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EMERGENCY SUPERVISORY ATTENTION REQUIRED:

May 22, 2003 Senate Judiciary Committee Hearing on the Confirmation of New York Court of Appeals Judge Richard C. Wesley to the Second Circuit Court of Appeals

DATE: May 22, 2003

TO: Senator Orrin G. Hatch, Chairman, U.S. Senate Judiciary Committee

By Fax: 202-224-6331 / 202-224-9102 [9 pages]

By E-Mail: senator_hatch@hatch.senate.gov
swen_prior@judiciary.senate.gov

Senator Patrick Leahy, Ranking Member, U.S. Senate Judiciary Committee

By Fax: 202-224-9516 / 202-224-9516 [9 pages]

By E-Mail: senator_leahy@leahy.senate.gov
rachel_arfa@judiciary.senate.gov

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

RE: THE URGENCY OF YOUR PERSONAL SUPERVISORY OVERSIGHT
AND RESPONSE

This memorandum reinforces the necessity of your immediate personal supervisory oversight of Senate Judiciary Committee staff, as requested in CJA's May 19th memorandum addressed to you – and as yet not forthcoming.

Much as the May 19th memorandum was based, in pertinent part, on two disturbing phone conversations I had with Swen Prior, nominations clerk for the Committee's Republican Majority, so this memorandum is based on a disturbing phone conversation I had with Amy Haywood, an "investigator" for the Committee's Republican Majority.

Such conversation was initiated by Ms. Haywood's phone call to me, at approximately 2:05 p.m. on May 19th -- within two-and-a-half hours of my fax and e-mail transmittal of CJA's memorandum. Ms. Haywood did NOT indicate that Chairman Hatch had authorized her call. Indeed, from her initial reference to Mr. Prior, my impression was that she was actually calling at his instance. I became even more convinced of this by the end of our 15-minute conversation when Ms. Haywood refused to respond to my direct question as to whether Chairman Hatch agreed with what she represented was Committee counsel's opinion of CJA's March 26, 2003 statement. As you know, this statement particularizes documentary evidence establishing the unfitness of Judge Richard Wesley and P. Kevin Castel, arising from their lack of integrity. The statement, as well as the documentary evidence substantiating it, were hand-delivered to the Committee on May 5th, under a May 5th memorandum addressed to each of you.

I believe the intended purpose of Ms. Haywood's May 19th call was simply to respond to item 1 of the May 19th memorandum's RE: clause,

"CJA's request to testify in opposition at the May 22, 2003 hearing on Judge Wesley's confirmation".

Consistent with what Mr. Prior had revealed to me back in March, Ms. Haywood was to tell me that the Committee does not allow citizens to testify at its hearings to confirm nominees to the lower federal courts -- and that CJA would not be permitted to testify at the May 22nd hearing in opposition to Judge Wesley's confirmation. However, before she could convey this and because I believed she was calling as an "investigator, discharging some supervisory function in response to CJA's just-sent May 19th memorandum, I waylaid her with questions. Among these, whether she had read CJA's March 26, 2003 statement.

Ms. Haywood admitted she had NOT read it. She claimed, however, to have a memo about the March 23, 2003 statement from Committee counsel who had reviewed it, whose names¹ she would not reveal. From what she told me about this memo, it would seem that such reviewing counsel did not bother to verify the truth and accuracy of the statement's recitation of official and professional misconduct by Judge Wesley and Mr. Castel -- inasmuch as it was counsel's opinion that this recitation, EVEN IF TRUE, did not rise to a level that would disqualify either nominee.

¹ Although I am assuming the plural, I have no knowledge of how many counsel reviewed the March 26, 2003 statement.

NO COMPETENT, UNCONFLICTED COUNSEL could ever possibly have such opinion. And to be sure I understood correctly what Ms. Haywood was saying, I repeated several times – each time with incredulity – her representation to me that counsel’s opinion, as reflected by the memo, was that the recitation in CJA’s March 26, 2003 statement, EVEN IF TRUE, did not rise to a level disqualifying either nominee.

So unbelievable – and frightening was this -- that I ultimately asked Ms. Haywood whether Chairman Hatch shared this opinion based upon his own personal review of CJA’s March 26, 2003 statement. It was a question Ms. Haywood would not answer. Rather, she abruptly terminated the phone conversation as I asked that Chairman Hatch respond, *in writing*, to CJA’s May 19th memorandum, including by acknowledging his personal review of the March 26, 2003 statement.

Before that, however, I requested a copy of the memo which Ms. Haywood purported to have. I also requested that it be provided to Committee members, as well as made part of the record of the Committee’s proceedings -- CJA’s March 26, 2003 statement being part of the record, as requested by our May 19th memorandum. I believe this memo to be a very short document – as it apparently made NO FINDINGS as to the specifics of CJA’s March 26, 2003 statement. I believe this because Ms. Haywood asked me what I meant by FINDINGS. Clearly, Ms. Haywood, a lawyer, as well as “investigator”, is presumed to know what findings are – and certainly, CJA’s May 19th memorandum – which she purported to have read -- repeatedly discusses FINDINGS as an essential concomitant to any “appropriate review” of CJA’s March 26, 2003 statement. Indeed, CJA’s May 19th memorandum (p. 6) gives examples of some of the “minimum”, *readily-verifiable* FINDINGS that any competent counsel would have had to have made.

I must note that Ms. Haywood did not answer my question as to “what quantum of misconduct” Committee counsel deemed sufficient to disqualify² -- if not the official

² It would appear that the Committee has NO “written standards for evaluating the qualifications of federal judicial nominees” – as such was requested by CJA’s March 14, 2003 letter to Mr. Prior (Exhibit “A”, p. 2), with no response thereto. CJA’s March 26, 2003 statement (p. 14) expressly stated “there is NO reason why there should be a different standard in confirming judges than in disciplining them.” – and quoted the legal standard for judicial removal, in the record before Judge Wesley, when he knowingly and deliberately committed, his misconduct in my important public interest lawsuit against the New York State Commission on Judicial Conduct – then adhering to it on reargument:

and professional misconduct particularized by CJA's March 26, 2003 memorandum.

So disturbing was Ms. Haywood's apparent concession that there had been NO INVESTIGATION of the documentary evidence substantiating CJA's March 26, 2003 statement, that I immediately telephoned Chairman Hatch's Senate office (202-224-5251 at 2:22 p.m.) requesting to speak with his Chief of Staff. I was routed to Susan³, who, upon my telling her of the urgent need for Chairman Hatch's supervisory oversight of Senate Judiciary Committee staff, told me she was transferring my call to Alex Dahl. Upon getting Mr. Dahl's voice recording, I left a message requesting to speak with him upon his review of CJA's May 19th memorandum, faxed and e-mailed for Chairman Hatch *via* the Senate Judiciary Committee, as well as his Senate office.

I then telephoned Ranking Member Leahy's Senate office (202-224-4242 at 2:35 p.m.), requesting to speak with Senator Leahy's Chief of Staff -- Luke Albee -- about the urgent need for the Senator's supervision of Senate Judiciary Committee staff. Sarah, a staff assistant, took my message. Such was, in fact, my second message for Mr. Albee -- the first having been left for him less than an hour earlier, at 1:45, *via* a different staff assistant, Erica, as to the necessity of the Senator's supervision, based on the facts set forth in CJA's May 19th memorandum, e-mailed and faxed⁴.

"A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify a removal...", italics added by the Appellate Division, First Department in *Matter of Capshaw*, 258 A.D. 470, 485 (1st Dept 1940), quoting from *Matter of Droege*, 129 A.D. 866 (1st Dept. 1909)."

"A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another..." (at 568, emphasis in original). "Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe." (at 574). *Matter of Bolte*, 97 A.D. 551 (1st Dept. 1904).

³ In preparing this letter, I yesterday confirmed (May 21st, 4:42 p.m.) that there is an Assistant Chief of Staff named Susan Cobb. The Chief of Staff's name is Patricia Knight.

⁴ In contrast to Chairman Hatch's website, which lists his Senate office fax number, Ranking Member Leahy's website does not. His Senate office was also unwilling to give me a fax number for the May 19th memorandum -- even after I explained my concern that Senate Judiciary Committee staff might not forward to him a fax, sent to the Senate Judiciary Committee, which complained about it and sought his supervisory oversight. As a consequence, CJA's May 19th memorandum was only e-mailed to his Senate

Immediately thereafter, I called the Republican Majority side of the Senate Judiciary Committee (202-224-5225 at 2:40 p.m.), with a request to speak with its Chief of Staff. My call was originally picked up by Steve, followed by a woman, and then by Matt. I explained to Matt that it was most urgent that I immediately speak with the Chief of Staff as I had just received a most disturbing telephone call from Ms. Haywood. Matt asked me if I would tell him about that conversation -- and I did so, giving him the essentials hereinabove recounted. Matt told me that the Chief of Staff would call me. However, he would not give me the Chief of Staff's name, telling me that such Chief of Staff would give me his name when he called. I indicated that although I would be unavailable from about 3:15 to 4:30 p.m., he could call me anytime after that.

Somewhere between about 3:05 --3:30 p.m., Mr. Dahl left a voice mail for me, stating that he was responding to mine and that he had NOT seen CJA's May 19th memorandum. He, therefore, asked that I fax it to him at the fax number he provided (202-228-1115) so that he could review it. As I began to prepare a coverletter for Mr. Dahl to accompany the fax, I realized I did not have the spelling of Mr. Dahl's name -- or his title in what I believed was Chairman Hatch's Senate office. I thereupon telephoned Senator Hatch's Senate office (3:35 p.m.) to ask for Mr. Dahl's title. The person with whom I spoke, however, did not know Mr. Dahl's title and, apparently could not locate it. I then was told that I would be put through to the Senate Judiciary Committee. This, I strenuously resisted -- until being told that actually Mr. Dahl works from the Senate Judiciary Committee. My coverletter to Mr. Dahl, which did not indicate any title for him, read as follows:

"RE: The Necessity of Supervisory Oversight over the Senate Judiciary Committee by Chairman Hatch Personally

Thank you for your voice mail message -- returning my call, forwarded to you by Chairman Hatch's Senate office (202-224-5251). As requested, I am faxing you the correspondence for which Chairman Hatch's personal supervisory oversight is essential -- and which you stated you had not seen. Following your review, I would appreciate your return call so that I can apprise you of shocking subsequent developments reinforcing the exigency of the Chairman's immediate personal oversight." (emphases in the original).

office.

That done, I telephoned the Democratic Minority side of the Senate Judiciary Committee (4:30 p.m.), asking to speak with Chief Counsel/Chief of Staff Bruce Cohen. The staff assistant who picked up the call and who identified himself as sitting at the first desk directly opposite the doorway stated that Mr. Cohen was not available. I, therefore, left a message, requesting to speak with him about the need for supervisory oversight, now reinforced by Ms. Haywood's phone call to me. I also took the opportunity to leave an additional message for nominations counsel Helaine Greenfeld, who had not returned my earlier messages, and to request that nominations clerk Rachel Arfa again be e-mailed on my behalf, as I had received no response from her as to whether she had received the package that was supposed to have been transmitted by Senator Schumer's New York office.

Suffice to say, in these 2-1/2 days since this round of costly, long-distance phone calls to the Republican Majority and Democratic Minority sides of the Senate Judiciary Committee and to the Senate offices of Chairman Hatch and Ranking Member Leahy on a matter whose profound seriousness is IMMEDIATELY discernible from the most cursory review of CJA's March 26, 2003 statement -- I have not heard a "peep" from any supervisory personnel -- or, for that matter, from anyone else associated with the Senate Judiciary Committees and its two head Senators. This includes Mr. Dahl, whose title I have now learned: Senator Hatch's counsel on the Senate Judiciary Committee.

Just as CJA's May 19th memorandum requested (p. 8) that it be copied and provided to each and every Senate Committee member so that their participation at the May 22nd hearing and subsequent vote could be "properly informed", CJA requests that this memorandum also be copied and provided to each and every Committee member, as likewise the following documents: (1) CJA's May 19th memorandum to Home-State Senators Schumer and Clinton; (2) CJA's May 21st letter to Senator Schumer; (3) CJA's May 21st letter to Senator Clinton; (4) CJA's May 21st letter to Chairman Hatch and Ranking Member Leahy; and (5) CJA's May 21st letter to Capitol Police. CJA additionally requests that all these be submitted for printing in the record of the May 22nd hearing on Judge Wesley's confirmation.

Thank you, in advance.

cc: See next page

cc: President George W. Bush
Senator Charles E. Schumer
Senator Hillary Rodham Clinton
New York Court of Appeals Judge Richard C. Wesley
P. Kevin Castel, Esq.
The Press

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March 14, 2003

U.S. Senate Judiciary Committee
Room 224, Dirksen Senate Office Building
Washington, D.C. 20510-6275

ATT: Swen Prior, Nominations Clerk for the Republican Majority

RE: Citizen Opposition to Senate Confirmation of Richard C. Wesley to the Second Circuit Court of Appeals and P. Kevin Castel to the District Court/Southern District of New York

Dear Mr. Prior:

This follows up our telephone conversation a short time ago. As discussed, and reiterating my phone conversation on Friday, March 7th with staff assistant Jacob Johnson, our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), strenuously opposes Senate confirmation of New York Court of Appeals Judge Richard C. Wesley to the Second Circuit Court of Appeals and of P. Kevin Castel, Esq. to the District Court of the Southern District of New York – and requests to testify in opposition at the Committee's hearings on their confirmation.

This confirms that you will be sending us copies of the public portions of their completed Committee questionnaires, which you stated the Committee had received from the Justice Department¹.

¹ You stated that the Committee received Judge Wesley's completed questionnaire on March 10th and Mr. Castel's completed questionnaire on March 7th.

March 14, 2003

Please also send any written informational materials about the Committee's confirmation process. This would include information concerning the Committee's investigative procedures upon receiving notification, such as this, of citizen opposition and requests to testify in opposition. This would also include the Committee's written standards for evaluating the qualifications of federal judicial nominees – including the weight accorded to bar association ratings, such as those of the American Bar Association and the Association of the Bar of the City of New York [City Bar].

Thank you.

Yours for a quality judiciary,



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

cc: Rachel Arfa, Nominations Clerk for the Democratic Minority
[By Fax: 202-224-9516 & E-Mail: rachel_arfa@judiciary.senate.gov]