the congressional statute they purport to implement^[fn], 28 U.S.C. §§351-364, and do not comply with its requirement of ‘appropriate public notice and an opportunity for comment’ (§358), at least not in a meaningful, good-faith way”?

If so,

(a) What is your view of the Judicial Conference's adoption of the rules on March 11, 2008?;

(b) Do you agree that this is a matter properly brought to Congress' attention?

(2) Do you agree that the Breyer Committee Report is superficial, "methodologically-flawed and dishonest", and "a knowing and deliberate fraud on the public"?

If so,

(a) Do you agree that such warrants "congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline that currently exists"?

(b) Isn't action by our other government branches, Congress and the President, even more compelled if the Chief Justice does not respond to CJA's March 6, 2008 letter – including by taking such action as Congress empowered the Judicial Conference to take, pursuant to 28 U.S.C. §331, to "hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority"?

In the event you are unwilling to answer these evidence-based questions, determinative that "stronger medicine" is NOW necessary, would you kindly furnish the names of other scholars who you believe would do so? I have already asked these questions of Professor Arthur Hellman, who testified with you at the House Judiciary Committee's June 29, 2006 and September 21, 2006 hearings. Enclosed is a copy of my March 17, 2006 letter to him, to which I have as yet received no response.

Additionally, do you know of any scholars and/or organizations which have done their own critiques of the Breyer Committee Report? Certainly, Congress, the President, and the presidential candidates, to whom we will be turning to protect the public's rights, will want that information, as well.

Finally, I enclose a copy of CJA's April 18, 2008 comments to the Judicial Conference Committee on Codes of Conduct as to its material repudiation of the 2007 ABA Model Code of Judicial Conduct by its proposed revisions to the Code of Conduct for United States Judges. As co-reporter for the 2007 ABA Model Code, do you share this assessment and would you be

willing to otherwise respond to our submitted comments? Have you or others associated with the ABA's 2007 Model Code submitted comments of your own?

I would appreciate your response as soon as possible so that I may know if you are willing to work collaboratively to achieve the essential goal of ensuring the integrity of federal judicial discipline and, related to it, federal judicial selection.²

Thank you.

Yours for a quality judiciary,



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

cc: Professor Arthur D. Hellman

Enclosures: (1) CJA's March 6, 2008 letter to Chief Justice Roberts
(2) March 7, 2008 letter of Judicial Conference Secretary James Duff
(3) CJA's March 10, 2008 letter to James Duff
(4) CJA's March 17, 2008 letter to Professor Hellman
(5) CJA's April 18, 2008 comments to the Judicial Conference
Committee on Codes of Conduct

² See, final footnote of CJA's March 6, 2008 letter to the Chief Justice and pp. 3-4 of CJA's March 17, 2008 letter to Professor Hellman.