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ORAL TESTIMONY ON BEHALF OF THE CENTER FOR JUDICIAL ACCOUNTABILITY, INC. AT THE DECEMBER 9, 1994 PUBLIC HEARING OF THE COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, D.C.

Good afternoon. My name is Elena Ruth Sassower. I am here to present testimony on behalf of the Center for Judicial Accountability, Inc., of which I am the Coordinator and a Co-Founder. The Center for Judicial Accountability, Inc. is a national non-partisan, not-for-profit citizens' action group formed to provide independent monitoring of the processes by which judges are selected and disciplined. These processes take place behind closed doors and in ways which, demonstrably, are neither serving nor protecting the public. The Center's goal is to document what is taking place so as to raise public consciousness of the need for major and meaningful reform in both areas.

At the outset, we commend the Judicial Conference for giving the public the opportunity to participate in its evaluation of its "Proposed Long Range Plan for the Federal Courts". In making the trip here today from New York, we do so with the hope and expectation that these hearings will not be a pro forma preliminary to "rubber-stamping" the "Proposed Long Range Plan", but rather that the information presented by us--documentarily rebutting central tenets of the Plan, as reflected

by its "Core Values" (at p. 5)--will be seriously studied and evaluated.

Unfortunately, that was not the case with the National Commission on Judicial Discipline and Removal, whose methodologically flawed work product is referred to under Recommendation 52 of the Long-Range Plan. In inviting comment from the public, the National Commission's June 1993 Draft Report had expressly stated that absent a "convincing demonstration" of the inadequacy of disciplinary mechanisms within the judicial branch, it would not recommend substantial change. However, when a "convincing demonstration" was thereafter presented, the Commission showed itself to be totally disinterested. Similarly, although the Commission's Draft Report explicitly recognized the "prophylactic" value of a careful appointments process, stating that it would be "useful to know" about its "structural defects", the Commission thereafter failed to avail itself of the documentary information which it was provided showing that the present system does not even screen out judicial candidates who are blatantly unfit.

In the ten minutes allotted, I will focus my remarks on the materials we presented to the National Commission on Judicial Discipline and Removal since those very materials are extremely relevant to the "Core Values" of "Equal Justice", "Excellence" and "Accountability", which the Long-Range Plan repeatedly states it has been formulated to "conserve and enhance".

Under the "Core Value" of "Excellence" (p. 6), the Plan recognizes that "the quality of the nominations process" is critical to achieving the highest competence level for members of the federal judiciary.

The Plan also acknowledges that public confidence in the federal judiciary rests:

> "in no small part...[on] the belief that federal judges are selected by an exacting process..." (p. 5)

Yet there is no affirmative statement in the Long-Range Plan that our present appointment system is one which is, in fact, "exacting" in producing judges of the highest quality. Such evaluation of the appointments process is particularly critical in view of the Plan's acknowledgement that more federal judges will have to be appointed to keep up with the dramatically accelerating caseload.

For that purpose, the Center submits to the Long-Range Planning Committee the case-study critique of the federal judicial screening process prepared and presented by its predecessor local citizens' group, the Ninth Judicial Committee, to the Senate leadership in May 1992 and, again, last year to the National Commission on Judicial Discipline and Removal. As set forth and documented by that critique, which empirically analyzed a particular federal judicial nomination to the district court of the Southern District of New York:

> "a serious and dangerous situation exists at every level of the judicial nomination and confirmation process--from the inception of the senatorial recommendation up to and

> including nomination by the President and confirmation by the Senate--resulting from the dereliction of all involved, including the professional organizations of the bar." (at p. 2)

Inasmuch as the Long-Range Plan views the appointments process as the province of the other branches of government, we wish to make known to this Committee--much as we made known last year to the National Commission on Judicial Discipline and Removal--that events subsequent to submission of our critique to the Senate leadership in 1992 not only reinforced the validity of our conclusion as to the "dereliction of all involved", but demonstrated the complete failure of government and bar leaders to take corrective action after such dereliction was made known to them. Time has not permitted us to assemble for presentation here today a compendium of our extensive and shocking correspondence with the Senate Judiciary Committee, as well as the Senate and bar association leadership. However, such compelling documentation--which must be read to be believed--will be shortly transmitted to you for inclusion in the Record. It demands that the Judicial Conference act affirmatively in calling for a thorough investigation of the appointments process, which our critique exposed as totally inadequate and tainted.

Now, beyond "Excellence", I turn to the other "Core Values" of "Equal Justice" and "Accountability" (pp. 5-6), the existence of which the Long-Range Plan accepts as hallmarks of the federal judiciary. The Long-Range plan recognizes as of

utmost importance to maintaining public confidence in the judiciary that there be a perception:

> "that the courts' rulings are supported and constrained by well-articulated legal principles, and that those decisions are reviewable by an appellate system that will correct errors, reject arbitrary judicial conduct and be faithful itself to the constitutional limits imposed on the judiciary." (at p.5)

The chasm between these ideals and the reality of judicial conduct on the federal bench may be seen from our July 14, 1993 letter to the National Commission on Judicial Discipline and Removal. That letter described how judges of the Second Circuit--including now Chief Judge Jon Newman--used their judicial office "to crush and destroy those who speak out against judicial abuse or are associated with 'judicial-whistleblowers'" by authoring decisions which were "knowingly false and fabricated as to all material facts and in knowing disregard of controlling black-letter law." The supporting documentary materials--including a petition to the Second Circuit for rehearing en banc--presented to the National Commission exploded the Commission's unsupported views as to the adequacy of appellate review and the so-called "peer disapproval" as a "fundamental check" against judicial misconduct. Those views are essentially repeated in the Long-Range Plan (p. 68).

Indeed, the fact that the Second Circuit's decision, per Jon Newman, was not repudiated on the en banc application of the plaintiffs--where the decision was not only illogical and internally-inconsistent on its face, but conflicted with bedrock

decisional law of the U.S. Supreme Court, as well as the Second Circuit itself--refutes the notion, appearing repeatedly in the Long-Range Plan, that the smallness and collegiality of the federal judiciary ensures the consistency and coherence of decisions. What they do is make more likely cover-up, rather than correction of, judicial misconduct.

As part of the record herein, I am providing for the Committee--in addition to the petition to the Circuit Court for rehearing en banc--a set of our papers before the U.S. Supreme Court in Sassower v. Field, 92-1405, wherein, to no avail, review was sought, specifically, under that court's "power of supervision" for redress of the monstrous judicial misconduct on the part of the Second Circuit and the district court.

Although the Long-Range Plan finds "troubling" (at p. 44) that Congress--whose members are democratically elected--should attempt to override directly federal rules enacted under the Rules Enabling Act--it does not address the problem created when federal judges use "inherent power", without the slightest necessity or due process, to override those rules--as was done by Judge Newman, with no review granted by our highest Court.

Although the Long-Range Plan endorses what it calls the National Commission's "central recommendation" as to impeachment, available evidence suggests that not only is the impeachment process--as initiated by the House Judiciary Committee upon individual complaints--moribund, but that the National Commission knew it to be so when it concealed that fact

in its Report. In view of this Committee's endorsement of the impeachment mechanism, we certainly expect that, based on the information herewith provided, it will take steps to ensure that such mechanism is in good working order. With so many anticipated new life-time judges on the federal bench, the need for an effective impeachment machinery will be even greater--particularly if there is no change in the grossly-deficient appointments process.

Finally, I would add that the National Commission, in favorably concluding as to the extent of judicial misconduct and the adequacy of disciplinary mechanisms within the judicial branch, shockingly failed to solicit testimony from federal litigants and lawyers on the subject. Based on my own first-hand personal experience and those of others, the situation is, to put it mildly, very, very far from what the Commission describes and from what is described in this Committee's Long-Range Plan.

The Center will be working actively to advance the "Core Values" and looks forward to serving as a resource for your Committee in realizing them in our lifetime.

Thank you. I will gladly answer your questions.