CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8220
White Plains, New York 10602

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

BY FAX: 312-988-5100 (12 pages)
BY E-MAIL: abapresident@abanet.org

June 3, 2008

TO: American Bar Association (ABA)
ATT: William H. Neukom, President
Laurel G. Bellows, Chair, House of Delegates

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: **Serving Congress and the Public by Critical Scholarship:**
(1) Federal Judicial Pay Raises; &
(2) Breyer Committee Report on the Implementation of the Judicial Conduct and Disability Act of 1980

As you know, the American Bar Association has strongly advocated in support of immediate and substantial pay increases for federal judges. This advocacy includes a February 12, 2007 resolution of the ABA House of Delegates, posted on the U.S. Courts' website[1], expressly endorsing Chief Justice Roberts' statement that the failure to raise judicial pay is now a "crisis that threatens to undermine the strength and independence of the federal judiciary."

Our national, nonpartisan, nonprofit citizens' organization has a different view of Chief Justice Roberts' call to increase federal judicial compensation, opposing it for reasons set forth by our May 13, 2008 memo to leaders of Congress. The memo points out that the same sentence of the U.S. Constitution as gives federal judges undiminished compensation during their "Continuance in Office" predicates such "Continuance" on their "good Behaviour". Yet, Chief Justice Roberts and other advocates of increased federal judicial pay ignore this. Indeed, the ABA's own extensive advocacy not only routinely fails to reference the "good Behaviour"

---

* The **Center for Judicial Accountability, Inc. (CJA)** is a national, non-partisan, non-profit citizens' organization, documenting, by *independently-verifiable* empirical evidence, the dysfunction, politicization, and corruption of the processes of judicial selection and discipline on federal, state, and local levels.

[1] http://www.uscourts.gov/judicialcompensation/support.html#bar

predicate to judicial tenure and compensation[2], but misrepresents the Constitution as providing "life tenure", which it does not.[3] Simultaneously, the ABA – like other advocates of increased judicial pay – makes claims as to the excellence and quality of the federal judiciary in upholding the rule of law, without the slightest acknowledgment of dispositive contrary evidence of which it has long had knowledge. This evidence, from court records, is of systemic corruption within the federal judiciary, reaching its highest levels and wiping out any semblance of the rule of law. Such infests not only trial and appellate processes, but embraces the federal judiciary's implementation of the judicial disqualification and discipline statutes.

We invite the ABA to provide Congress with the benefit of its scholarly response to our May 13, 2008 memo. This includes our request therein that Congress defer action on the Senate and House bills for a 29% increase in federal judicial pay pending congressional hearings on the Report on the Implementation of the Judicial Conduct and Disability Act of 1980, rendered

---

[2] In addition to the February 12, 2007 House of Delegates resolution, this extensive advocacy has included: (1) a January 5, 2007 "Op-Ed: *Judicial Pay Crucial to Our Courts' Future*" by then ABA President Karen J. Mathis, (2) an April 19, 2007 "Statement on Federal Judicial Compensation", submitted for the record of the April 19, 2007 hearing of the House Judiciary Committee's Courts Subcommittee; (3) an April 2007 letter-writing campaign to members of Congress from ABA bar leaders as part of "ABA Day in Washington 2007", requesting members of Congress to write to the Judiciary Committees and congressional leadership in support of increased judicial pay and furnishing a sample letter for such purpose; (4) a May 8, 2007 letter to House Judiciary Committee Chairman John Conyers, Jr. and Ranking Member Howard Coble from the ABA Section of Business Law; (5) a May 17, 2007 compilation of "Background Information on the Need for Federal Judicial Pay Reform"; (6) an August 2007 summary entitled "Federal Judicial Salaries: ABA Urges Immediate and Substantial Increase"; (7) a November 1, 2007 letter to House Judiciary Committee Chairman Conyers; (8) a November 2, 2007 letter to Senate Judiciary Committee Chairman Patrick Leahy, with copies to every Committee member; (9) individualized November 14, 2007 letters to Senate Judiciary Committee Chairman Leahy and every Committee member; (10) a January 30, 2008 letter to the Senate Judiciary Committee.

[3] See the ABA's May 2003 report, "*Federal Judicial Pay: An Update on the Urgent Need for Action*", rendered jointly with the Federal Bar Association, whose Executive Summary states "The Constitutional guarantees of life tenure and an undiminished salary are the hallmarks of our Federal judiciary, providing a mantle of independence and integrity for judicial decision-making, while demanding in return a lifetime commitment to public service." (p. ii). The report, which on May 28, 2003 was presented by the presidents of the ABA and Federal Bar Association to Chief Justice Rehnquist, contains only the most passing mention of "life tenure during good behavior" (p. 5). Also, the predecessor February 2002 report "*Federal Judicial Pay Erosion: A Report on the Need for Reform*", also jointly rendered by the ABA and Federal Bar Association, asserting "The Constitutional guarantees of life tenure and an undiminished salary were designed to protect the independence of the Federal judiciary." (at p. 2) – and containing other references to "lifetime appointment", "lifetime tenure", and "life tenure" (pp. 1-2, 12, 15). Similarly, the ABA's May 17, 2007 compilation "Background Information on the Need for Federal Judicial Pay Reform" with its subsection entitled "Life Tenure" and other references thereto (p. 2). See, additionally, "*The Judge Judy Standard for Judicial Pay*", April 19, 2007, Legal Times blog by Tony Mauro, quoting ABA President Karen Mathis as saying "It's not life tenure anymore when judges are leaving the bench."

by a judicial committee headed by Associate Justice Breyer in September 2006. Such request for deferment and congressional hearings is based on our 73-page Critique of the Breyer Committee Report, detailing and documenting its cover-up of systemic and longstanding violations of "good Behaviour" within the federal judiciary, for which removal from office, not increased compensation, is constitutionally-dictated.

To enable the ABA to assist Congress in safeguarding the rule of law and constitutional guarantees of justice, our May 13, 2008 memo is enclosed, as is our Executive Summary of our 73-page Critique. The Critique itself is posted on our website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal". That is where the other substantiating documents referred-to by our May 13, 2008 memo are also posted. This includes our March 6, 2008 letter to Chief Justice Roberts, transmitting the Critique to him and calling upon him to take corrective steps to keep the federal judiciary's "house in order", without intervention by the other government branches.

Please be advised that this is not the first time we have alerted the ABA to our Critique and letter to the Chief Justice. By memo dated May 5, 2008, we asked the ABA Governmental Affairs Office, which is responsible for the ABA's lobbying to Congress, as well as the ABA Standing Committee on Federal Judicial Improvements and the ABA Standing Committee on Judicial Independence, reposed within the ABA Justice Center, whether the ABA would be willing to evaluate and comment upon our Critique and March 6, 2008 letter to the Chief Justice, pointing out that:

> "...none of this nation's scholars who write and speak about federal judicial discipline and none of the organizations which routinely advocate about judicial independence have done any critical analysis of the Breyer Committee Report. Nor has the media critically examined it. As for Congress, it has held no hearings on the Report." (at p. 3, quoting from our Executive Summary to our Critique).

We received no response – just as we received no response to our predecessor April 1 and April 29, 2008 memos, inquiring, *inter alia*, whether the ABA had done its own analysis or critique of the Breyer Committee Report. Copies of these three unresponded-to memos are enclosed for your review and for corrective action consistent with ABA-promulgated codes of professional responsibility.

As the ABA continually exhorts bar associations to defend the judiciary against "unjust criticism"[4], the ABA's correlative duty is to speak out in instances where the criticism is

---

[4] This includes the ABA House of Delegates' February 2, 1998 resolution, specifically adopting a recommendation that bar associations defend the judiciary from criticism, contained in the July 4, 1997 report An Independent Judiciary, by the ABA's Commission on Separation of Powers and Judicial Independence.

"just". Such instance is presented by our Critique and letter to the Chief Justice – as would be obvious from the ABA's answers to the questions based thereon, specified by our May 5, 2008 memo:

> "(1) Do you agree that the federal judiciary's new rules for federal judicial discipline 'violate and affirmatively misrepresent the congressional statute they purport to implement[fn], 28 U.S.C. §§351-364, and do not comply with its requirement of 'appropriate public notice and an opportunity for comment' (§358), at least not in a meaningful, good-faith way'?
>
> If so,
>
> (a) What is your view of the Judicial Conference's adoption of the rules on March 11, 2008?;
>
> (b) Do you agree that this is a matter properly brought to Congress' attention?
>
> (2) Do you agree that the Breyer Committee Report is superficial, 'methodologically-flawed and dishonest', and 'a knowing and deliberate fraud on the public'?
>
> If so,
>
> (a) Do you agree that such warrants 'congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline that currently exists'?;
>
> (b) Isn't action by our other government branches, Congress and the President, even more compelled in light of the Chief Justice's failure to respond to CJA's March 6, 2008 letter – including by taking such action as Congress empowered the Judicial Conference to take, pursuant to 28 U.S.C. §331, to 'hold hearings, take sworn testimony, issue subpoenas

---

Among the other recommendations of that 1997 ABA report was that Congress hold hearings on the 1993 Report of the National Commission on Judicial Discipline and Removal (p. 59). In July 2001, CJA's advocacy for such hearings, alerting Congress to this 1997 ABA recommendation, resulted in the House Judiciary Committee's November 29, 2001 hearing, which was sham. This is chronicled by our Critique's Exhibits L-1 (p. 4), L-4 (pp. 3-4), M, N, O, and P.

The 1993 National Commission Report was the only "comprehensive look" at the federal judiciary's implementation of the Judicial Conduct and Disability Act of 1980 prior to the Breyer Committee's 2006 Report.

and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority'?"

As stated by our May 5, 2008 memo, we would be pleased to provide the ABA with hard copies of the Critique and related primary source documents to facilitate its answers to these dispositive questions.

The ABA, with its 400,000-plus membership of lawyers and judges, has an unparalleled number of legal experts and scholars available to it. If, nonetheless, the ABA will not assist Congress by its answers, please advise why and whether the ABA would be more receptive to a request coming directly from Congress.

Thank you.

Enclosures: by e-mail:
(1) CJA's May 13, 2008 memo to leaders of Congress
(2) CJA's Executive Summary of its Critique of the Breyer Committee Report
by e-mail & fax:
(3) CJA's April 1, April 29, and May 5, 2008 memos to ABA Governmental Affairs Office & Justice Center

cc: All recipients of CJA's May 13, 2008 memo to Congress
ABA Governmental Affairs Office
ATT: Denise A. Cardman, Acting Director
ABA Justice Center –
Standing Committee on Federal Judicial Improvements
Standing Committee on Judicial Independence
ATT: Aimee Skrzekut, Director/Justice Center
Konstantina Vagenas, Judicial Independence Initiatives Manager

CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8220
White Plains, New York 10602

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

BY HAND

DATE: May 13, 2008

TO: United States Congress:
Senate Majority Leader Harry Reid
Senate Minority Leader Mitch McConnell
Speaker of the House Nancy Pelosi
House Minority Leader John Boehner

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Request for Congressional Hearings on the Breyer Committee's Report on the Implementation of the Judicial Conduct and Disability Act of 1980; &, Pending Same, Deferment of Congressional Action on Senate and House Bills, S. 1638 and H.R. 3753, to Raise Judicial Salaries 29%

This is to request congressional hearings on the federal judiciary's implementation of the Judicial Conduct and Disability Act of 1980, reposing federal judicial discipline in the federal judiciary. Such hearings are consistent with Congress' promise, in promulgating the Act, that it would engage in "vigorous oversight".[1]

More than a year and a half ago, on September 19, 2006, Chief Justice John Roberts presented the American People with a report by a judicial committee headed by Associate Justice Stephen Breyer, purporting that the federal judiciary has been "doing a very good overall job in handling complaints filed under the Act". Yet, Congress has held no hearings on the Breyer Committee Report.

By contrast, after Chief Judge Roberts presented his "2006 Year-End Report on the Federal Judiciary" on January 1, 2007, chastising Congress for failing to raise judicial pay and

---

* The **Center for Judicial Accountability, Inc. (CJA)** is a national, nonpartisan, nonprofit citizens' organization, documenting, by *independently-verifiable* empirical evidence, the dysfunction, politicization, and corruption of the processes of judicial selection and discipline on federal, state, and local levels.

[1] See 1993 Report of the National Commission on Judicial Discipline and Removal, p. 4:

> "Congress provided a charter of self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight."

describing it as "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary", Congress held two hearings:

- a February 14, 2007 hearing by the Senate Judiciary Committee on "Judicial Security and Independence", at which the sole witness, Associate Justice Anthony Kennedy, spoke at length about judicial salaries – an issue that consumed more than half of his prepared statement, and

- an April 19, 2007 "Oversight Hearing on Federal Judicial Compensation" by the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property, at which the sole witnesses were Associate Justices Breyer and Samuel Alito.

At the latter hearing, the Ranking Member of the House Judiciary Committee, Congressman Lamar Smith, raised the subject of the Breyer Committee Report in his opening statement, opining that an increase in federal judicial pay should be "part of other judicial reforms". Citing the Report's finding that "roughly 30 percent of all high profile disciplinary cases were mishandled", Ranking Member Smith referred to the Report's "12 recommendations to ensure that the misconduct statute will be used to maximum benefit in future cases", stating:

> "While I understand the judiciary's commitment to implement all 12 recommendations, we are informed that a plan to do so will not be available until the fall of 2007, meaning the Judicial Conference will have taken an entire calendar year just to develop a blueprint with no implementation in sight. It might help efforts to raise judicial pay if better progress can be shown in this effort." (Tr. 5-6).

He then returned to this in questioning Justice Breyer:

> "Mr. SMITH: …Justice Breyer, in my opening statement, I mentioned the Breyer Committee and the recommendations that have come out of the Breyer Committee and the fact that there is a plan that will be, I understand, made public at the end of this year. Do you see any hope that we might actually see implementation of those 12 recommendations, say, by next year or in a relatively, you know, short period of time?
>
> Justice BREYER. Yes. The answer is yes. I have talked—I went over to the meeting of the chief judges of the circuit. And we discussed this. And they agree with all of them. And the Judicial Conference says we agree with all of them, and we will implement them. The key to this, I think, is to get the chief judges now and in the future to recognize that they might during the course of their career have one of these controversial matters. And then they have to have the help to treat it properly. And that means partly technical. It is partly a question

> of — well, I see Congressman Sensenbrenner is here. And he was very helpful on this. And we went through it. And it will be implemented.
>
> Mr. SMITH. And the fact that these 12 recommendations are relatively or are non-controversial you think will lead to implementation perhaps in 2008?
>
> Justice BREYER. I would think so. I ask Jim Duff, who is here. He says absolutely. He told me before absolutely. And now he is just saying yes.
>
> Mr. SMITH. Okay. Thank you, Justice Breyer." (Tr. 94).

The view – expressed by Ranking Member Smith – that federal judicial pay increases should be joined with reforms pertaining to federal judicial discipline is supported by the Constitution. The same sentence of Article III, Section 1 as ends with the requirement that compensation of federal judges "shall not be diminished during their Continuance in Office" begins by stating that they "hold their Offices during good Behaviour".

Tellingly, Chief Justice Roberts not only failed to identify the Constitution's "good Behaviour" provision in his "2006 Year-End Report on the Federal Judiciary", but referred to "life tenure" of federal judges as being directly threatened by "[i]nadequate compensation". This, although the Constitution does not confer "life tenure", but tenure that is contingent on "good Behaviour". Likewise, Justices Kennedy, Breyer, and Alito did not examine the Constitution's "good Behaviour" provision during their appearances before the Senate and House Judiciary Committees in February and April 2007. Indeed, the only mention of it at either hearing was by Justice Kennedy in responding to a question of Senate Judiciary Committee Chairman Patrick Leahy about impeachment, unconnected to the judicial compensation issue (see fn. 3, *infra*). As to the Justices' written statements to the Judiciary Committees, only Justice Breyer mentioned "good Behaviour", which he did in passing (Tr. 14) – without identifying that it is in the same sentence of the Constitution as the provision for undiminished compensation, without exploring its relevance to the compensation issue, and without asserting that mechanisms to evaluate complaints against federal judges for violations of "good Behaviour" are properly functioning. [2]

---

[2] Justice Breyer's written statement, which is part of the April 19, 2007 hearing record, also attaches a March 2007 report of the American College of Trial Lawyers, "*Judicial Compensation: Our Federal Judges Must Be Fairly Paid*". It omits the "good Behaviour" provision in stating:

> "the U.S. Constitution contains two critical provisions to defend and preserve judicial independence for federal judges: (1) life tenure and (2) a prohibition against diminution of compensation." (Tr. 46 – and then again Tr. 172, underlining added).

Similarly, the hearing record includes other submissions, comparably deficient. There is an April 18, 2007 letter from the American Association for Justice, stating:

It appears that Congress has held no hearings on federal judicial compensation at which members of the public, rather than members of the federal judiciary, have been invited to testify. Had it done so, it would have heard graphic testimony as to the federal judiciary's flagrant and deliberate violations of the "good Behaviour" predicate for "Continuance in Office", for which removal – not compensation – is constitutionally-dictated.

As a result, Congress has not had the benefit of the public's rebuttal of the federal judiciary's self-serving claims as to the supposed threat to judicial independence caused by the supposed inadequate compensation of federal judges – claims that members of Congress, including its leadership, have apparently adopted. On June 15, 2007, Senate bill S.1638 was introduced to "adjust the salaries of Federal justices and judges" and, on October 4, 2007, House bill H.R. 3853 was introduced to "increase the pay of federal judges" – each representing an approximately 29% pay hike. As these two bills have been voted out of their respective Senate and House Judiciary Committees – the Senate bill with various ethics reforms attached – hearings on the Breyer Committee Report are additionally compelled so that Congress can understand the deceit practiced upon it by the federal judiciary in seeking increased compensation when it has eviscerated the "good Behaviour" predicate for federal judges' "Continuance in Office". Such truly is "a constitutional crisis", one which has made a mockery of the very purpose for which judicial independence is intended: ensuring that judicial decisions are based on fact and law and not extraneous influences and pressures.[3]

> "The U.S. Constitution contains two vital provisions addressing Federal Judges: (1) life tenure, and (2) a prohibition against the diminution of compensation." (Tr. 143, underlining added).

Also, an April 2007 report of the Governance Studies program at the Brookings Institution and the American Enterprise Institute, "*How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries*", which, acknowledging that the Constitution provides for judicial service "during good Behaviour" defines this as "(essentially for life)", thereafter using the phrase "life-tenured judges" (Tr. 146).

[3] The federal judiciary continually misleads Congress and the public into believing that judicial decisions are not a proper basis for discipline and impeachment. Illustrative is the following excerpt from the Senate Judiciary Committee's February 14, 2007 hearing:

> "Chairman LEAHY. But Chief Justice Rehnquist said, and said in a very straightforward way, 'Judges judicial acts may not serve as a basis for impeachment,' and then said, 'any other role would destroy judicial independence.' Do you agree with that? Of the judicial acts?
>
> Justice KENNEDY. Of course. The first impeachment of Justice Chase established, again, a good separation of powers rule. The Constitution does not say exactly the grounds of impeachment. It says the judges hold their offices during good behavior. But it has been established and it is part of our constitutional tradition that the decisions of the court, as you indicate, Mr. Chairman, are not the bases for impeachment—it is part of our constitutional tradition." (Tr. 11).

To assist Congress in confronting heinous violations of "good Behavior" within the federal judiciary, covered-up by the Breyer Committee Report, our nonpartisan, nonprofit citizens' organization has rendered a Critique expressly "in support of congressional hearings & disciplinary and criminal investigations." The Critique details that the Breyer Committee Report is "a knowing and deliberate fraud on the public", "methodologically-flawed and dishonest", and that it rests on

> "hiding the evidence – first and foremost, the thousands of judicial misconduct complaints filed under the Act, which the federal judiciary, not Congress, shrouded in confidentiality and made inaccessible to both Congress and the public, so as to conceal what it is doing." (at p. 1).

Additionally, the Critique demonstrates that the federal judiciary's new rules for federal judicial discipline, based on the Breyer Committee Report, "violate and affirmatively

---

This is overbroad. Judicial independence covers only decisions made in good-faith. It does not cover bad-faith decisions, where a judge knowingly and deliberately falsifies and omits the material facts and/or disregards controlling, black-letter law. Such wilful decisions, particularly by lower court judges, are not merely "wrong", "erroneous", and/or "unpopular". They are corrupt – and the distinction was recognized by Justice Chase himself at his impeachment trial. See, *inter alia*, When Courts & Congress Collide, 2006, by former House Judiciary Committee counsel Charles Gardner Geyh, particularly his chapter on impeachment, and his article "*Rescuing Judicial Accountability from the Realm of Political Rhetoric*", September 2006, Legal Studies Research Paper, accessible *via* http://ssrn.com/abstract=933703:

> "It is hard to quarrel with the notion that judges should be accountable for intentional decision-making error: The judge who makes such errors has knowingly violated her oath of office, in which she swore to uphold the law.", citing 28 U.S.C. §453. (p. 15, underlining added);
>
> "With respect to decision-making, most would agree that intentional disregard of the law – regardless of motive – is an indefensible usurpation of power by judges who have sworn to follow the law, for which judges are properly accountable to the public and political branches." (p. 19, underlining added);
>
> "At his Senate trial, Justice Chase drew a distinction between innocent and ill-motivated error that resonates to this day. For Chase, 'ignorance or error in judgment,' is an impeachable offense only if it has 'flown from a depravity of heart, or any unworthy motive.'[fn] Accordingly, if the Senate found that he 'hath acted in his judicial character with willful injustice or partiality, he doth not wish any favor; but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him." – the footnote being "1 Trial of Samuel Chase 102 (statement of Justice Chase)." (p. 26, underlining added)

See also CJA's published article, "*Without Merit: The Empty Promise of Judicial Discipline*", The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997), annexed as Exhibit A-1 to the Compendium of Exhibits substantiating CJA's Critique of the Breyer Committee Report, *infra*.

misrepresent the congressional statute they purport to implement". A copy of the Critique is enclosed, as is our Executive Summary, summarizing the content of the Critique's 20 sections.[4]

More than two months ago, we hand-delivered two copies of the Critique to the Judicial Conference and the Supreme Court. Our March 6, 2008 coverletter to Chief Justice Roberts, as head of the Judicial Conference, stated:

> "...Unless you deny or dispute the Critique's 73-page analysis and the accompanying and referred-to substantiating documentary proof, we respectfully call upon you to take such appropriate steps as Congress empowered the Judicial Conference to take pursuant to 28 U.S.C. §331:
>
> > 'hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority.'
>
> Otherwise, we will turn to the President and Congress for their endorsement of 'congressional hearings, disciplinary and criminal investigations, and radical overhaul of the façade of federal judicial discipline' – relief clearly warranted by the Critique." (at pp. 3-4).

We received no response from the Chief Justice, either before or after the Judicial Conference's March 11, 2008 adoption of its new rules for federal judicial discipline. All that we received was a non-responsive five-sentence March 7, 2008 letter from James Duff, Director of the Administrative Office and Judicial Conference Secretary, to which we replied on March 10, 2008. We have heard nothing further.

Evident from this correspondence – a copy of which is enclosed – is the deliberateness with which Chief Justice Roberts and Mr. Duff (reportedly the federal judiciary's "point man for the salary campaign")[5] have turned their backs on this last chance to put the federal judiciary's "house in order" without intervention of the other governmental branches. Such reinforces the necessity that Congress vindicate the public's rights by demanding the federal judiciary's response to each of the Critique's 20 sections, including, under oath, at congressional hearings.

We look forward to assisting you and other members of Congress in discharging your constitutional duties to protect the People of this nation from federal judges who should not be additionally compensated, but, rather, removed from the bench for their corruption and

---

[4] The Critique, Executive Summary, and substantiating documents are all posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal".

[5] "*Judge Pay Hike May Be Running Out of Steam*", Legal Times (Tony Mauro), May 6, 2008.

betrayal of the public trust, as *readily-verifiable* from primary-source documentary evidence.

Thank you.

Enclosures: (1) Executive Summary of CJA's March 6, 2008 Critique
(2) CJA's March 6, 2008 Critique, bound Compendium of Exhibits, & three free-standing file folders of further primary source documents;
(3) Correspondence:
– CJA's March 6, 2008 letter to Chief Justice Roberts
– James Duff's March 7, 2008 letter
– CJA's March 10, 2008 letter to James Duff

cc: Supreme Court Justice John G. Roberts, Jr.
Associate Justice Stephen Breyer
Associate Justice Samuel Alito
Associate Justice Anthony Kennedy
James C. Duff, Judicial Conference Secretary & Director of the Administrative Office
House Judiciary Committee:
Congressman John Conyers, Jr., Chairman
Congressman Lamar S. Smith, Ranking Member
Congressman Howard L. Berman, Chairman, Courts Subcommittee
Congressman Howard Coble, Ranking Member, Courts Subcommittee
Senate Judiciary Committee:
Senator Patrick J. Leahy, Chairman
Senator Arlen Specter, Ranking Member
Senator Charles E. Schumer, Chairman, Courts Subcommittee
Senator Jeff Sessions, Ranking Member, Courts Subcommittee
President George W. Bush
Presidential Candidates:
Senator John McCain
Senator Barack Obama
Senator Hillary Rodham Clinton
Congresswoman Nita Lowey
The Public & The Press

CENTER for JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 8220 *Tel. (914) 421-1200* *E-Mail:* cja@judgewatch.org
White Plains, New York 10602 *Fax (914) 428-4994* *Website:* www.judgewatch.org

Law Day, May 1, 2008

EXECUTIVE SUMMARY
Critique of the Breyer Committee Report

In September 2006, the Judicial Conduct and Disability Act Study Committee, chaired by Associate Justice Stephen Breyer, presented Chief Justice John Roberts with a Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980. ["Breyer Committee Report"], purporting that the federal judiciary has been "doing a very good overall job in handling complaints filed under the Act". Chief Justice Roberts and Justice Breyer then jointly presented the Report to the American People at a press conference held at the Supreme Court.

From that time until now, none of this nation's scholars who write and speak about federal judicial discipline and none of the organizations which routinely advocate about judicial independence have done any critical analysis of the Breyer Committee Report. Nor has the media critically examined it. As for Congress, it has held no hearings on the Report.

In March 2008, the Center for Judicial Accountability, Inc. (CJA), a nonpartisan, nonprofit citizens' organization with a 15-year history documenting the corruption of federal judicial discipline, rendered a 73-page Critique of the Breyer Committee Report, expressly in support of congressional hearings and disciplinary and criminal investigations. The Critique demonstrates that the Report is "a knowing and deliberate fraud on the public", "methodologically-flawed and dishonest", and that it rests on

> "hiding the evidence – first and foremost, the thousands of judicial misconduct complaints filed under the Act, which the federal judiciary, not Congress, shrouded in confidentiality and made inaccessible to both Congress and the public, so as to conceal what it is doing."

The Critique's Table of Contents provides a handy overview of its fact-specific, evidence-based presentation, in support of "radical overhaul of the façade of federal judicial discipline that currently exists". Here are some highlights:

- **THE BREYER COMMITTEE'S ESTABLISHMENT (pp. 3-8)**: Chief Justice Rehnquist was fully aware of "real problems" with the federal judiciary's implementation of the Judicial Conduct and Disability Act of 1980 ["1980 Act"] years before establishing the Breyer Committee in May 2004. As far back as 1998, CJA had provided Chief Justice Rehnquist, in both his administrative capacity as head of the Judicial Conference and in his judicial capacity as head of the Supreme Court, with documentary evidence that the federal judiciary had reduced the Act to an "empty shell". His nonfeasance and misfeasance in face of such evidence resulted in

CJA filing a November 6, 1998 impeachment complaint against him and against the Associate Justices, including Justice Breyer – copies of which were sent them. Such impeachment complaint is still pending before the House Judiciary Committee, uninvestigated. "Investigation of the impeachment complaint – beginning with the particulars set forth by CJA's March 10 and March 23, 1998 memoranda to the House Judiciary Committee, referred to therein – would suffice to discredit the Breyer Committee Report, totally."

- **THE COMMITTEE'S SELF-INTERESTED MEMBERSHIP & RESEARCH STAFF (pp. 8-12)**: Associate Justice Breyer had a direct interest in the outcome of the Committee's work – as he could not examine the true facts as to the federal judiciary's implementation of the 1980 Act without validating the impeachment complaint against himself and Chief Justice Rehnquist.

  The Committee's five other members, also appointed by Chief Justice Rehnquist, were also interested in its outcome: four are federal judges, subject to the Act and against whom judicial misconduct complaints may have been filed, were pending, or might be filed. Additionally, they – like Justice Breyer before he ascended to the Supreme Court – had been responsible for dumping virtually all judicial misconduct complaints they had received under the 1980 Act. The fifth member, the only non-judge, was Chief Justice Rehnquist's own administrative assistant – who served at his "pleasure", with an interest in protecting the Chief Justice reputationally.

  The Committee's staff was also self-interested, none more so than Jeffrey Barr, Esq., then assistant general counsel at the Administrative Office of the United States Courts and its "principal staff" to the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders. In those capacities, as well as others, Mr. Barr had been pivotally involved in the federal judiciary's subversion of the Act, as documented by the record underlying the November 6, 1998 impeachment complaint.

- **THE COMMITTEE'S FLAWED METHODOLOGY, REFLECTIVE OF ITS SELF-INTEREST (pp. 13-66)**:

  A. Failing to Identify and Respond to Criticism of the 1993 Report of the National Commission on Judicial Discipline and Removal (p. 13): The Report states that administration of the 1980 Act had previously been "the object of one major inquiry: that of the National Commission on Judicial Discipline and Removal, which Congress created in 1990 and which filed its report in 1993" – without identifying any scholarly literature or other critiquing of the National Commission's Report, or response thereto.

  There was at least one very significant critique – CJA's published article "*Without Merit: The Empty Promise of Judicial Discipline*", The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997) – and we had explicitly and repeatedly called for the Judicial Conference's response to its showing that the National Commission's 1993 Report was "methodologically-

flawed and dishonest, specifically with respect to the federal judiciary's implementation of the 1980 Act". As documented by the record underlying the November 6, 1998 impeachment complaint, the Judicial Conference, including Chief Justice Rehnquist, had not responded.

B. <u>Concealing the Federal Judiciary's Non-Compliance with Key Recommendations of the National Commission's Report for Ensuring the Efficacy of the 1980 Act, which the Breyer Committee Now Advances as Its Recommendations</u> (pp. 14-20): The Report asserts that the federal judiciary has implemented "most" of the National Commission's recommendations "concerning the Act, its administration, and related matters" – with no specificity as to this alleged implementation.

Among the unimplemented recommendation were those having the potential to make federal judicial discipline more than the sham it is. Most importantly, expanding the role of the Judicial Conference's Committee to Review Judicial Conduct and Disability Orders to ensure ongoing monitoring of the federal judiciary's implementation of the Act and for the federal judiciary to build caselaw interpreting the Act. The federal judiciary's material non-compliance with the National Commission's recommendations was the subject of CJA's advocacy, ultimately embodied in the November 6, 1998 impeachment complaint. Fully half of the Breyer Committee's recommendation's – and its most significant – are without the slightest acknowledgment of, or explanation for, the federal judiciary's wilful and deliberate failure to previously implement them when put forward by the National Commission.

C. <u>Concealing the Material Particulars of the Congressionally-Requested 2002 Federal Judicial Center Follow-Up Study</u> (pp. 20-25): The Report fails to disclose the two questions that the chairman and ranking member of the House Judiciary Committee's courts subcommittee had requested of the federal judiciary in 2002 – and the federal judiciary's deceitful response, which the Report replicates pertaining to: "(1) whether the orders of the chief judges set forth factual allegations raised in complaints and the reason(s) for the subsequent disposition; and (2) what percentage of dismissals are based on the grounds that the complaint is directly related to the merits of a decision or procedural ruling"?

D. <u>Concealing the Substantive Nature of Amendments to the 1980 Act to Avoid Examining Them and their Significance</u> (pp. 25-31): The Report fails to disclose that in 1990 Congress gave chief circuit judges power to "identify a complaint" by "written order stating reasons therefor" – and that the chief circuit judges had largely failed to utilize such power. It provides no statistics as to the numbers of complaints they had identified and no explanation for the omission.

The Report additionally fails to disclose that in 2002 Congress substantially amended the Act and to discuss its effect on the Act's efficacy, if any. Among the amendments: (1) conferring upon chief circuit judges statutory

power they did not previously have to conduct a "limited inquiry" as part of their "initial review" of complaints. This represented a huge expansion of power, enabling chief circuit judges to dismiss complaints by what amounted to summary judgment; and (2) conferring upon the circuit judicial councils the statutory power to refer petitions for review to five-judge panels, rather than be decided by the whole circuit judicial councils, consisting of between 9 and 29 judges. The Report provides no information as to whether the petitions decided by panels had received "greater scrutiny and process" – which was the rationale for the amendment.

E. <u>Covering up Violative & Misleading Illustrative and Circuit Rules</u> (pp. 31-39): The Report fails to correctly identify the number of times the federal judiciary revised its Illustrative Rules Governing Complaints of Judicial Conduct and Disability – and to explain the reasons for such revisions or non-revisions. Nor does it compare the Illustrative Rules with the Act or even claim that they are in conformity therewith. As comparison would have readily revealed, the Rules and the circuit modifications are violative of the Act in respects that are profoundly material.

Most significant: the Illustrative Rules and most of the circuit-modifications make mandatory the discretion that Congress conferred on the federal judiciary NOT to dismiss judicial misconduct complaints that fall within any of the statutory grounds for dismissal – as, for instance, complaints which are "directly related to the merits of a decision or procedural ruling". Nor do the Illustrative Rules and circuit-clones reveal that complaints alleging that a judge's decision resulted from "an illicit or improper motive" are NOT "merits-related". Additionally, the Illustrative Rules and circuit-modifications shroud complaints filed under the Act in confidentiality, notwithstanding such confidentiality is not required under the Act.

The Report is affirmatively misleading both as to "merits-relatedness" and confidentiality and, additionally, does not reveal that the claim in the Illustrative & circuit-modified rules that the Act is "essentially forward-looking and not punitive" – which underlies the Breyer Committee's assessment of the federal judiciary's compliance with the Act – is not necessarily supported by the legislative history of the statute.

F. <u>Steering Clear of the Federal Judiciary's Own Store of Complaints & Communications from Members of the Public</u> (pp. 39-41): The Report purports that "the only way" the Committee could "answer" whether the federal judiciary had "failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism", was by examining complaints filed under the Act. In fact, an "answer" was also obtainable by comparing the federal judiciary's rules with the Act. Moreover, if the Committee wanted to honestly confront "institutional favoritism" by examining complaints, it had the full record of three complaints CJA had sent Mr. Barr years earlier precisely because they established "institutional favoritism" so extreme as to mandate action by

the Judicial Conference, if federal judicial discipline was to continue to be reposed in the federal judiciary. Indeed, CJA had fashioned each of these three complaints to "empirically test the Act" and the National Commission's claims, in its 1993 Report, as to the adequacy of existing mechanisms to restrain federal judicial misconduct. Mr. Barr also knew that CJA was a source for other judicial misconduct complaints, additionally demonstrative of "institutional favoritism". Moreover, since the Administrative Office and Judicial Conference regularly receive complaints and other communications from members of the public protesting the federal judiciary's handling of their complaints, the Committee could also have readily obtained these.

Nonetheless, the Committee did not see fit to review any complaints that members of the public brought forward – either in the past or in the present. The Report identifies that upon the Committee's receipt of what it terms "unsolicited submissions" from "48 individuals" – nine of whom are described as having "protested the disposition of a misconduct complaint under the Act" – the Committee did nothing to communicate with these persons about their complaints, other than sending them a generic postcard acknowledging receipt and referring them to the Act.

G. Obscuring the Number of Congress-Originating Complaints – & the Outcome of the Committee's Review of their Disposition (p. 42): The Report does not reveal the number of Congress-originating complaints the Committee reviewed and the percentage found to be "problematic". Indeed, it obscures and dilutes the percentage of "problematic dismissals" of congress-originating complaints by lumping them into a bogus category of "high-visibility complaints" – where the measure of "high visibility" is absurdly low, giving no separate percentage for the complaints Congress had filed or inquired about.

H. Failing to Interview Any Complainants, Yet Interviewing All Current Chief Circuit Judges and their Staff, which the Committee Selectively Uses to Buttress Self-Serving Conclusions (pp. 43-45): The Report does not reveal that the Committee failed to interview any of the complainants whose approximately 700 complaints it was reviewing. By contrast, the Report identifies that the Committee and its staff interviewed all current chief judges, former chief judges, and circuit staff, although it does not append a list of questions asked or topics discussed. It appears that the most important and obvious questions were not asked and that the interviews were selectively used to buttress self-serving claims as, for instance, that chief circuit judges "don't do boilerplate" and are "careful and forthcoming" in dismissing complaints.

I. Failing to Disclose the Committee's Initial Protocol and Deviation Therefrom (pp. 45-46): The Report fails to reveal that the Committee's publicly-announced initial protocol was to "initially examine as many non-frivolous Act-related complaints as can be identified", that its research plan was to interview "practicing lawyers" and examine "complaints submitted by

members of the public to other institutions, including Congress", and to "develop methods for obtaining information from members of the public". Nor does the Report reveal that the Committee did not follow this publicly-announced initial protocol – or the reasons why.

J. <u>Concealing the Content of the House Judiciary Committee's Files</u> (pp. 46-48): The Report fails to reveal any information about the number of complaints against federal judges the Committee found within the House Judiciary Committee's files and gives no information about them, other than that there were "no high-visibility complaints not already identified". Nor does the Report identify how the House Judiciary Committee addressed the complaints in its files, if at all. The Report is entirely silent about what should have been a wealth of information in the House Judiciary Committee files about what the public was telling Congress about the state of federal judicial discipline, including their experiences under the 1980 Act – and what, if anything, the House Judiciary Committee was saying in response.

K. <u>Concealing Other Means for Readily-Ascertaining the Federal Judiciary's Handling of Complaints under the Act</u> (pp. 48-52): The Report fails to reveal that among the easiest ways for assessing the federal judiciary's implementation of the 1980 Act was by examining complainants' petitions for review of chief circuit judges' dismissals of their judicial misconduct complaints. The Report identifies that 44% of complainants were petitioning for review and that virtually 100% were dismissed. Yet, the Report gives no information as to what these petitions say; does not state how often circuit council orders recite the petitions' allegations and support their denials of the petitions with reasons responsive to their allegations.. Yet, this could have easily been done, just as the Report purported to do by its statistics for chief circuit judges' orders dismissing complaints.

There is a further reason the Report should have discussed the efficacy of petitioning for review, namely, the Committee's reliance on the availability of such appeal process to explain why complaints against chief circuit judges for dismissing complaints are dismissible as "merits-related".

L. <u>The Committee's "Standards for Assessing Compliance with the Act" are Materially Incomplete, Superficial, and Misleading</u> (pp. 52-56): The Report annexes the Committee's "Standards for Assessing Compliance with the Act", interpreting nine specific phrases of the Act – none of these being the language that Congress used to give to the federal judiciary discretion NOT to dismiss complaints that fell within the statutory grounds for dismissal. This alone vitiates the Standards as a tool for assessing "compliance with the Act".

Although the Standard pertaining to "merits-related" identifies that a complaint alleging corruption and bias "— however unsupported – " is not "merits-related", it conceals that the federal judiciary rejects, as constituting evidence of corruption, bias, and illicit motive, a judge's decisions and rulings –

with the result that complaints alleging that a judge has demonstrated his corruption, bias, and illicit motive by decisions and rulings which *knowingly* falsify and omit material facts and which *knowingly* disregard controlling, black-letter law – as verifiable from the record of pleadings, motions, and trial proceedings – are dismissed as "frivolous" and "unsupported".

M. <u>The Committee's Application of its "Standards for Assessing Compliance with the Act" Reveals their Superficiality and Deceit</u> (pp. 56-59): The Report's summaries of "problematic" and "high-visibility" complaints reveal that the Committee did not have legitimate, consistent "Standards for Assessing Compliance with the Act" and, certainly, not for "merits-relatedness", whose sticky issues pertaining to recusal, appellate remedies, and evidentiary proof it avoided. That the Committee does not append the orders of the chief circuit judges and circuit judicial councils for any of these summarized complaints – although publicly-available by the federal judiciary's own rules – serves to conceal the irresolution of these critical issues. Nor does the Committee offer the complaints and petitions for review, which the Act does not make confidential. Apparently, even redacted to remove identifying details, the Committee will not allow verification and scrutiny of its work.

N. <u>The Committee's Sham Justification for the Divergent Percentages of "Problematic Dispositions" for "High-Visibility" Complaints & Other Complaints</u> (pp. 59-62): The Report contends that although there was a 29.4% "problematic disposition" rate for 17 "high-visibility" complaints, there was only a 3.4% "problematic disposition" rate for its 593-complaint sample. The Report's claims as to the 593-complaint sample and the 100-complaint sample are unverifiable so long as the Committee does not release these complaints for independent examination – and such release is not precluded by the Act. The Report's summaries of "problematic dispositions" give ample reason to question the Committee's assessment of both samples. Conspicuously, the Report does not disclose how the Committee arrived at the sample size of 593 or how many of that sample constituted "complaints most likely to have merit (those filed by attorneys, for example)". Nor does it disclose how the balance of the 593-complaint sample was randomly-selected – or how the 100-complaint sample was randomly-selected – including who was involved and whether it was independently supervised. The possibility that the samples were rigged cannot be discounted.

As for the "high-visibility" complaints, it should be obvious that the federal judiciary would be more careful, not less, with respect to complaints filed or inquired about by members of Congress or the press. Indeed, it may be surmised that the reason the Committee did not question the chief circuit judges (and in some cases the judicial councils) as to how they made the errors they did in the handling of "high-visibility" complaints is because it knew that their errors were deliberate acts of "institutional favoritism" that could not be explained away.

O. Covering Up the Worthlessness of "Activity Outside the Formal Complaint Process" (pp. 62-66): The Report asserts that the 1980 Act is "not the only mechanism that seeks to remedy judicial misconduct or disability or prevent its occurrence" and lists nine "principal mechanisms", prefaced by the statement "The operation of these procedures was not part of our charge and we have not analyzed them." It then repeats, after listing them, "Examining the use of these other formal mechanisms was not in our charter and we did not do so."

No proper examination of the 1980 Act could have failed to include as part of its "charge" and "charter" evaluation of at least some of the listed "other formal mechanisms", most importantly: (1) "recusals sua sponte or on motion under 28 U.S.C. §§144 & 455"; (2) "appellate reversals aimed at improper judicial conduct"; and (3) "writs of mandamus". This, because their presumed efficacy underlies the Act's "merits-related" ground for dismissal of complaints. Had the Committee interviewed complainants, their comments would have been graphic not only as to their experiences in filing complaints under the Act, but as to the federal judiciary's corrupting of such "other mechanisms" as judicial disqualification motions, appeals, writs of mandamus, and lawsuits against judges. They would have described how the federal judiciary has destroyed all remedies of redress by decisions that are not, as the federal judiciary spins it, "wrong" or "erroneous", but, rather, outright judicial frauds – and demonstrably so.

- **THE FEDERAL JUDICIARY'S CHARADE OF PUBLIC COMMENT & ITS CONTINUED SUBVERSION OF FEDERAL JUDICIAL DISCIPLINE BY ITS NEW RULES (pp. 66-71)**: Following release of the Breyer Committee Report, the federal judiciary continued to disregard, and make a mockery of, public input by its proposal of new implementing rules for the 1980 Act to replace the federal judiciary's Illustrative Rules and the circuits' modifications thereof. Such new rules were expressly based on the Report. Like the Report, the proposed rules affirmatively misrepresented that a complaint "must" be dismissed if it is "directly related to the merits of a decision or procedural ruling" and that "The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative".

- **CONCLUSION (pp. 72-73)**: The thousands of judicial misconduct complaints filed under the Act by ordinary citizens – virtually 100% dismissed – are the best evidence of how the federal judiciary has corrupted federal judicial discipline. This is why the federal judiciary, to impede oversight by Congress and the American Public, made them confidential. It is also why the Breyer Committee fashioned a "study" where citizens would not be interviewed or have the opportunity to testify about their complaints.

  The Report has not put forward a single complaint to support its claim that "chief judges and judicial councils are doing a very good overall job in handling complaints filed under the Act" and, by its own admission, has not evaluated the efficacy of "other formal mechanisms", such as "recusals sua sponte or on motion

under 28 U.S.C. §§144 & 455" and "appellate reversals aimed at improper judicial conduct". By contrast, CJA's Critique is substantiated by the three complaints we filed under the Act – in other words, by three more than the Committee has supplied – with each complaint arising from and showcasing the federal judiciary's corrupting of the recusal and appellate "mechanisms" that the Committee has not examined.

* * *

CJA's three judicial misconduct complaints filed under the Act, as likewise the wealth of other substantiating primary-source documents substantiating the Critique – most importantly, CJA's still-pending November 6, 1998 impeachment complaint against the Justices and its referred-to March 10 and March 23, 1998 memoranda to the House Judiciary Committee – are posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal"