Center for Judicial Accountability, Inc. (CJA)

From: Center for Judicial Accountability, Inc. (CJA) [elena@judgewatch.org]
Sent: Friday, December 21, 2007 12:12 PM
To: 'cgrimes@syr.edu'
Cc: 'kjbybee@maxwell.syr.edu'; 'mjobbie@syr.edu'; 'margolick@aol.com'; 'jeffrey.toobin@turner.com'
Subject: "The U.S. Supreme Court is a special creature and it gets yet another kind of reporter" --
Attachments: 12-11-07-obbie.pdf

TO: Professor Charlotte Grimes /Knight Chair in Political Reporting – S.I. Newhouse School of Public Communications

Syracuse University

[cc: Professors Bybee & Obbie; David Margolick, Esq., Jeffrey Toobin, Esq.]

Those were your words at the March 27, 2007 symposium, "*Are Federal Judges Political? Views from the Academy, the Bench, and the Press*", sponsored by Syracuse University's Institute for the Study of the Judiciary, Politics, and the Media.

You did not, thereafter, elaborate as to what "kind of reporter" covers the Supreme Court. To what extent do you believe such reporter fits David Margolick's observations, recited in my December 11, 2007 letter to Professor Obbie, to which you are an indicated recipient?

Attached is that December 11th letter, proposing that Mr. Margolick's observations be the subject of empirical scholarship. Will you join in that proposal – and will you repudiate Professor Obbie's response thereto, recounted by my letter of today's date to Professor Bybee, already e-mailed to you?

Thank you.

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December 11, 2007

Professor Mark Obbie
Associate Director, Institute for the Study of the Judiciary, Politics, and the Media
Director, Carnegie Legal Reporting Program/S.I. Newhouse School of Public Communications
Syracuse University
Syracuse, New York

RE: PROPOSAL FOR SCHOLARSHIP & TEACHING BY EXAMPLE: Examining the Evidence Supporting David Margolick's Criticism of U.S. Supreme Court Beat Reporters and Scholars – Including against Your Own Favorite, Most-Recommended Journalists and Scholars

Dear Professor Obbie:

This follows up the voice mail message I left for you on December 3rd, requesting to speak with you about CJA's latest primary source documentary evidence, rebutting views expressed by your LawBeat blog and by participants of various programs sponsored by the Institute for the Study of the Judiciary, Politics, and the Media.

That phone message, to which I have received no return call, was only minutes after my very brief phone call to the Institute's Director, Professor Keith Bybee. He responded to my similar entreaty by telling me, without reason, that he was "done with the conversation" and hanging up the phone. My prompt call back to him was answered by his voice mail – on which I left a message requesting the names of his superiors. I have received no subsequent call or other communication from him.

Presumably, you and Professor Bybee are already familiar with a portion of the documentary evidence I had called to discuss – at least if you and he read the two recent e-mails I sent both of you. These e-mails, dated November 21st and 27th, were addressed to journalists whose opinions about the Supreme Court and its justices you had criticized in your LawBeat blog as being unsupported by "proof",

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* The **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization dedicated to ensuring that the processes of judicial selection and discipline are effective and meaningful – a goal that cannot be achieved without honest scholarship and a press discharging its First Amendment responsibilities.

"specifics" and "hard evidence". These journalists are Andrew Cohen and David Von Drehle and my e-mails asserted that such "proof", "specifics" and "hard evidence" as you had demanded from them could be found in what the Supreme Court had done in an important case before it.

As stated in the first of these e-mails, addressed to Mr. Cohen:

> "The attached press release describes a far-reaching 'disruption of Congress' case, whose petition for rehearing (#07-228) was on today's conference calendar. Examination of the referred-to petition will provide you with powerful proof to refute Professor Obbie and expose that the Justices' purported 'openness', manifested by their speeches and interviews, which Professor Obbie lauds, is sheer hypocrisy, as compared to the Justices' actions and inactions which, as Professor Obbie well knows, the press will not report where doing so would expose the Justices' utter lack of accountability, not only to the public, but to the rule of law.
>
> I will happily review with you – and Professor Obbie – the pertinent documentary substantiation pertaining to the rehearing petition and the performance of the press. You can then either report it yourself, in discharge of your obligations as a journalist – or watch whether Professor Obbie will."

Have you examined the petition for rehearing? If so, you would have seen that the second ground for rehearing, entitled "Upholding Judicial Independence & its Meaning for The First Amendment and The Rule of Law", described Chief Justice Roberts' September 19th speech at Syracuse University and stated:

> "It may never be known whether the Chief Justice's September 19, 2007 speech, linking judicial independence with the vitality of the First Amendment and the rule of law, was influenced by this case, whose cert petition was distributed to the Justices on August 29, 2007…One thing is certain, however. The cert petition's chronicling of self-interested, pervasively biased and corrupt conduct by two levels of the D.C. judiciary offers a decisive gauge of the Chief Justice's true commitment, and that of the Associate Justices, to judicial independence, the First Amendment, and the rule of law." (at p. 11).

Do you disagree with that assessment? And do you disagree that any responsible press interested in shining light on the Court's internal operations and advancing its basic accountability would have seized upon the rehearing petition, as summarized and supplemented by the press release, for reportage and commentary? If not, how do you explain the ZERO coverage it has received – including from the very journalists and news sources you have promoted and who were the three panelists at the Institute's September 18, 2007 symposium "*Supreme Makeover: Inventing a New Model of Judicial Openness on the High Court?*"[1] – Dahlia Lithwick, Tony Mauro, and Benjamin Wittes.

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[1] The symposium's original title had not been a question, but a declaration "*Supreme Makeover: How the*

The answer to that ZERO coverage question is powerfully provided by David Margolick in his September 23rd New York Times book review of Jeffrey Tobin's The Nine: Inside the Secret World of the Supreme Court – to which you took issue in your September 22nd blog "*Reviewing a review of the Toobin reviews*". You stated:

> "Margolick's criticism of the beat reporters is an old one: that they're a timid, bookish bunch, prone to serving as Court scribes rather than as inquisitors. Just because we've heard this one for eons doesn't make it true. And just because Margolick hauls out the charges and trumpets them loudly doesn't mean that he has anything new to say.
>
> Even though Margolick knows the Court… he doesn't seem to know the beat. Margolick vastly overstates his case while adding little to the debate. The beat reporters provide 'nothing about [the Court's] inner workings'? 'Almost no one even tries' to write critically about the justices? That's absurdly exaggerated…"

Shouldn't the Institute for the Study of the Judiciary, Politics, and the Media critically examine whether Mr. Margolick's eons-old criticism is true – and, especially where it can do so in the context of something "new" that will meaningfully "add…to the debate"?

To that end, I propose that you and the students you teach interview the myriad of Supreme Court beat reporters and other journalists to whom I turned, as well as scholars, whose criticism by Mr. Margolick your blog doesn't address, and find out from them why the readily-verifiable and explosive story presented by CJA's November 19th press release "*How Does the U.S. Supreme Court Handle Misconduct Complaints against its Staff?*" elicited not a single follow-up inquiry of me, nor – to my knowledge – any mention in their articles, columns, blogs, and radio/television segments. This, where it encompassed Chief Justice Robert's shameful, if not scandalous, decision, as Circuit Justice, in *Boumediene v. Bush*. *Boumediene* – which was argued before the Court on December 5th – is, as you assuredly know, widely regarded as the Court's most important case this term and "perhaps the most important habeas corpus case in modern history" (Marcia Coyle, National Law Journal, December 3rd).

My outreach to Supreme Court beat reporters, journalists, and scholars, embodied by primary source documentary evidence, is posted on CJA's website, www.judgewatch.org, accessible *via* the "'Disruption of Congress'- Appeals" sidebar panel. May I suggest that you and your students begin with Dahlia Lithwick, Tony Mauro, and Lyle Denniston, as my correspondence and contact with them are the most extensive and damning. Focusing on these three journalists is additionally instructive as you have warned your students that they should "check [their] assumptions"[2] – and you have been unabashed in your praise of these journalists, including by your March 21, 2007 blog "*The Dennison Hour*" and your October 6, 2007 blog "*My 'best' list of law blogs*".

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news media and the Supreme Court justices they cover are inventing a new model of judicial openness".

[2] Your March 29, 2007 blog "*My how-not-to list for legal reporters*", which you are currently reprising.

Like yourself, Ms. Lithwick wrote about Mr. Margolick's review in her "*Nine Ways to Read The Nine*" – although far less critically than you. Indeed, she elaborated on, and even flaunted, how compromised "the regular and semiregular press corps" covering the Supreme Court is – "See, Mr. Margolick? We are hopelessly compromised in *dozens* of ways!" (italics in the original piece). She also expanded upon his observations of scholars:

> "In some sense, the small army of constitutional law professors across the land have always been a parallel Supreme Court press corps…Of course, as Margolick observes, the professors are as hopelessly, if differently, compromised as the rest of us. Many of them clerked at the court, hope to have students clerk at the court, or hope to someday occupy a seat there."

Ms. Lithwick's column, which began by stating that "no institution…more needs to be opened up to scrutiny" than the Supreme Court, and ended by urging "reporters should be aggressive about challenging the justices, rather than corrupted by a struggle for access", in fact gave reporters cover for their non-reporting: purporting it was going to be really hard for them to break through the Court's secrecy. Such was posted on Slate's website on September 21st – a day after Ms. Lithwick had received my e-mails about the lawlessness and lack of professionalism at the Supreme Court's Clerk's Office and requesting to speak with her, and just hours after we did speak and in which she conceded to me that she had never written a story about the Clerk's Office.

Though the story I was proposing was easy to verify and then unfolding: sabotaging the "disruption of Congress" case, whose cert petition was on the Court's September 24th conference calendar, I did not hear back from her, nor from Mr. Mauro, who I was also e-mailing, jointly with Ms. Lithwick.

On November 13th and 15th, my joint e-mails to them expressly identified my intent to empirically test Mr. Margolick's assessment of Supreme Court reporters. Indeed, my November 13th e-mail provided an important correction to what Mr. Margolick had written, one making their conduct and that of their fellow journalists all the more indefensible:

> "Please call me at your earliest convenience so that we can discuss your coverage of this extraordinary story – one laying bare an important aspect of the Court's 'internal operations and culture'. Indeed, this story reveals David Margolick's misconception in his September 23rd New York Times book review that it is 'nearly impossible' for reporters to obtain information about the Court's 'internal operations and culture', except 'years after the fact' when the Justices make it 'available to the public', as by their 'posthumous papers'. Here, the information is 'available' to you in 'real time' – thereby presenting a test of David's more formidable charge, summarized and quoted in '*Nine Ways to Read the Nine*' by Dahlia and Emily Bazelon, posted on Slate's website on September 21st – just hours after my phone conversation with Dahlia about my September 17th motion to compel the Solicitor General's response to my cert petition:

> 'Margolick more or less goes after all the beat reporters as slothful and compromised: Covering the justices critically 'is dangerous: you risk losing whatever tiny chance you have that one of them will talk to you in a pinch or throw you an occasional crumb. So almost no one even tries. *No other reporters are as passive as Supreme Court reporters.*' The italics here are ours, because, ouch.'"

My November 13th e-mail explained that I was giving Ms. Lithwick and Mr. Mauro the lead because "[they] (alone among Supreme Court reporters) were at Justice Roberts' September 19th Syracuse University speech and were participants the day before in the...symposium '*Supreme Makeover...* ". In return, I requested that they let me know whether they'd be writing about the story and, if not, the reasons. Two days later, my November 15th e-mail began "Please let me hear from you as soon as possible" and requested that if they were not going to investigate and report the story, they advise as to which Supreme Court reporters would. Stating that I had obtained from the Supreme Court's Public Information Office a list of 26 reporters with "Permanent press passes for the October 2007 term", for which I asked their assistance in providing me with e-mail addresses and/or phone numbers, I reiterated:

> "It is my hope to reach as many of your colleagues as possible on the Supreme Court beat so that we can <u>empirically</u> test David Margolick's assertions about Supreme Court reporters – about which Dahlia and Emily Bazelon wrote in their '*Nine Ways to Read the Nine*'...But, will you then report it?" (underlining in the original).

Ms. Lithwick's belated response, on November 19th, was that she "[didn't] see the story for [her] here" and that I should "respect [her] judgment about [her] job". Upon my entreating her for a reason for her "judgment" based on what she had read, this sophisticated journalist, a graduate of Yale University and Stanford Law School, whose writing on the Supreme Court and on legal subjects for <u>Slate</u> involves constantly distilling truly complex subject matter – unlike the utterly straight-forward "disruption of Congress" case – purported "I just don't think I can do justice to a story about a motion referencing another pleading that references a case". She offered no suggestions of other Supreme Court reporters – or contract information for them.

As for Mr. Mauro, writing and blogging for <u>Legal Times</u>, who you had praised in your October 6th best law blogs list by stating:

> "**BLT: Blog of Legal Times**: A good way to keep up with the best in legal journalism (that being Legal Times), including Tony Mauro's Supreme Court coverage",

he never responded. Nor has there been any response from <u>Legal Times</u> Executive Editor Tom Schoenberg for whom I left several voice mail messages, complaining of Mr. Mauro's non-response and asking how it is possible that <u>Legal Times</u> would not report on the case at the Supreme Court level, where Mr. Schoenberg had himself extensively reported on it in 2004 when it was in D.C.

Superior Court – culminating in its being featured in Legal Times' 2004 year-end review.[3]

As for Lyle Denniston, extolled by your October 6th best law blogs list:

> "**SCOTUSblog**: I've been accused of having a journalistic crush on Lyle Denniston. Guilty as charged! Original reporting always wins my heart over, and Denniston is still a marvel of energy and smarts after a half a century on the Supreme Court beat.",

my November 19th e-mail to him transmitting the press release "*How Does the U.S. Supreme Court Handle Misconduct Complaints against its Staff*?", gave him the opportunity to do "original reporting". Yet, not only did Mr. Denniston not respond to this e-mail, he also did not respond to my subsequent November 27th e-mail, additionally furnishing him with an opportunity for "original reporting". This second e-mail, entitled "Bringing Transparency & Accountability – TO SCOTUSBLOG", recounted how two separate sets of comments that I had posted on SCOTUSblog on November 19th and November 20th about the Chief Justice's decision in *Boumediene* and the "disruption of Congress" case in response to the SCOTUSblog entries on "*The State of the Term*" and "*Petitions to Watch/Conference 11.20.07*' had been removed. The e-mail asked who had removed the comments, the basis therefore, whether the SCOTUSblog "authors" were each so-advised and agreed, the criteria for removing comments, and where, if at all, SCOTUSblog posts such criteria. This November 27th e-mail also reiterated the substantive questions that were part of the removed comments, which it quoted:

> "(1) 'Has there been any commentary on Chief Justice Roberts' remarkable decision, as Circuit Justice for the District of Columbia, in the *Boumediene* case, 127 S.Ct. 1725 (April 26, 2007)?...and [will] you…be writing about it, as it deserves the expert commentary and analysis that SCOTUSBLOG is equipped to provide.' – Comment to '*The State of the Term*'
>
> (2) 'HAS SCOTUSBLOG EVER EXAMINED THE QUESTION POSED BY THE PRESS RELEASE – 'HOW DOES THE U.S. SUPREME COURT HANDLE MISCONDUCT COMPLAINTS AGAINST ITS STAFF?' If not, shouldn't SCOTUSBLOG do so now? Indeed, do the experts who operate this important blog disagree that the Chief Justice's misfeasance/[non]lfeasance with respect to the aforesaid two misconduct complaints would rightfully warrant not only congressional inquiry and legislation, but impeachment proceedings against him and the complicit Associate Justices?' – Comment to '*Petitions to Watch/Conference 11.20.07*'"

This November 27th e-mail, as likewise the November 19th e-mail were not sent to Mr. Denniston alone, but to the entire SCOTUSblog team of "authors", including SCOTUSblog founder Tom Goldstein, a practicing lawyer specializing in Supreme Court litigation, who also teaches at Harvard

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[3] This coverage is posted on CJA's website, accessible *via* the sidebar panel "Press Suppression", which lists a "Special Topic" pertaining to media coverage in the D.C. Superior Court about the "disruption of Congress" case.

and Stanford Law Schools. That none of them responded underscores how dangerous it is for the Supreme Court press corps to look to Mr. Goldstein and his SCOTUSblog as an honest, authoritative information source. This danger is entirely unappreciated by your October 1st blog "*First Monday love affair*", which begins "The Supreme Court press corps has a crush on a boy named Tom" and ends:

> "Goldstein has long had a deserved reputation for smart, careful analyses of trends, and it's only logical that the reporters rely on folks like him. But there have to be a lot of jealous Court scholars out there this morning, experts whose life work is devoted to tracking such trends and who dream of one or two mentions in national newspapers every year or so. Clearly they don't stand a chance when Tom Goldstein is in town."[4]

Finally, and further establishing the truth of Mr. Margolick's criticism of Supreme Court beat reporters and scholars, is CJA's past correspondence with them. Such is part of CJA's goldmine of primary source documents, spanning more than a decade and a half, that I offered the Institute to advance its scholarship. That was more than a year ago, on October 17, 2006, in my only prior telephone conversation with Professor Bybee. It was followed by my November 17, 2006 letter to him, with a copy to you, demonstrating the value of such primary source materials in rebutting a panoply of materially false and misleading representations made by the three panelists at the Institute's October 19, 2006 symposium "*The Last Umpires? The News Media, the ABA and Other Independent Voices in the Federal Judicial Confirmation Process*" – Mr. Denniston among them.[5] Indeed, pages 4-7 of that November 17, 2006 letter critiqued Mr. Denniston's symposium representations, with footnote 9 identifying the documentary evidence of his cover-up of impeachable conduct by the Supreme Court justices, as follows:

> "Mr. Denniston was himself among the newspaper journalists to whom we turned, unsuccessfully, in 199[9], for coverage of our fully-documented impeachment complaint against U.S. Supreme Court Justice William Rehnquist and all eight Associate Justices. The press releases we sent Mr. Denniston at that time and our

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[4] What the insular Supreme Court press corps, other journalists, and scholars should be doing – especially if they want to find out about the Court's "internal workings" and the like – is to be receptive to information that ordinary people might provide about their denied cert petitions and other applications. Indeed, nothing better exemplifies this than what Linda Greenhouse said to me on August 7, 2007 when I ran into her at the Supreme Court. Her response to my telling her that I was there to file a motion for permission to add 5-1/2 pages to my cert petition was that it would not be granted because "they are never granted". Two days later, my motion was not only granted, but with an allowance of an additional half page.

[5] Professor Bybee did not respond to that November 17, 2006 letter – a fact to which I alerted you by my January 10, 2007 letter to you, to which you, likewise, did not respond. Such was then reiterated by – and was the basis for – my March 21, 2007 memo to Syracuse University Professor Charlotte Grimes and Wellesley College Assistant Professor Nancy Scherer – both participants in the Institute's March 27, 2007 symposium "*Are Federal Judges Political? Views from the Academy, the Bench, and the Press*" – to which Professor Bybee and you also did not respond. All three letters – and the relevant transmitting e-mails – are posted on CJA's website, accessible *via* the sidebar panel "Searching for Champions (Correspondence): Academia"

> correspondence with him and other journalists, transmitting the substantiating documents – including the impeachment complaint and its expressly incorporated rehearing petition – are all posted and accessible from the "Press Suppression" webpage [of CJA's website], as part of the "SPECIAL TOPIC":
>
> > "TESTING THE PROPOSITION: THAT 'ANY PUBLICLY MADE (NON-FRIVOLOUS) ALLEGATION OF SERIOUS MISCONDUCT…AGAINST A SUPREME COURT JUSTICE WOULD RECEIVE INTENSE SCRUTINY IN THE PRESS…' (1993 Report of the National Commission on Judicial Discipline & Removal, at p. 122)."

The referred-to "other journalists" include Mr. Mauro, to whom I provided "hard copies" of the substantiating documents in January 1999 and had a lengthy meeting at USA Today headquarters in February 1999. The documentary evidence of his cover-up of the justices' impeachable conduct at that time, as likewise Mr. Denniston's, is reflected by TEST #1 on the above-cited webpage, Five years later, in 2004, Mr. Mauro again covered-up further impeachable conduct by the justices. The documentary evidence of this is TEST #2 on the same webpage.

In 2004, Ms. Lithwick was working for Slate and TEST #2 would have included her, but for the fact that I had been unable to obtain contact information for her. I told her this when I met her on November 18, 2006, at a Nieman conference on narrative journalism in Boston, which I attended specifically so that I might meet her. The purpose of my doing so was to alert her to two important cases – the first being the "disruption of Congress" case[6], which I stated would most likely be reaching the Supreme Court in 2007. I told her that it would raise issues as to the justices' mandatory supervisory duties and ethical responsibilities, in addition to issues of judicial disqualification and disclosure. I stated that as to all these, the justices had a direct interest by reason of the impeachment complaint I had filed against them, with the House Judiciary Committee, in 1998 – which remained pending, uninvestigated – and as to which there had been no press coverage. I told her about the "Press Suppression" page of CJA's website, from which she could readily access the impeachment complaint and my 2004 supplement to it. The justices' impeachable conduct that I summarized for her included: (1) their *sub silentio* repudiation of the judicial disqualification statute, 28 U.S.C. §455, which applies to them; (2) their failure to create a judicial misconduct complaint process for themselves, as recommended by the 1993 report of the National Commission on Judicial Discipline and Removal; and (3) their misrepresentations to Congress as to the efficacy of the judicial disqualification statutes, both as relates to themselves and the lower federal judiciary, as well as their misrepresentations as to the efficacy of the judicial misconduct complaint process governing the lower federal judiciary.

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[6] As background, I gave her copies of my three published letters to the editor, from Roll Call, the New York Law Journal, and the Village Voice. The second case to which I alerted Ms. Lithwick, is CJA's public interest lawsuit against The New York Times for journalistic fraud, as to which I gave her three press releases. These documents are posted on CJA's website, under Ms. Lithwick's name on the same webpage as my subsequent correspondence with her.

The next day, Ms. Lithwick was a presenter at two Neiman conference sessions – and my questions at each reinforced what I had already told her. At the second session, in which Ms. Lithwick was the sole presenter, it was with reluctance and after attempting a dodge, that in a wildly garbled sentence, she appeared to answer in the affirmative my question as to whether she might write a story about the justices' failure to set up the complaint mechanism recommended by the National Commission on Judicial Discipline and Removal and, additionally, about impeachment complaints against the justices at the House Judiciary Committee. This, after downplaying comments she had made during the session implying she had suffered retaliation at the Court for writing critically about the justices. The full exchange and the contextual comments to which I referred in my question are annexed at the end of this letter, transcribed by me from the CD of the session I purchased.[7]

In any event, CJA's posted primary source documents, comprising TESTS #1 and 2, involving Mr. Mauro – and about which Ms. Lithwick had notice from November 18, 2006 and thereafter[8] – readily establish the superficial, false, and misleading nature of much of what the two of them had to say at the "*Supreme Makeover*" symposium about disqualification of the Court's justices (and lower federal judges) under what Ms. Lithwick identified as 28 U.S.C. §455[9]. Indeed, their comments

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[7] Also annexed is the transcript of my question at the first session, where Ms. Lithwick, sitting on a panel with two other journalists, kept silent, as I asked:

> "Have the panelists ever written about issues of judicial corruption? Would they consider writing about judicial corruption? Do they know of other journalists who write about judicial corruption, and the corruption of judicial selection and discipline?".

At the end of the session, I went up to Ms. Lithwick, seated at the dais. She volunteered to me that after our conversation the previous day, she had looked at CJA's website. I either repeated to her my public question – or framed the related question as to whether she had ever examined the role of citizens in federal judicial selection. Her response was that she had written about "the organizations". It was to enable her to witness for herself the refusal of such "organizations" to confront readily-verifiable casefile evidence of judicial corruption and the corruption of judicial selection and discipline, that, from June through August 2007, I cc'd her (and Mr. Denniston) on my letters to an extensive array of organizations, liberal, conservative, and purportedly non-partisan, requesting *amicus curiae* and other assistance in the "disruption of Congress" case.

[8] This includes on February 16, 2007, when Ms. Lithwick was participating at a symposium sponsored by the Program in Law and Journalism at New York Law School and I gave her, *in hand*, copies of my November 17, 2007 letter to Professor Bybee and my January 10, 2007 letter to you, to read and transmit to Mr. Denniston, whose contact information you and Professor Bybee would not furnish me, just as you and he would also not confirm for me that your transmittal of that correspondence to him, as I had requested.

[9] Mauro: "If in fact there is a case that comes along…and one of the parties thinks that Scalia has already judged it because of that case, he or she can file a recusal motion and hopefully that will be public and we will sort of see that process. So, I think it is, the system can handle this sort of candor in established ways."

…

Lithwick: "Why didn't he recuse himself…? Because, and this is the nut of the problem that we're dancing around. There's no rule. The rule is – this incredibly, incredibly, broad judicial cannon, that says – that, quote, you know, this is title 28, Section 455 – quote, the recusal rule – justices and judges are supposed to

bemoaning the arbitrary, unreviewable nature of judicial disqualification at the Supreme Court are utterly hypocritical as they both had it in their power to force change by reporting on the 1998 impeachment complaint and 2004 supplement. Such would have – and still will – create a public outcry, compelling congressional examination of the issues and remedial legislation.

Your LawBeat blog makes admirable disclosure of your myriad personal, professional, and financial relationships with your journalistic colleagues and with media entities. However, disclosure alone is inadequate. It must be combined with actions demonstrating that those and other relationships and interests do not, in fact, interfere with your professional obligations.

In keeping with your yesterday's blog "Ode to a muckraker" about journalism as "public service" and investigative journalism as a "dying art", please call me, as soon as possible, so that we might discuss the above-described proposal for evidence-based scholarship and teaching, by example. Until then, I will further verify the truth of what Mr. Margolick had to say about journalists covering the Supreme Court and scholars by sending copies of this letter to the long list of journalists and scholars who are M.I.A. on this story, with an invitation that they illuminate the situation by coming forward with such

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recuse themselves, quote, in any case in which their impartiality may reasonably be questioned. So the question, now back to Ben and the rest of the panel, is well, who, who can possibly judge that?...

... So I do think it raises this larger problem of what is the appearance of impartiality....

...But, I think the foxes are guarding the henhouse here. The justices are in charge of making that determination for themselves. The Court doesn't have any authority to force Scalia to step down...

...He makes that determination for himself based on this incredibly squished standard and it seems to me that we're debating this question as though there's some bright line rule. Not only is there no bright line rule, but the people who enforce the rule have a direct interest in staying on the case."

Mauro: "Just to underline Dalia's point, the real scandal, I think, well, at the appeals court level, lower federal courts who also have to abide by that law, if they refuse to recuse in a case where their impartiality could be questioned, that can be appealed to this council of that circuit court. . At the Supreme Court, there's no appeal. If you ask Justice Scalia to recuse and he says no, or more likely, he says, nothing, that's the end of the story. It's a longstanding tradition that the justices regard recusal motions as a communication with that justice and nothing more, as if somebody wrote them a letter and it's beyond scrutiny by any of the other justices. They have a sort of an etiquette that they don't feel like any of the justices should comment on the recusal or non-recusal of another justice for fear of offending them, I guess."

Witt: "I would just add that precisely because of that point, that the standard is squishy, you know, the passive voice of that standard is significant, you know,. 'could be questioned', It really doesn't say 'could be questioned' by whom. And because there's no review of the decision, that actually suggests that you're in a land where you are relying on the justices' judgment as to the propriety of what they say. And this then goes back to my point and to Dahlia's point that there is a weird world of issues that this kind of new openness raises..."

...

Mauro: "If it's a really serious story that's tantamount to a scandal or something, I will put the question through to the justice, but you do it through the public information office. Sometimes you get an answer. Most of the time, not. I've asked some of these recusal questions to the justices and they never answer, or almost never."

facts and circumstances as might otherwise explain the ZERO coverage of CJA's November 19, 2007 press release "*How Does the U.S. Supreme Court Handle Misconduct Complaints against its Staff*?"".

Thank you.

Enclosures:

(1) CJA's November 19, 2007 press release:
"*How Does the U.S. Supreme Court Handle Misconduct Complaints against its Staff?*"

(2) Transcript excerpts of two November 19, 2006 Neiman Conference sessions with Dahlia Lithwick

cc: Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University
Keith Bybee, Director; Lisa Dolak, Associate Director; Kyle Sommers, Graduate Assistant
S.I. Newhouse School of Public Communications at Syracuse University
Professor Charlotte Grimes/Knight Chair in Political Reporting
David Margolick, Esq.
Recipients of CJA's November 19, 2007 press release, etc., identified by this letter
Andrew Cohen, WashingtonPost.com/CBS Radio
David Von Drehle, Time
Jeffrey Toobin, Esq., CNN, New Yorker
Dahlia Lithwick, Esq., Slate
Tony Mauro, Legal Times – Supreme Court credentialed, 2007 Term
& Legal Times Executive Editor Tom Schoenberg
Lyle Denniston, SCOTUSblog – Supreme Court credentialed, 2007 Term
& all other SCOTUSblog "authors": Professor David Stras, Tom Goldstein, Esq., Amy Howe, Esq., Patricia Millett, Esq., Kevin Russell, Esq., James Harrow, Ben Winograd, Eliza Presson
Benjamin Wittes, Brookings Institute, New Republic Online, Atlantic Monthly
Marcia Coyle, National Law Journal – Supreme Court credentialed, 2007 Term
Linda Greenhouse, New York Times – Supreme Court credentialed, 2007 Term
Other recipients of CJA's November 19, 2007 press release, etc.
Jan Crawford Greenburg, Esq., ABC News, Supreme Court credentialed, 2007 Term
Professor Jeffrey Rosen, George Washington University Law School, New Republic
Joan Biskupic, USA Today – Supreme Court credentialed, 2007 Term
Mark Sherman, Associated Press – Supreme Court credentialed, 2007 Term
Pete Yost, Associated Press – Supreme Court credentialed, 2007 Term
James Vicini, Reuters – Supreme Court credentialed, 2007 Term

Michael Doyle, McClatchy Newspapers – Supreme Court credentialed, 2007 Term
Robert Barnes, Washington Post – Supreme Court credentialed, 2007 Term
Jess Bravin, Wall Street Journal – Supreme Court credentialed, 2007 Term
David Savage, Los Angeles Times – Supreme Court credentialed, 2007 Term
Brent Kendall, Los Angeles Daily Journal – Supreme Court credentialed, 2007 Term
Nina Totenberg, National Public Radio – Supreme Court credentialed, 2007 Term
James Oliphant, Chicago Tribune – Supreme Court credentialed, 2007 Term
Steve Lash, Chicago Daily Law Bulletin – Supreme Court credentialed, 2007 Term
Pete Williams, NBC – Supreme Court credentialed, 2007 Term
Deirdre Hester, CBS – Supreme Court credentialed, 2007 Term
Barry Bagnatno, CBS Radio – Supreme Court credentialed, 2007 Term
William Mears, CNN – Supreme Court credentialed, 2007 Term
Tanya Chattman, C-Span – Supreme Court credentialed, 2007 Term
Michelle Malkin – FOX & for Ian McCaleb – Supreme Court credentialed, 2007 Term
James Kilpatrick, Universal Press Syndicate – Supreme Court credentialed, 2007 Term
Greg Stohr, Bloomberg Business News – Supreme Court credentialed, 2007 Term
Mark Anderson, Dow Jones News Wire – Supreme Court credentialed, 2007 Term
Professor Eugene Volokh, UCLA Law School, The Volokh Conspiracy:
Professors Dale Carpenter, David Bernstein, Ilya Somin, James Lindgren,
Orin S. Kerr, Randy E. Barnett, Sasha Volokh, Stuart Benjamin & Erik Jaffe, Esq.
Professor Jack Balkin, Yale Law School, Balkanization
– & Professor Lee Epstein, Northwestern University Law School
Howard J. Bashman, Esq., How Appealing
David Lat, Esq., Above the Law
Stuart Taylor, Jr., Esq., Brookings Institute, National Journal, Newsweek
Professor Christopher L. Eisgruber, Princeton University
Professor David O'Brien, University of Virginia
Professor Christopher Smith, Michigan State University
New York Law Journal: Editor-in-Chief Kris Fischer
Roll Call: David Meyers, Jennifer Yachnin
Village Voice: Tony Ortega, Ward Harkevy,
Wayne Barrett, Tom Robbins, (Nat Hentoff)

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PRESS RELEASE
November 19, 2007

How Does the U.S. Supreme Court Handle Misconduct Complaints against its Staff?

Two misconduct complaints, now before Chief Justice John Roberts, provide a rare window into the Supreme Court's internal operations, showcasing lawlessness, lack of professionalism, and invidiousness by the Court's Clerk's Office, covered-up by the Court's Legal Office.

The first complaint, against the Court's Clerk and his staff, details how they shielded the Government from accountability by improperly withholding from the Chief Justice, as Circuit Justice for the District of Columbia, a motion to compel the Government's response to a petition for a writ of certiorari in a politically-explosive "disruption of Congress" case (#07-228). They did this without citing any legal authority, which they refused to provide. Such misconduct resulted in the Court's denying the cert petition – and was the basis for a second motion, seeking recall/vacatur of the denial order and, additionally, clarification by the Chief Justice of his remarkable decision, as D.C. Circuit Justice, in *Boumediene v. George W. Bush*, 127 S.Ct. 1725 (2007), being misused by the Clerk's Office. This second motion disappeared in the Clerk's Office, as if in "a black hole", with the Clerk and his staff refusing to give any information as to its status.

This first complaint was sent to the Chief Justice in his administrative capacity. The response was a three-sentence letter from the Court's Legal Office, by its counsel. Ignoring all the facts, law, and legal argument presented by the complaint, the letter baldly purported that the actions of the Clerk's Office were "consistent with Court rules and policies" and that there would be "No response…to further correspondence on these issues."

This has led to the second complaint – against counsel for his flagrant cover-up. The complaint notes that the letter from the Legal Office did not indicate that a copy was being provided to the Chief Justice and asks the Chief Justice whether he endorses and approves of counsel's handling of the complaint against the Clerk and his staff and, if not, what steps he will take. It also requests the Chief Justice to distribute the eight enclosed copies of the complaint to the Associate Justices because they "share responsibility for the proper functioning of the Court's Clerk's Office and Legal Office" and because it bears upon their consideration of the petition for rehearing in the "disruption of Congress" case, calendared for the Court's November 20, 2007 conference. The Clerk's Office misconduct is the first ground for rehearing in that petition. The second ground is the Chief Justice's September 19, 2007 speech at Syracuse University on judicial independence, the First Amendment, and the rule of law – the very issues presented by the cert petition.

This story is easy to verify – and explosive. The two complaints to the Chief Justice, dated October 26, 2007 and November 14, 2007, and the substantiating underlying Supreme Court submissions are all posted on the Center for Judicial Accountability's website, www.judgewatch.org, *via* the sidebar panel "'Disruption of Congress' – The Appeals". Indeed, the website posts the full record of the case, establishing that two levels of the District of Columbia judiciary, as well as the U.S. Attorney's Office for the District of Columbia, utterly trashed the rule of law to cover-up the corruption of federal judicial selection involving the Senate's most influential members – Senator Hillary Rodham Clinton, among them. Such record of judicial and prosecutorial lawlessness is the basis upon which both the cert petition and rehearing petition assert that the Court's review of the case is mandatory, compelled by its supervisory and ethical responsibilities.

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* The **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization dedicated to ensuring that the processes of judicial selection and discipline are effective and meaningful.

Nieman Conference on Narrative Journalism
Boston, Massachusetts, November 17-19, 2006

Dahlia Lithwick (Second Session):
"The Advantages of Bringing Personality to Technical Subjects"
November 19, 2006, 2:30 p.m. – 3:40 p.m.

Lithwick: …

(at 16.32)

We have this bizarre credentialing system, wherein, like, some people get credentialed and others don't and an even more bizarre system of, you know, Linda Greenhouse sits in the front row; and, you know, the poor guy from the local St. Petersburg Times who's only there this week sits in the back row, and Dahlia Lithwick sits in the middle or, alternatively, behind a column if she's written something bad about the justices the day before. You know, it's just, nobody else has this sort of access problem.

But, and here's the sort of tricky psychological compartment of the show, most of the Supreme Court reporters in the court -- and this is the only part where I'm going to be slightly critical of them -- seem to labor under the belief that maybe someday they will get access to the justices; that if they just write enough fawning profiles of their justice in the hometown paper, someday, in fact, Anthony Kennedy is going to sit upright and say "And, today I give you an interview and tell you all my secrets." It doesn't happen. And yet the sort of fearfulness, the complete refusal to sort of call it as you see it, to say, you know, this justice was grumpy, this one was misbehaving, this justice was asleep, never happens. And so the same sort of ethos that would have kept you, say, if you were covering the Medici family, you know that, sort of like, don't want to offend anyone, might get access, is animating the way we cover the court. And, again, it is preposterous.

Every once in a while someone will turn to me and say, "Dahlia, you should totally write that". And when I say, "Why don't you write it?" They always say, "Ooooww, might not get that interview someday".

So, you know, I sort of feel that one of the great freeing aspects of my job was just deciding on about day two, when I wrote a column called "Stripper Bingo at the Supreme Court". It was a naked dancing case. And I just put the justices' names across the top of the page and I said the first one who says the word, doesn't matter, whatever obscene word I had chosen, is going to get me to stand up and yell "Bingo". And I wrote the piece that way, just because it was funny, but you know I pretty much knew I wasn't going to get a lot of interviews after that and, lo and behold, eight years later, it's true.

…

(at 21:26)

I think that there is a larger problem, and it sort of goes to the, sort of, larger democratic problem., which is that our reverence for the Court, our tendency to treat it like a secular church in this country, our refusal to really look hard at what the justices do, and I think that whole process is, sort of, aided and abetted by a far too reverent press corps, uh, really worries me. I mean, that's the part that I lie awake at night and think this is nuts, you know, we cannot treat one of the three branches of government as though they are deities and we are acolytes…

…

Second Session continued --

Question & Answer:

(at 46.03)
Sassower: Elena Sassower, Director and Co-Founder of the Center for Judicial Accountability. On the subject of bringing personality into reporting, you mentioned the fear of Supreme Court reporters in writing critically about the justices, that you yourself had written something and then you were behind a column. Is this a legitimate fear? Is this something that the reporters covering the Supreme Court disclose, write about, their fear of retribution, retaliation for critical reporting? And then related questions: Would the Supreme Court reporters be willing to write a story about the failure of the justices of the Supreme Court to set up a complaint mechanism to address misconduct complaints against themselves, as was recommended in 1993 by the National Commission on Judicial Discipline and Removal? And would they, additionally, be willing to report and cover on impeachment complaints filed with the House Judiciary Committee against Supreme Court justices?

Lithwick: Okay, let me try to distill all that. First I should be very careful to say I don't think anyone makes me sit behind columns because of what I write. I think there's just a lot of seats behind columns in the Supreme Court. There is a strange, strange credentialing system, that, that I think is, is not right, but I don't think that anyone suffers retribution. Although you will be hauled out of there if you are not dressed to then Chief Justice Rehnquist's specifications. If you're wearing a tee-shirt, G-d forbid, in the press area, you would hear about it. Welcome again to 1802.

On the issue of the justices, Supreme Court press corps writing about specific things, I will say I think that the Supreme Court press corps is probably, and nobody says anything to me, I think that it is one of the unspoken rules of the profession that we are probably too protective.

We have a very narrow ambit of what we cover and the best example I can give of that is the minority clerks story, which, this is way, way inside baseball, but, several years ago, many years ago, Tony Mauro, who I think is one of the best reporters on the beat, did a story about how few minority and female clerks were on the Court. You know, each justice has three or four clerks and it is the plum in a career of any young lawyer to get that job. And Tony thought it was appropriate to point out there were just way, way, way too many white men getting those jobs. And the rest of the press corps pretty much didn't, didn't back him up and several gave statements suggesting that this was not something worthy of reporting.

It took until this summer, and this was years later, for Linda Greenhouse to write a story about the minority clerks issue and it was written in this funny triangulated way where she said, literally, the story was, Justice Ginsburg called me to say she's worried about the minority clerks issue and she thought I should talk to some other justices about the, so I talked to them, and they said it's kind of a problem, and that's my story. So, you know, short of , actually, you know, I mean it really was the most completely, you know, inability to step up and say, hey there's, you know, not enough girl clerks on the court. Or, you know, alternatively hey, this isn't an issue. This is a very circular thing So I do think we tend to be, it's part of this notion that what we do is science and the only thing that's important is the law.

I sometimes joke that if there were ever, like, a sex scandal at the Court, and someone had to sort of rifle through the dumpster to find, you know, the negligee, we'd all just be paralyzed because what we are really good at doing is reading cases. That's what we do. We put on our glasses, go to

library, pour ourselves a snifter of something and read cases. And so, as a consequence, you know, I think the great part of that is that the quality of reporting about the cases is phenomenal. We really, really understand the law. The downside is that we sometimes tend to think that anything outside of the sort of very narrow bandwidth of, you know, the case said this, the dissent said this, you know, doesn't get reported. So I do think that is, that is an issue

Can I, you know what, there's one person –

Sassower: I'm sorry, I didn't get the answer to the question. Would Supreme Court reporters cover the fact that the Supreme Court justices have not set up the complaint mechanism as recommended by the National Commission on Judicial Discipline and Removal 12 years ago, 13 years ago, and would they report on impeachment complaints at the House Judiciary Committee against the various justices?

Lithwick: I can (t)–

Sassower: Could you see a story being written or are they so protective –

Lithwick: I could certainly see a story being written. about that

Sassower: Would you be a reporter that might write such a story?

Lithwick: I could certainly be a story (sic) that might write that story someday.

Sassower: Thank you.

Lithwick: You're welcome.

Nieman Conference on Narrative Journalism
Boston, Massachusetts, November 17-19, 2006

Dahlia Lithwick (First Session),
with Susan Eaton, Connie Schultz:
"Covering the Law – Cops, crime and courthouse reporting"
November 19, 2006, 11:40 a.m. - 12:50 p.m.

Question & Answer:

(at 1:02:12)
Sassower: My name is Elena Sassower and I'm the director and co-founder of a non-partisan, non-profit citizens' organization called the Center for Judicial Accountability.

Quite frankly, we document judicial corruption and, specifically, the corruption of the processes of judicial selection and discipline. I have to say that the reason, or one of the important reasons, why these essential governmental processes are so broken down, so corrupted, is because the press does not wish to report on what goes on in the court to the extent that it involves judicial abuse and corruption.

Our organization brings together people with direct, first-hand experience of their own cases and they recount, time and time again, how they have reached out to the press. And indeed, we have also reached out to the press. And whether you're talking about individual cases – No. no, the reporters aren't interested, it's too complicated, too many details, they don't have the time to go through the records –

Eaton: Okay. Can I suggest something? I suggest that you – write.

Sassower: Uuh, I –

Eaton: I think, it's fine, you try to sell your stories, you try to sell the problem, you try to raise awareness. I think that one of the most important skills for an advocate to have or for someone who is socially concerned is, is, is, is to not focus solely on getting other reporters to write about the problem or getting journalists to care. I think it's to develop, I assume that's one of the reasons why you're here, is to develop the skills and the networks so that you can get your message across in the way that you want because if you, even if you get a journalist to be concerned, more concerned about your issue or your –

Sassower: Our issue.

Eaton: your situation, or the thing that concerns you, the thing that drives you and that you have passion about, you're not going to be able to control that. The reporter has an obligation to write about the other side. The reporter, the journalist, the writer is a creative individual and so that person will ultimately decide how –

Sassower: If I may –

First Session continued --

Eaton: – they want to tell the story. So my suggestion to you is to do exactly what you're doing, which is to come to the conference and develop the skills, in addition to trying to raise awareness through the media

Sassower: Yes, and I also wish that I could perform heart surgery. I wish I had a lot of skills and talents, but –

Eaton: But, a lot of advocates do have the skills – have developed them.

Sassower: But, my question to you. Iindeed, I do a great deal of writing, but that doesn't make me a journalist. That doesn't give me those, that skill set. My question to you, and if I can just finish the comment –

Collective panel (& audience?) response: Blog, blog.
Would you mind asking a question, we have to wrap up. Do you have a question?

Sassower: Yes, absolutely. Have the panelists ever written about issues of judicial corruption? Would they consider writing about judicial corruption? Do they know of other journalists who write about judicial corruption, and the corruption of judicial selection and discipline?

Schultz: Um, I'd like to make a distinction between reporters and editors. And I think it is an important one on this issue. I know at our paper and most daily newspapers there have been stories written about that and, certainly at the Plain Dealer, and my story was in part about that. There are a lot of really hardworking reporters with a great deal of integrity who want to do the deeper stories. My concern is. first and foremost, it's often hard, as we were talking earlier, to convince editors to buy into it. And secondly, I want to say this at this conference because I know a lot of newspaper people will be hearing the tapes. With the state of newsrooms right now and all the cuts that are going on, I am so terribly concerned for the future of my profession and, particularly, for all the people like you who show up at conferences like this and who want to do the in-depth reporting. And I just say it at every conference I go to now, if you keep cutting, you're not going to recognize the work we do in five or ten years from now. So I thank you for your input.