CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

STATEMENT OF DORIS L. SASSOWER, DIRECTOR 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, THE UNITED STATES COURTHOUSE, NEW YORK CITY

I appear here as Director and co-founder, with my daughter, Elena, of the Center for Judicial Accountability, Inc., a national, non-profit, non-partisan organization, working to improve the quality of our federal and state judiciary. The subject of this hearing--gender-bias--is one about which I have direct personal knowledge and a good deal of experience, both as an attorney long active in the field of human rights and as a civil rights litigant.

To this day, I have a vivid memory of my very first appearance in federal court some forty years ago. At that time, I was co-counsel in a case in the Eastern District of New York. Although I was the lawyer who was personally handling the matter, I was barred by the Chief Judge of that court from participating in, or even entering, his Chambers for a critical court conference on the case. The court's clerk bluntly told me the reason: His Honor did "not like women lawyers" because he did not believe women should be lawyers, and they were "not allowed in Chambers."

Throughout my professional career since, I devoted myself to ending that all-too pervasive sexism and to encouraging women to enter the legal profession, which I saw as essential to raising their status in society as a whole. When I graduated in 1955 from New York University Law School, which I attended with the benefit of a Florence Allen Scholarship, named for the first woman appointed to serve as a federal appeals judge, and later the first woman to serve as a Chief Judge of such court--there were only <u>five</u> women in my graduating class.

As President of the New York Women's Bar Association in 1968, I wrote and spoke extensively to raise consciousness about the existence of discrimination against women in our society generally and in our profession, particularly, which at that time was not yet publicly acknowledged, and the need for more women judges. Those activities led to an invitation for me to present my views and recommendations to the National Conference of Bar Presidents at their annual mid-year meeting in 1969--the first woman ever to address that august body. In 1976, the National Conference again invited me to speak--to update the bar leaders and receive their update on the progress of the recommendations I had made seven

years earlier. During those years, I, likewise, litigated numerous cases raising constitutional issues relating to gender-based bias, not only on behalf of women, but on behalf of men, as well, because as I contended long ago, "equality cuts both ways".

Consequently, I come before you as one who has been in the forefront, fighting "in the trenches", of today's feminist movement, with the battle scars to prove it. My further credentials, as they last appeared in Martindale-Hubbell's Law Directory, along with a bibliography of my published writings, are submitted for your information. Also submitted is the Center's ad "Where Do You Go When Judges Break the Law?", published on the Op-Ed page of October 26, 1994 issue of The New York Times. That ad discusses the vicious judicial retaliation to which I have been subjected for my outspoken advocacy of long-overdue reform in the way lawyers become judges.

For purposes of this presentation, I would also briefly highlight a few of my credentials in the area of judicial reform. In 1971, I served on the first pre-nominating screening panel set up by the Reform Democrats of New York County to pass upon the qualifications of candidates for state Supreme Court vacancies in the First Judicial Department of New York. My article about that experience appeared on the front page of the October 22, 1971 issue of the New York Law Journal and led to my appointment as the first woman to serve on the New York State Bar Association's Judicial Selection Committee. In that capacity, I served for eight years, from 1972 to 1980, reviewing the qualifications of every candidate for the New York Court of Appeals, the Appellate Divisions, and the Court of Claims. On the federal level, I and my daughter engaged in a six-month investigation of the judicial nominating process, focused on a case study of one particular nominee to the Southern District of New York bench. That documented study, showing the inadequacy of the screening process in screening out politically connected, palpably unqualified candidates for lifetime federal judgeships, was submitted to the U.S. Senate Judiciary Committee, Senate leadership, and leaders of the Bar. Thereafter, copies were furnished to both the National Commission on Judicial Discipline and Removal and the Long-Range Planning Committee of the Judicial Conference. Not only did those bodies not follow up with any investigation or referral, they did not even incorporate such information in their subsequently published reports.

Since my daughter's presentation focused on the complaint mechanism provided by the 1980 Act in the context of the National Commission's recommendation that each circuit examine its adequacy and that of "other existing mechanisms" to handle problems of judicial bias, my presentation will be directed to the adequacy of the "other existing mechanisms" for dealing with a biased judge.

Such "other mechanisms" are motions for recusal, appeals, and writs of

mandamus.

Based on empirical evidence and my "hands-on" personal experience, I am convinced that, for all practical purposes, these supposed remedies are more illusory than real, and an important reason why public dissatisfaction with our judiciary, is growing nation-wide, as more and more litigants feel frustrated and cheated, when these supposed remedies turn out to be no remedy at all but only a further waste of their time, energy, and financial resources.

As to the appeals remedy, I and my daughter have dispositively documented the failure of the appellate process to redress undisguised judicial bias by a district court judge of the Southern District of the Second Circuit in the context of a civil rights action under the Fair Housing Act for discrimination based on gender, as well as on marital status and religion.

The appellate record before the Second Circuit showed that the district court judge torpedoed the case of the civil rights plaintiffs by refusing to enforce their discovery rights, permitting the accused discriminating defendants to engage in fraud, misrepresentation, and other litigation misconduct, and by engaging in a multitude of biased acts--including the issuance of legally and factually insupportable judicial rulings.

The result was a judicially-created loss of a good and meritorious case--following which the district judge imposed upon them unprecedented monetary sanctions--amounting to nearly $100,000. As shown by the record, the district court's sanctions decision/order--which was the subject of plaintiffs' appeal--was factually false, legally insupportable, and the product of rabid judicial bias.

How did the Second Circuit respond to the dispositive evidence of such flagrant judicial bias by the district court against the civil rights plaintiffs? In a decision authored by now Chief Judge Jon Newman, the issue of judicial bias was ignored entirely--much as was every other issue raised by plaintiffs on their appeal--including the lack of evidentiary support in the decision appealed from. As to the lack of legal support for the district court decision, Judge Newman invoked "inherent power" to sustain it--which, for those in the audience who do not know, is the power that judges have arrogated to themselves when the statutory law does not authorize them to do what they want to do.

Notwithstanding Judge Newman's decision was facially repugnant to black-letter decisional law of this Circuit and of the U.S. Supreme Court and internally inconsistent, the Second Circuit denied the plaintiffs' petition for rehearing en banc.

Thereafter, the appellate remedy showed itself further useless and non-existent when the plaintiffs sought a writ of certiorari from the U.S. Supreme Court. In so doing, they specifically invoked the high court's "power of supervision" to review the Second Circuit's unconstitutional deprivation of the their due process and equal protection rights by "inherent power"--which they alleged was being employed for the purpose of retaliating against them.

So that this Task Force may have the benefit of the empiric evidence as to the total inadequacy of the so-called appellate remedy for these victims of judicial bias, gender-based and otherwise, I am providing, as part of this testimony, a copy of the U.S. Supreme Court submissions in the discrimination case about which I have been speaking. The appellate papers filed with the Second Circuit should be readily available from the Second Circuit.

As you will see from those documents, I and my daughter are both in a position to attest, with direct, first-hand knowledge, as to judicial bias in that discrimination case and the inadequacy of the appellate remedy, since we were the aggrieved civil rights plaintiffs.

I might add that copies of the U.S. Supreme Court submissions were provided by us to the National Commission on Judicial Discipline and Removal in July 1993, and to the Long-Range Planning Committee of the Judicial Conference of the United State in December 1994. Both those bodies failed to follow-up with any investigation or referral and, thereafter, issued reports extolling the high-calibre of the federal judiciary and expressing confidence in the appellate process.

As for the adequacy of recusal motions as a means of removing a biased judge, I offer the Task Force the benefit of my most recent experience involving another federal judge of the Southern District in another civil rights action filed by me, this one under 42 U.S.C. §1983. The documentary record in that action leaves no doubt but that the federal courts have transmogrified the recusal statutes into a meaningless facade.

The two relevant recusal statutes, which Congress intended to implement litigants' Fifth Amendment due process right to a fair and impartial tribunal, are 28 U.S.C. §144 and §455--each of which have been the subject of extensive commentary in the basic treatises on federal practice. Such recognized treatise as Wright, Miller & Cooper's Federal Practice and Procedure, Vol.13A, Jurisdiction 2d, §3542 (1984 ed), explicitly state that actual disqualifications under §144 are "rare", §3541, text at 551 and fn.12 and state "There is general agreement that §144 has not worked well." (at 555).

For that proposition, Wright, Miller, and Cooper cite various law review articles, one going back nearly 50 years. They also quote from another law review article as

follows:

> "§144 has been construed strictly in favor of the judge (emphasis added)...Strict construction of a remedial statute is a departure from the normal tenets of statutory construction."

It is simply extraordinary to compare the plain language of §144 and the judicial interpretation and not come to the conclusion that our federal judiciary effectively gutted the statute. Thus, although 28 U.S. §144 reads:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding...",

the judicial interpretation has been that the judge who is the subject of the recusal affidavit is permitted, if not actually required, to decide its timeliness and sufficiency. Berger v. United States, 255 U.S. 22 (1920). The predictable result is that such complained-of judge acts as a censor, ruling in his own favor to avoid prompt review of his conduct by another judge. He does this by pretending that a palpably timely and sufficient affidavit is untimely and/or insufficient. This leaves litigants even worse off than when they started--since they have now openly "taken on" the judge.

Additionally, our federal judiciary has engrafted onto the §144 and §455 recusal statutes the limitation that the bias complained of be of "extrajudicial" origin, which is deemed to refer to a source "outside the four corners of the courtroom." In other words, if the basis of the recusal application is that, the judge has engaged in oppressive, bullying, insulting, behavior, has disregarded black-letter law, and falsified the record--in other words, where he has engaged in all the misconduct popularly believed to be biased--that judge, under accepted judicial construction, need not recuse himself even when a motion for recusal relief is made.

These judicial interpretations of the plain language of the aforesaid two recusal statutes have resulted in the situation where "recusal is rare, and reversal of a district court refusal to recuse, is rarer still" (and is so described in one of the underlying studies of the National Commission (Research Papers, Vol. I, p. 771)).

This situation prevails--notwithstanding the Supreme Court's decision last year in Liteky v. U.S., 114 S.Ct. 1147 (1994) which implicitly approved the "pervasive bias"

exception to the extrajudicial source requirement. As shown by my own recent experience in seeking recusal of the federal district judge in my §1983 civil rights action, the judge--who arbitrarily allowed me only five minutes to present oral argument in support of my recusal application--ignored such exception.

Thus may be seen that gender-based bias by a federal judge in the course of a litigation commonly evades review. Such conduct is not only "off-limits" for a recusal motion but, as described in my daughter's testimony, is, generally speaking, tossed out as "directly related to the merits" when made the subject of a disciplinary complaint filed under the 1980 Act.

Since the treatises recognize the general unavailability of the extraordinary remedy of mandamus as a means of removing a biased judge--acknowledging that "the vast preponderance of the cases deny the writ"--Moore's Federal Practice, 1991 ed., ¶63.07[4] at 63-37, the appeal remedy is that more likely to be employed by victims of judicial bias. Yet, as hereinabove described, even the most heinously exhibited judicial bias can survive the appellate process intact. Moreover, as is well-known, most litigants, particularly plaintiffs bringing civil rights actions, never make it to the appeal stage. Faced with a biased and abusive judge, they are compelled--by virtue of the emotional strain and sheer economics of litigation--to abandon their substantial and meritorious legal claims.

This Task Force, by evaluating the adequacy of the mechanisms available to victims of judicial bias, has an enormously significant job to do--one which was not done by the National Commission, but which the National Commission recognized as needing to be done if judicial bias, gender-based or otherwise, is to be eradicated from our federal courts.

Thank you for this opportunity to make this presentation. I would be pleased to answer your questions.