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TESTIMONY OF ELENA RUTH SASSOWER, COORDINATOR OF THE CENTER FOR JUDICIAL ACCOUNTABILITY, INC. AT THE PUBLIC HEARING OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS, NOVEMBER 28, 1995, NEW YORK CITY

Good afternoon. My name is Elena Ruth Sassower. I am the coordinator and co-founder of the Center for Judicial Accountability, Inc. The Center for Judicial Accountability is a national, non-partisan, not-for-profit citizens' organization focused on the twin issues of judicial selection and judicial discipline. In other words, how we get our judges--and how we get rid of them when they betray their oaths of office. The Center gathers "horror stories" from those with direct, personal experience in our federal and state courts. Over and again, these "horror stories" depict judges engaging in biased and abusive behavior and the ineffectiveness of the mechanisms designed to ensure We the People of our most basic constitutional right in our judicial system--our right to a fair and impartial tribunal. The empirical evidence being gathered by the Center establishes that judicial misconduct, including bias, is a serious, substantial, and unresolved problem--reaching the highest levels of our judicial system.

Exhibit Q-2

This evidence contradicts the key conclusion of the National Commission on Judicial Discipline and Removal in its August 1993 Report. That conclusion was that existing mechanisms of judicial discipline and removal in the federal system are adequate to deal with misconduct by federal judges, which the National Commission regarded as not pervasive. I already testified in Washington before the Long Range Planning Committee of the Judicial Conference of the United States in December of last year that the National Commission's Report is profoundly dishonest and methodologically flawed. The National Commission--in rendering its Report--disregarded the evidence of heinous unredressed judicial misconduct which it had before it. As will be more fully discussed in the testimony of my co-presenter, this evidence included a dispositive presentation by us to the National Commission in July 1993 establishing the complete failure of the appellate process to correct retaliatory Second Circuit decisions that were factually fabricated and legally insupportable--including one authored by now Chief Judge of the Second Circuit, Jon Newman himself. The National Commission also failed to solicit information about judicial misconduct and the inadequacy of existing mechanisms from obvious and available sources. Thus, it did not reach out to the consumers of judicial services, i.e. litigants--which it invariably tagged as "disgruntled". Nor did the Commission solicit testimony from lawyers and law professors with a known

outspokenness on the subject. In the latter category, I include Professors Anthony D'Amato and Alan Dershowitz--each of whom had already written and spoken out about fabricated and dishonest decisions. Dishonest decision-making, as evidence of judicial bias, was not even identified by the National Commission as a form of misconduct. In that connection, I would strongly recommend that this Task Force read Professor D'Amato's law review article "The Ultimate Injustice: When the Court Misstates the Facts", *Cardozo Law Review*, Vol. 11: 1313 (1989) about dishonest federal court decisions in a case involving the murder conviction of a black defendant.

Unlike this Task Force, which is holding a series of regional hearings throughout the Second Circuit, the three hearings held by the National Commission prior to its Draft Report were *all* held in Washington and--to the best of my knowledge--not publicized to the general public or to the bar at large. I am sure that most of the people testifying here today before this Task Force were unaware of the National Commission's work and would have made an important contribution to it, as would the many, many more who are not here today testifying simply because the focus of this hearing is limited to *gender* bias--and they wish to address manifestations of judicial bias other than gender-based.

What are the mechanisms which--at least on paper--protect us from

federal judges who are biased and abusive? The National Commission identified the primary mechanism within the judicial branch as that enacted under 28 USC 372(c). Because it was passed by Congress in 1980, 28 USC 372(c) is popularly known as the 1980 Act. I will address that mechanism. My co-presenter will address the mechanism of appellate review--the efficacy of which the National Commission accepted without scrutiny--as well as discuss recusal and writs of mandamus. Among the questions both I and my co-presenter will raise--and which this Task Force should be expected to answer--is "Where do you go with a merits-related bias complaint against a federal judge?"

In rendering its Report, the National Commission made a series of recommendations. Among them was one that should be of particular importance to this Task Force. The National Commission recommended:

> "that each circuit that has not already done so conduct a study (or studies) of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment, and of the extent to which the 1980 Act and other existing mechanisms and programs...are adequate to deal with it." (Report, at 126).

This recommendation can only be seen as a concession by the National Commission that, notwithstanding the superficial impressiveness of its underlying studies of the 1980 Act, they failed to address basic bias issues. Indeed, such

underlying studies--which describe a range of complaints filed under the 1980 Act--are not organized according to categories of judicial misconduct--except for the category of complaints predicated on delay. Thus, the underlying studies do not segregate, and thereby analyze, complaints based on bias--either as to the Circuits cumulatively or as to the Second Circuit particularly--so that common principles governing their handling may be gleaned. The consequence is that it is difficult, if not impossible, to clearly delineate the boundaries of justiciability of complaints filed under the 1980 Act. Is a bias complaint which alleges that--by reason of his bias--a judge has rendered factually dishonest and legally insupportable rulings just as justiciable under the 1980 Act as a bias complaint which alleges that a judge has made derogatory sexual, ethic, or racial comments? We believe the former complaint is, by far, the more common--and credit most judges as sophisticated and clever enough to know today not to express their biases openly. Their biases, therefore, go "underground": The judge proclaims his "impartiality" and "fairness"--all the while "socking it" to the litigant.

The issue of justiciability under the 1980 Act is a particularly thorny one--since under the 1980 Act a complaint is dismissable that is "directly related to the merits of a decision or procedural ruling". Indeed, "merits-related" dismissals are the most common ground upon which 372(c) complaints are dismissed.

According to a statistic from the Administrative office appearing in one of the National Commission's underlying studies, in 1991, 83% of complaints filed under the 1980 Act were dismissed as "merits related" (Research Papers of the National Commission, Vol. I, p. 730).

The critical significance of this justiciability issue was articulated more than eight years ago by then Chief Judge of the Court of Appeals for the D.C. Circuit, Patricia Wald. In a memo to her judicial colleagues, the Chief Judge posed the question in clear, straightforward language:

> "Since the vast majority of complaints we receive come out of judicial proceedings, some clarification in this area would be helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?" (Research Papers, Vol. I, p. 524)

Yet the underlying studies of the National Commission do not offer any clear answer to Judge Wald's query--any more than they refer to any answer to such question having come from Judge Wald's colleagues on the bench.

Tellingly, the National Commission showed itself to be perfectly capable of refining the key elements relevant to justiciability when a 372(c) complaint is filed alleging delay by a federal judge in rendering a decision. It is justiciable if the delay is part of a "habitual practice", is motivated by "improper

animus or prejudice", or is "egregious...constituting a clear dereliction of judicial responsibilities" (Report, p. 95). Yet, conspicuously the National Commission did not--as it should have--articulate such standards as would make an otherwise "merits-related" complaint justiciable (cf., Report, p. 93). As a consequence, were members of the Task Force to go to the Clerk's office of the Circuit Court and request to see the dismissal orders of the Chief Judge and Circuit Counsel relating to 372 (c) complaints, you would find that the Second Circuit is tossing out as "merits-related" precisely these kind of bias complaints.

In contemplation of this Task Force's study of the 1980 Act, I draw your attention to the National Commission's comment that:

> "A few of the troublesome dismissals [under the 1980 Act] involved allegations of bias on the basis of race, gender, or sexual orientation, although none of them was predicated on the ground that such allegations were outside the Act's jurisdiction." (Report, p. 99).

It is unclear to us precisely which complaints the National Commission is referring to. However, some bias complaints were "concluded" following so-called corrective action--which might be considered inadequate for the misconduct complained against. In other words, the judge got off with the proverbial "slap on the wrist".

In designing your examination of the 1980 Act, it is incumbent upon

the Task Force to communicate with those individuals who have filed 372(c) bias complaints in the Second Circuit. This was not done by the National Commission researchers--including those who were given access to the actual complaints filed under the 1980 Act. Instead, the researchers interviewed Chief Judges and Circuit Executives. Indeed, buried in one of the researchers' reports is the extraordinary admission "We know little about complainants and what they seek. We did not design this research to address those issues." (Research papers, Vol. I, p. 625). You may be sure that had the researchers bothered to interview complainants--and, additionally, to confront the "merits-related" justiciability issue--their conclusions about the effectiveness of the 1980 Act would have been very different.

One final comment is in order--and that relates to the constraints of confidentiality which hampered the National Commission's review of the 1980 Act. It is our position that this Task Force need not be stymied by the confidentiality that plagued the National Commission. Firstly, in enacting the 1980 Act, Congress did not require confidentiality of the filed complaints or any proceedings had on them--except at the level of the appointment of a special committee. This fact was noted by the National Commission's studies, which further noted that special committees have been appointed in only 40 out of over 2,400 complaints. Thus, statutory confidentiality, in fact, adheres to only 1.6% of the filed complaints (Research

Papers, Vol. I, pp. 443-4).

It is the judiciary, by its Illustrative Rules to the 1980 Act, adopted to varying degrees by the Circuits, that imposed confidentiality as to all aspects of the complaint process except for dismissal orders of the Chief Judge and dismissal orders of the Circuit Counsel--which it allowed to be released, albeit in generally expurgated form (Research Papers, Vol. I, pp. 443-4). The National Commission did not challenge the judiciary for having placed 372(c) complaints beyond public purview (Report, pp. 106-8)--yet at the same time recognizing that no proper evaluation of the dismissal orders of chief judges and the Circuits is possible without examination of those complaints (Report, p. 86). Placing the matter in its proper perspective, 95% of the complaints filed under the 1980 Act are disposed of by such dismissal orders--a statistic compiled by the Administrative Office based on the Circuits' own figures (Research Papers, Vol. I, p. 510).

It may be noted that the National Commission recommended that the Illustrative Rules be amended to specifically "authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act." Chief Judge Newman should be the first to agree to authorizing the Task Force to examine the Second Circuit's handling of 372(c) bias complaints.

Indeed, when formation of the Task Force was announced, Chief Judge Newman stated "if any manifestations of bias are occurring in the courts of the Second Circuit, we want to know about it and take steps promptly to eliminate such occurrences." (1994 Second Circuit Report, p. 61).

In closing my remarks on the 1980 Act, two other recommendations made by the National Commission deserve comment. These relate to the National Commission's finding that only a portion of instances of judicial misconduct ever result in complaints being filed under the 1980 Act. The National Commission found that most people--federal litigators included--do not even know about the 1980 Act and, moreover, that there is a widespread fear of retaliation on the part of lawyers which prevents them from filing complaints (Report, pp. 70-1, 99-102).

The National Commission, therefore, recommended that steps be taken to increase awareness of the Act--including by "a reference to the 1980 Act and the circuit counsel's rules...in the local rules of each district court" (Report, p. 100). As to fears of retaliation, the National Commission recommended that:

> "each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges." (Report, p. 101).

These two recommendations were reviewed by the Judicial Conference

of the United States in March 1994. As to the recommendation for increasing awareness about the 1980 Act, the Judicial Conference endorsed it--including the National Commission's suggestion about publicizing the 1980 Act through the district courts' local rules. As to the fear of retaliation, the Judicial Conference's recommendation was as follows:

> "Agreed to recommend to the individual circuits and courts covered by the Act that they consider whether and what committee(s) or other structures or approaches, at the district or circuit level, might serve the purpose of assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation." (March 15, 1994 Report of the Judicial Conference)

What has been the response of the Second Circuit to the aforesaid two recommendations of the National Commission, endorsed by the Judicial Conference? According to the Circuit Executive's office, there is *no* document from the Second Circuit reflecting action by it on these or, for that matter, any of the other recommendations made by the Judicial Conference in response to the recommendations of the National Commission.

We are unaware of whether, or how, the Second Circuit is publicizing the existence of the 1980 Act. Last month, I attended a program at the Association of the Bar of the City of New York on judicial misconduct entitled "Temper in the Court: A Forum on Judicial Civility"--and there was no mention at all of the 1980

Act. Moreover, in preparation for our testimony here today, I reviewed the local rules of the six district courts covered by the Second Circuit. Not one has included a reference to the 1980 Act or the Circuit's rules relating to it.

As to the creation of a committee to facilitate the filing of meritorious complaints and alleviate fears of retaliation, I was told by the Circuit Executive's office that it had been "considered and a decision was made not to establish a committee". No information was given to me about "other structures or approaches".

This is not surprising since, as Chief Judge Newman well knows, judicial retaliation--in the form of deliberately dishonest decision-making--is alive and well in the Second Circuit and he is one of its practitioners.

This Task Force has much important work ahead of it to ensure that We the People are protected from biased federal judges. I thank you for this opportunity to offer testimony and will gladly answer questions.