

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

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And Express Mail

June 28, 1996

Senator Orrin G. Hatch, Chairman
United States Senate Judiciary Committee
Room 224, Dirksen Senate Office Building
Washington, D.C. 20510-6275

RE: The Rigged Confirmation of Justice Lawrence Kahn and
other Federal Judicial Nominees

Dear Chairman Hatch:

This letter is submitted to vehemently protest the fraudulent manner in which the Senate Judiciary Committee confirms presidential nominees to life-time appointments on the federal bench and its abusive treatment of civic-minded representatives of the public who, without benefit of public funding, give their services freely so as to assist the Committee in performing its duty to protect the public from unfit judicial nominees.

This letter is further submitted in support of the Center's request for immediate reconsideration and reversal of the Committee's illegal vote yesterday, approving confirmation of Justice Lawrence Kahn's nomination as a district court judge for the Northern District of New York. As hereinafter detailed, such Committee vote was taken prior to expiration of the announced deadline for closure of the record and without any investigation by the Senate Judiciary Committee into available documentary evidence of Justice Kahn's politically-motivated, on-the-bench misconduct as a New York state court judge, for which he has been rewarded by his political patrons with a nomination for a federal judgeship.

Because this Committee has deliberately refused to undertake essential post-nomination investigation, even where the evidence before it shows that appropriate pre-nomination investigation was not conducted, this letter is also submitted in support of the Center's request for an official inquiry by an independent commission to determine whether, when it comes to judicial confirmations, the Senate Judiciary Committee is anything more than a facade for behind-the-scenes political deal-making. In the interim, the Center reiterates its request for a moratorium of all Senate confirmation of judicial nominations. Such moratorium was first requested more than four years ago by letter dated May 18, 1992 to former Majority Leader George Mitchell (Exhibit "A"). Copies of that letter were sent to every member of the Senate Judiciary Committee--including yourself.

As you know, our moratorium request was based on our six-month investigation of the federal judicial screening process, focused on a case-study of one judicial nominee. The fruits of our investigation were embodied in a documented critique, which we then presented to the Senate Judiciary Committee and Senate leadership. By that critique, we exposed the deficiencies of pre-nomination federal judicial screening, including the purported screening of the American Bar Association and the Justice Department--on which the President relies in making his judicial nominations. More recently, a duplicate of that critique--and three compendia of correspondence relating to it--were provided to the Committee, under our May 27, 1996 coverletter to you (Exhibit "F").

As evident from Correspondence Compendium I, following submission of our critique, the Senate Judiciary Committee and Senate leadership wilfully ignored our innumerable phone calls, faxes and letters on the subject. Finally, in September 1992, after a personal trip to Washington, D.C.--at which no counsel from the Senate Judiciary Committee would meet with us--the Committee's then Staff Director and its then General Counsel attempted to deflect the seriousness of what we had uncovered about the deficiencies of pre-nomination screening by assuring us of the thoroughness of the Senate Judiciary Committee's post-nomination screening. Their representation to us, in a letter dated September 21, 1992 (Exhibit "B"), was as follows:

"...the committee itself conducts its own thorough and independent investigation on each nominee named by the President. Only after completion of the committee's full investigation is a public hearing scheduled on a given nomination. At least one week following the hearing, the committee votes on the nomination..." (emphasis in the original).

This Committee has no publicly available written rules and procedures concerning its behind-closed-doors processing of judicial nominations, just as it has "no written guidelines in evaluating judicial nominees" (Exhibit "G"). However, based upon our direct, first-hand experience with the Senate Judiciary Committee throughout the entire two and a half month period that Justice Kahn's nomination has been pending before it, we can now documentarily establish that this Committee does not conduct "thorough and independent investigation on each nominee" prior to

the confirmation hearing¹. Nor does it wait "at least one week" following the confirmation hearing before voting on the nomination.

According to today's New York Law Journal (Exhibit "C-1"), the Committee yesterday approved Justice Kahn's nomination, and that of the five other judicial nominees with whom he shared the June 25th confirmation hearing (Exhibit "D-1"). Plainly then, the Judiciary Committee no longer adheres to the indicated "one week" time frame between the confirmation hearing and the Committee vote--yesterday's June 27th vote coming a mere two days after the June 25th hearing.

This is particularly astonishing since, at the conclusion of the confirmation hearing--at which the public was neither invited nor permitted to present opposition testimony--the presiding Chairman, Senator Kyl, announced that the record would remain "open for three days" for written submissions.

We do not know what the point is for citizens to spend time, effort, and money to submit "for the record"--unless such submission is to be considered by the Senate Judiciary Committee before its vote.

The Committee's hasty vote on Justice Kahn's confirmation--before expiration of the announced deadline for written submissions--underscores the fact that it has no real desire to receive information adverse to federal judicial nominees, any more than it actually conducts a "thorough and independent investigation of each nominee".

Plainly, an investigation that is "thorough and independent" encompasses evaluating the legitimacy of articulated opposition to the nomination. This is particularly so where the opposition comes from a credible source--in this case, from a non-partisan organization, with a past history of having provided the Committee with a critique that so resoundingly proved the unfitness of its case-study nominee that he was never brought out for a confirmation hearing.

Yet, although we first notified the Senate Judiciary Committee of our opposition to Justice Kahn's confirmation on April 19, 1996 (Exhibit "E"), the very day after President Clinton nominated him

¹ On-the-record comments of Senators serving on the Senate Judiciary Committee reveal the generally limited nature of the Committee's investigation of judicial nominees--a fact we pointed out, to no avail, in our October 1, 1992 response to the September 21, 1992 letter of the Committee's Staff Director and General Counsel (See Correspondence Compendium I, Exhibit "W").

for a federal judgeship, at no time did anyone from the Committee ever communicate with us concerning the basis for our opposition to Justice Kahn's confirmation. Nor did anyone from the Committee ever request any of the substantiating documentation as to Justice Kahn's politically-motivated, on-the-bench misconduct, delineated in our May 27th letter (Exhibit "F")--which that letter and our subsequent June 18th letter (Exhibit "H") made plain was available for inspection.

This Committee's lack of follow-up and investigation is even more shocking in the context of the ABA's divided, equivocal rating of Justice Kahn: a rating of "Qualified" from a "substantial majority" of its Standing Committee on Federal Judiciary rating, with a rating of "Not Qualified" from a minority (Exhibit "D-2"). The unbridgeable chasm between a "qualified" and a "not qualified" rating should have triggered inquiry and examination by the Committee. Indeed, our May 27th letter (Exhibit "F") should have raised an immediate question for the Senate Judiciary Committee as to whether the "substantial majority" of the ABA Standing Committee which gave Justice Kahn a "Qualified" rating did so with knowledge of his politically-motivated, on-the-bench misconduct, the documentary evidence of which had been returned to us in "untouched by human hands" condition, and without any follow-up by the Second Circuit representative in charge of investigating Justice Kahn's professional qualifications (Exhibit "F", pp. 2-4).

An extraordinary "paper trail" is presented herein of this Committee's wilful failure and refusal to investigate our serious and substantiated opposition to Justice Kahn's confirmation--which it then tried to cover-up by summarily denying us the right to testify at the confirmation hearing. We, therefore, annex and incorporate by reference our correspondence on the subject with this Committee. It consists of the following:

(1) our April 26, 1996 letter (Exhibit "E"), addressed to the attention of this Committee's Nominations Clerk, B.J. Runyon. Such letter confirms our initial April 19th telephone conversation, in which we advised the Committee of the Center's desire "to testify in strenuous opposition" to Justice Kahn's confirmation and sought disclosure of his "confidential" ABA rating;

(2) our May 27, 1996 letter (Exhibit "F"), addressed to you, describing, inter alia, how the ABA's Standing Committee on Federal Judiciary deliberately ignored and failed to investigate the Center's documentary presentation of Justice Kahn's politically-motivated, on-the-bench misconduct. Enclosed therewith was a copy

of our October 31, 1995 letter to its Second Circuit representative, particularizing Justice Kahn's disqualifying misconduct and providing an inventory of documentary proof;

(3) Your June 12, 1996 letter (Exhibit "G") denying, without reasons, our request to testify at Justice Kahn's confirmation hearing and confirming the Committee's practice of not making ABA ratings publicly available until the hearing;

(4) our June 18, 1996 letter, addressed to you (Exhibit "H"), requesting to know the basis for denial of our request to testify and seeking reconsideration. We have received no response to that letter, which, like all our letters, was faxed to the Senate Judiciary Committee, as well as sent by certified mail, return receipt requested.

Since the Senate Judiciary Committee publishes the transcript of its confirmation hearings in thick volumes, we request that the record include the aforementioned documents, as well as this letter setting forth the scandalous and shameful way in which the Senate Judiciary Committee permitted--and, I believe, instructed--its staff to harass and intimidate me at the June 25th confirmation hearing. That intimidation is not reflected by the hearing transcript, but took place in the hearing room simultaneous with what is reflected by the transcript. As such, it is part of the res gestae.

First, let me describe how the Center was notified of the confirmation hearing. As may be gleaned from this Committee's list of 12 so-called "witnesses" and six judicial nominees who appear on the program of the June 25th confirmation hearing (Exhibit "D-1"), the Committee did not put together the hearing "overnight". It was necessarily preceded by advance arrangements with the judicial nominees, living as far away as California, Arizona, Illinois, Florida, and New York, and with their Congressional sponsors. However, the Committee has no procedure to ensure that members of the public--and, in particular, those who have expressed interest and/or opposition to a particular nominee, who likewise live all over the country, are given adequate notice to enable them to make the travel arrangements necessary to attend the hearings. Indeed, the public is given absolutely no information as to the status of a nomination, until the hearing date is announced and, in response to inquiries about the hearing, is told to keep calling (long distance) every week or so to ascertain if one has been scheduled. In fact, according to Committee staffers, there may be no more two or three days between announcement of the hearing and the hearing itself.

As recently as Wednesday, June 19th, we called the Committee and were told that no confirmation hearing for Justice Kahn had been scheduled. Nonetheless, on Tuesday, June 25th, at approximately 9:45 a.m., Mr. Runyon telephoned and informed us that the Committee would be holding a hearing at 2:00 p.m. that very day to confirm Justice Kahn's nomination². He made no mention of our June 18th letter to you (Exhibit "H").

Such last-minute notice gave us about four hours to get from Westchester, New York to Washington, D.C.--virtually a logistical impossibility. Surface transportation from New York to Washington--whether by car, bus, or train--is, at minimum, a six hour trip. Fortunately, New York's La Guardia airport runs hourly flights to D.C. Dropping everything else we were doing, we threw expense to the winds. At a cost of \$150, we booked a flight by airplane, which--so as not to lose even one precious minute in boarding at the airport--we pre-paid by phone at an added cost of \$35. We paid for a car service to get me to the terminal in time for a noon flight.

That done, our Center staff person immediately telephoned the Senate Judiciary Committee to inform it that I would be coming down. Indeed, before racing home to change my clothes, I left an urgent message for Mr. Runyon that it was enormously difficult and expensive to get down to Washington and that I did not wish to make the trip unless I was going to be permitted to testify. Although I emphasized the urgency, Mr. Runyon never called back. After I was en route, the Center's staffer left three subsequent telephone messages confirming that I was on my way down. It would appear that the Senate Judiciary Committee used this information to orchestrate a campaign of intimidation and harassment to greet me when I arrived.

I say this because shortly after I arrived in the crowded hearing room, settling into a seat in the very last row--where empty seats were readily available--a man came up to me from the back of my chair. Without introducing himself, he belligerently announced that I was not to distribute anything in the hearing room. He gave no reason for giving me such cautionary warning and I had no idea even know who he was. However, when I then learned he was Phil Shipman, the Senate Judiciary Committee's document clerk, I was really stunned. Over the years of my contacts with the Senate Judiciary Committee, the one truly friendly and helpful person at the Committee had always been Mr. Shipman, with whom I had had, until then, the most amicable of relationships.

² Indeed, the June 25th New York Law Journal reported that the nomination would occur that morning (Exhibit "D-2").

Yet, for the rest of the hearing, Mr. Shipman shadowed my every move. When I moved up to a vacant chair at the very end of the first row so as to better hear the proceedings--which at that point concerned Justice Kahn's nomination--Mr. Shipman followed me. Although no one was sitting in that chair, Mr. Shipman summarily instructed me to move. As quickly as I could--so as not to miss anything of what was said, which I was trying to take down on my note pad--I slipped around to the middle of the far side of the completely unoccupied side tables. Mr. Shipman must have followed in back of me because as soon as I "shushed" some gentlemen talking in the row directly in front of where I was now sitting, whose chatter was making it impossible for me to hear, Mr. Shipman was again leaning over me. In language I cannot now precisely recall, but whose coarseness and illogic made an indelible impression on me, he advised me that I would be removed if I ever dared to "shush" anyone during the hearing.

Thereafter, when the hearing recessed while the Senators took a roll call vote, I went up to the dais area to locate Mr. Runyon, which is where Mr. Shipman had said I would find him. I wanted to know the status of the Center's requests to testify. Mr. Runyon told me that he did not think I would be allowed to testify--without giving me any reason why that should be so. Although I asked to speak with counsel familiar with this matter, he claimed that none was available--notwithstanding there were approximately fifteen persons sitting behind the dais.

At that point the audience had substantially cleared out of the hearing room. The crowd of legislators who had been on hand at the outset to introduce their judicial nominees had all left. Since there were now a great number of empty chairs, I took a seat in the fourth or fifth row of the audience seating area. No sooner did I do so than the ubiquitous Mr. Shipman appeared hovering over me, now demanding that I move back to the last row. He threatened that if I did not do so he would have me removed, together with my "garbage". By "garbage", Mr. Shipman was referring to my rolling travel case containing my file of correspondence with this Committee, as well as the materials we had provided to the Second Circuit representative of the ABA's Standing Committee to document Justice Kahn's on-the-bench misconduct--which the Second Circuit representative thereafter returned to us in "untouched by human hands" condition (Exhibit "F", p. 3).

I told Mr. Shipman that I did not see him telling any other members of the audience where they should sit and that I did not understand why he was ordering me to sit in the back row, where I

could not hear, when there were empty seats in the front rows. Mr. Shipman responded by repeating his unwarranted demand that I move and threatened to call the Capitol Police when I did not do so.

In fact, it would appear that Mr. Shipman did call Capitol Police since, when I returned from the restroom during the continued recess, I observed a group of between six and eight police officers clustered in the hall, several of whom looked over in my direction as I walked down the corridor to the hearing door. Before entering the hearing room, I called out to them what seemed obvious: that I assumed they were there for me.

Sure enough. After taking my seat, I was approached by an officer, followed by Mr. Shipman, who again demanded that I move to the back row. I told the officer that I had no idea why Mr. Shipman was trying to control my movements and that everyone else in the hearing room appeared free to sit wherever they liked. Moreover, I pointed out what I had learned during the recess, that, contrary to Mr. Shipman's claim that the unmarked row in the middle of the audience was reserved for family and friends, the only other two people sitting in that particular row were ordinary spectators.

The officer then retreated, but, as the hearing resumed, I observed that several police officers remained in the hearing room.

I believe that Illinois Senator Carol Moseley-Braun--who had not been present earlier--began to speak on behalf of the Illinois district court nominee, prefacing her remarks with a description of how she and Illinois Senator Simon (the only member of the Senate Judiciary Committee there in addition to Senator Kyl), use a "merit selection" system for recommending judicial candidates to the President. I was so impressed by what she said and how beautifully she said it that, as she passed my aisle seat on her way out of the hearing room, I asked if I could speak with her. She agreed, readily.

In the corridor, I identified to her the fact that our New York Senators do not use a "merit selection" system and that Justice Kahn's nomination was a prime example of what results: a federal court nominee, who, as a state court judge, had used his office to promote his own judicial self-interest by protecting vested political interests.

I told Senator Moseley-Braun that the Center had made known its opposition to the Senate Judiciary Committee, but had been ignored, and that, without reasons, we had been denied the opportunity to testify in opposition. I also told her about our

unresponded-to June 18th letter (Exhibit "H") for reconsideration of our request to testify and that I had been unable to locate any Committee staff counsel with whom to discuss that request.

I also described how Mr. Shipman was trying to intimidate me and, for no reason, had called Capitol Police to keep an eye on me. I expressed concern that Chairman Kyl might be unaware of the Center's hearing request. To my surprise, however, the gentleman with her, who she identified as her counsel, indicated that Chairman Kyl knew of our request.

The remainder of the script-like hearing was uneventful. Following brief and superficial questioning of the single Circuit Court of Appeals' nominee, it was the turn of the five district court nominees. Since the questions being asked of them were boiler-plate, generic questions which each of them could answer, they were called up en masse. And, in assembly-line fashion, the five nominees, in turn, quickly responded, speeding the process along.

Indeed, within a remarkably short time, Chairman Kyl was thanking the nominees and concluding the hearing. He did not inquire whether anyone in the audience had come to testify and gave no indication that there was opposition to confirmation of any of the nominees.

For that reason, I rose. I stated that there was "citizen opposition" to Justice Kahn's nomination, that we had made known such fact to the Senate Judiciary Committee months earlier, as well as our desire to testify.

I believe by this time one of the police officers was already at my chair. I do remember trying to concentrate on what Chairman Kyl was saying while the officer was, simultaneously, warning me that if I said another word he would remove me.

Chairman Kyl did not inquire as to who I was or the particulars of what I had only identified as "citizen opposition". I believe his only response was there would be no testimony and that the record would remain "open for three days" for written submissions.

As the audience dispersed and Chairman Kyl approached the judicial nominees to congratulate them, I tried to speak personally with him to inform him of the seriousness of the Center's opposition. He waved me off. By this time, Mr. Shipman had caught up with me and was threatening to have me removed for harassing the Senate Judiciary Committee. I told him that I had no desire to harass anyone, but simply wished to discuss our opposition with the appropriate individuals. Mr. Shipman then kept me under his personal surveillance as I spoke

with Assistant Attorney General Eleanor Acheson³ and then with Mr. Runyon.

Once again, I asked Mr. Runyon if I could speak with Judiciary Committee counsel. Peremptorily, he told me that no one was available. Mr. Runyon would not identify whether any of the fifteen or so persons who had sat with him behind the two presiding Senators were Senate Judiciary Committee staff or counsel with whom I could speak. And when I called to them, asking if there was any counsel present, no one answered--except for one man who responded with such rudeness that I asked his name. He not only refused to give it, but then walked over to where Mr. Shipman and the police officers were standing and accused me of harassing him--an outrageously untrue accusation, which I vigorously denied.

Mr. Shipman then followed me--together with three police officers in tow--as I went to the adjoining offices of the Senate Judiciary Committee. Again, I requested to speak with staff counsel. Specifically, I asked to speak with whoever it was who had written the June 12th letter to us, purportedly signed by you (or, more likely, a machine producing your signature), summarily denying our request to testify at the hearing (Exhibit "G"). I stated that such person would presumably be handling our June 18th letter, which had requested to know the reasons for such denial and for reconsideration (Exhibit "H"). I also stated that we wanted to know Justice Kahn's ABA rating--which we had been advised would be made known at the time of the hearing, but, in fact, had not been announced.

³ For the record, I had three brief conversations with Ms. Acheson. In my first conversation, before the hearing commenced, Ms. Acheson deflected my request that the Administration withdraw the nomination by telling me that we were now at the Senate confirmation hearing. In my second conversation, during the recess, when I asked Ms. Acheson to support my right to testify at the hearing, she said nothing. Indeed, she took no steps to ensure the public's right to be heard in opposition to Justice Kahn's confirmation. In my third conversation, at the conclusion of the hearing, when I asked Ms. Acheson as to what Justice Kahn's ABA rating had been--since it had not been announced at the hearing--she told me that she did not know. This, notwithstanding our substantial communications with her during the preceding weeks on the very subject of Justice Kahn's ABA ratings (Exhibit "I").

Although we were no longer in the Senate Judiciary Committee hearing room and my demeanor was then--as it was throughout--completely professional, Mr. Shipman demanded that I leave the waiting area of the Senate Judiciary Committee office, stating that I could not sit in the chairs there for that purpose. Reinforcing this message was the physical presence of armed police officers.

Not one to be bullied, I remained, and Mr. Shipman, realizing from the June 12th letter that I showed him that we had been promised the ABA ratings at the time of the confirmation hearing (Exhibit "G"), disappeared to obtain the ABA ratings, while the police officers continued their watch of me. Some minutes later, Mr. Shipman returned with a piece of paper listing the ABA ratings for Justice Kahn and the five other judges (Exhibit "D-2"). Of all the judicial nominees, Judge Kahn's mixed ABA rating was the lowest. Thereafter, I left the Senate Judiciary Committee room.

This should be the end of my recitation of my police-escort for my appearance in the hearing room and waiting area. However, it did not end there. Within a couple of feet of the Senate Judiciary Committee's door, Capitol Police wrongfully arrested me in the corridor on a completely trumped-up charge of disorderly conduct. In fact, what occurred was nothing short of gross police misconduct.

I believe the Senate Judiciary Committee was fully aware of my arrest immediately outside its doors. Yet, it took no action to intervene to protect me from being hauled off in handcuffs, behind my back, and transported to jail like a common criminal.

For the record, we wish to state that the Center for Judicial Accountability, Inc. views the aforescribed conduct of the Senate Judiciary Committee as unconscionable intimidation and a reflection of this Committee's wilful abdication of its duty to protect the public from unfit judicial nominees.

The Center remains ready to provide the Senate Judiciary Committee with documentation of Justice Kahn's misconduct as a New York State Court judge. To date, despite our vigorous efforts, that extraordinary corroborating proof has not even been investigated by the American Bar Association, the Justice Department, or by your Committee.

June 28, 1996

The People of the State of New York have suffered irreparable injury from Justice Kahn's politically-motivated misconduct on the state court bench. They, along with citizens throughout the nation, are entitled to be protected from the danger inherent in his elevation to the federal bench--as well as from the dangers of a Senate Judiciary Committee, which refuses to do its duty and investigate documentary evidence of his unfitness.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures

cc: President Bill Clinton
Senate Majority Leader Trent Lott
Senate Minority Leader Thomas Daschle
Members of the Senate Judiciary Committee
Senator Carol Moseley-Braun
U.S. Department of Justice
Assistant Attorney General Eleanor Acheson
American Bar Association
Irene Emsellem, ABA liaison to Standing Committee on
Federal Judiciary
Capitol Police: Case #529600574
Phil Shipman, Senate Judiciary Committee Documents Clerk
Media

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Chairman Orrin Hatch
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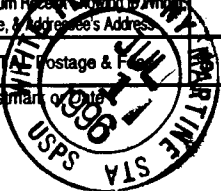
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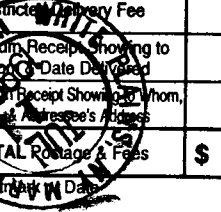
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