[Appellant's Appendix 120-137]

Petitioner's July 3, 2001 letter to Senator Charles Schumer (enclosure to petitioner's May 21, 2003 fax to Capitol Police)

BY FAX: 202-228-0525 (18 pages)
BY EXPRESS MAIL: EM025605966US

July 3, 2001

Senator Charles E. Schumer
Chairman, Subcommittee on Administrative Oversight
and the Courts
Senate Judiciary Committee
313 Senate Hart Building
Washington, D.C. 20510

RE: Statement For the Record of the June 26, 2001 hearing, *"Should Ideology Matter?: Judicial Nominations 2001"*, held by the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts

Dear Chairman Schumer:

As you know, the Center for Judicial Accountability, Inc. (CJA) is a national, non-partisan, non-profit citizens' organization, based in New York. Our purpose is to safeguard the public interest in meaningful and effective processes of judicial selection and discipline. On the federal level, as likewise on state and local levels, these essential processes take place almost exclusively behind closed-doors. For your convenience, a copy of CJA's informational brochure is enclosed -- similar to one I gave you, *in hand*, on March 20, 1998, when you were seeking election as a Senator from New York.

In the twelve years since our founding in 1989, CJA has had substantial first-hand experience with the Senate

Judiciary Committee under both Democratic and Republican chairmen. Reflecting this is the enclosed copy of CJA's May 27, 1996 letter to then Judiciary Committee Chairman Orrin Hatch, as printed in the record of the Committee's May 21, 1996 hearing on "*The Role of the American Bar Association in the Judicial Selection Process*" (Exhibit "A-1"). The subject of that hearing was whether the ABA should continue to occupy a privileged, semi-official role. This, because the ratings of the ABA's Standing Committee on Federal Judiciary were allegedly tainted by ideological considerations and by ABA "liberal" policy positions.

[p. 2] Inasmuch as CJA received no notice from the Senate Judiciary Committee of the June 26, 2001 hearing, "*Should Ideology Matter?: Judicial Nominations 2001*", held by the Subcommittee on Administrative Oversight and the Courts, which you now chair, I draw your attention to the final paragraph of CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A-1", p. 127):

> "Finally, we ask that this letter serve as [CJA's] standing request to be placed on a 'notifications' list so that, in the future, we are immediately contacted when matters bearing specifically on judicial selection, discipline, and judicial performance are being considered by the Senate Judiciary Committee or any of its subcommittees."[1]

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[1] This identical request was made in a May 22, 1996 letter to Kolan Davis, then Chief Counsel to the Subcommittee on Administrative Oversight and the Courts – with copies sent to Winston Lett, the Subcommittee's then Minority Counsel, and John Yoo, then General Counsel to the full Committee and to his then Minority counterpart, Demetra Lambros (Exhibit "A-2"). Indeed, CJA's May 22, 1996 letter to these staff counsel is largely identical to CJA's May 27, 1996 letter to Chairman Hatch, except that it does not contain the ten or so particularizing paragraphs summarizing "CJA's more recent contacts with the ABA's Standing Committee on Federal Judiciary, this year and last...." (Exhibit "A-1", pp. 126-127).

We did not learn of your June 26, 2001 Subcommittee hearing until June 25, 2001 – and this, from a front-page item in the New York Law Journal, identifying it as "a hearing to debate the criteria senators should use when voting on President Bush's judicial nominees". I immediately called your office. After verifying that the hearing was focused on ideology, rather than more broadly on "criteria" – as to which CJA would have requested to testify -- I advised that CJA would be submitting a statement for the record of the Subcommittee's hearing. Please consider this letter, *including the annexed substantiating exhibits*, as CJA's Statement for inclusion in the printed record of the June 26th hearing.

In your Op-Ed article in the June 26th New York Times, "*Judging By Ideology*" – as likewise in your prefatory statement at the June 26th hearing -- you confess that Senators privately consider a nominee's ideology, but that because of the taboo surrounding its consideration, they conceal their ideological objections to nominees by finding "nonideological factors, like small financial improprieties from long ago". You state, "This 'got-cha' politics has warped the confirmation process and harmed the Senate's reputation."

While CJA agrees with this assessment and applauds, as long overdue, your readiness to explore the ideological views of judicial nominees – many of whom were, and are, presumably chosen by Presidents precisely for their ideological views -- **we must point out that there is [p. 3] a more fundamental reason why the confirmation process is "warped". It is "warped" because – *except when the Senate Judiciary Committee is searching for some non-ideological "hook" on which to hang an ideologically-objectionable nominee* – the Committee cares little, if at all, about scrutinizing the qualifications of the judicial nominees it is confirming. Indeed, the**

Committee wilfully disregards incontrovertible proof of a nominee's unfitness, as likewise, of the gross deficiencies of the pre-nomination federal judicial screening process that produced him.

The Senate Judiciary Committee's failure to discharge its duty to investigate the qualifications of judicial nominees – notwithstanding its self-promoting pretenses to the contrary – has been powerfully chronicled in the 1986 Common Cause study, Assembly-Line Approval – which made a list of salutary recommendations, most of which appear to be unimplemented today. Other studies, also with unimplemented salutary recommendations, have included the 1988 Report of the Twentieth Century Task Force on Judicial Selection, entitled Judicial Roulette, with a chapter entitled "*Senate Confirmation: A Rubber Stamp?*", as well as the 1975 book by The Ralph Nader Congress Project, The Judiciary Committees, with a chapter entitled "*Judicial Nominations: Whither 'Advice and Consent'?*". These are important resources for the further hearings that your prefatory statement announced would be "examin[ing] in detail several other important issues related to the judicial nominating process"[2].

CJA's own direct, first-hand experience with the Senate Judiciary Committee provides additional – and more recent -- evidence of the Committee's outright contempt for its "advice and consent" constitutional responsibilities

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[2] In particular, your upcoming, as yet unscheduled, two hearings on: "(1) The proper role of the Senate in the judicial confirmation process. What does the Constitution mean by 'advise and consent' and historically how assertive has the Senate's role been?"; and "(2) What affirmative burdens should nominees bear in the confirmation process to qualify themselves for life-time judicial appointments? The Senate process is criticized for being a search for disqualifications. We should examine whether the burden should be shifted to the nominees to explain their qualifications and views to justify why they would be valuable additions to the bench."

and for the public welfare. CJA's experience with the Committee is also unique in that it involves more than opposition to specific nominees. It involves meticulously-documented evidentiary presentations establishing critical deficiencies in the pre-nomination screening process, including as to the "investigations" of the American Bar Association and the pre-eminent Association of the Bar of the City of New York [City Bar]. Specifically, CJA demonstrated, as to one federal District Court nominee, Westchester County Executive Andrew O'Rourke, appointed in 1991 by President George Bush, the gross inadequacy of the ABA's Standing Committee on Federal Judiciary's supposedly "thorough" investigation of his qualifications, as well as the actual "screening **[p. 4]** out" of information dispositive of Mr. O'Rourke's unfitness by the City Bar's Judiciary Committee. As to another federal District Court nominee, New York State Supreme Court Justice Lawrence Kahn, appointed in 1996 by President Bill Clinton, CJA showed that the ABA Standing Committee on Federal Judiciary had "screened out" information dispositive of his unfitness. Additionally, in 1998, CJA's provided the Senate Judiciary Committee with information from which it could infer that both the ABA and City Bar had "screened out" information bearing adversely on the fitness of Alvin K. Hellerstein, nominated in 1998 by President Clinton to the District Court for the Southern District of New York – whose confirmation CJA opposed. In other words, CJA's contacts with the Senate Judiciary Committee have not been addressed solely to judicial nominees, but to the adequacy and integrity of the judicial screening process.

CJA regards it as a positive step that President George W. Bush has removed a wholly unworthy ABA from its preeminent, semi-official pre-nomination role in rating judicial candidates. Indeed, by letter to the President, dated March 21, 2001 (Exhibit "A-3"), CJA expressed support for such prospective decision, enclosing for his

review a copy of our May 27, 1996 letter to Chairman Hatch (Exhibit "A-1") to illustrate the "good and sufficient reason" for removing the ABA from the pre-nomination screening process. Needless to say, inasmuch as the Senate Judiciary Committee – or at least the Democratic Senators -- are now going to be utilizing the ABA to fulfill a post-nomination screening function, the *readily-verifiable* evidence of the inadequacy and dishonesty of ABA "investigations" of judicial candidates – and of the ABA's persistent refusal to confront that evidence -- are *threshold issues* for the Committee in assessing whether, and under what circumstances, it can rely on ABA ratings. Likewise, to the extent the Senate Judiciary Committee may be increasingly relying on such other bar groups as the City Bar, it is essential that the Committee examine the City Bar's similarly inadequate and dishonest "investigations" and persistent refusal to confront the *readily-verifiable* evidence of its misfeasance.

We do not know the state of the Senate Judiciary Committee's record-keeping. However**, we respectfully suggest that you make it a priority to find out what has become of the voluminous correspondence and documentary materials that the Committee received from CJA.** Most voluminous is CJA's 50-page investigative Critique on the qualifications and judicial screening of Andrew O'Rourke, substantiated by a Compendium of over 60 documentary exhibits, which we initially presented to the Senate Judiciary Committee as our "Law Day" public service contribution in May 1992. As reflected by CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A-1"), we transmitted to him a duplicate copy of the Critique and Compendium under that letter, along with three Compendia of correspondence **[p. 5]** relating thereto. The most voluminous of these, Correspondence Compendium I, collected CJA's correspondence with the Senate Judiciary Committee and Senate leadership in connection with CJA's May 18, 1992 letter to then Senate Majority Leader George Mitchell

(Exhibit "B-1"). That letter – copies of which CJA sent to *every* member of the Senate Judiciary Committee -- called for a Senate *moratorium* on the confirmations of *all* judicial nominations pending official investigation of the deficiencies of the federal judicial screening process, demonstrated by the Critique. Correspondence Compendia II and III collected CJA's correspondence with the ABA and City Bar concerning their professional obligation to retract their insupportable bare-bones approval ratings for Mr. O'Rourke and to endorse CJA's request for a moratorium and official investigation. By and large, CJA had previously provided this correspondence to the Senate Judiciary Committee.

In regards to the ABA, CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A-1", p. 125) highlighted the Critique's evidentiary significance in establishing

> "not the publicly-perceived partisan issue of whether the ratings of the ABA's Standing Committee on Federal Judiciary are contaminated by a 'liberal' agenda. Rather, ...the issue that must concern *all* Americans: the gross deficiency of the ABA's judicial screening in failing to make proper threshold determinations of 'competence', 'integrity' and 'temperament'." (emphasis in the original)

Indeed, CJA's May 18, 1992 letter for a Senate moratorium and official investigation stated:

> "To the extent that the Senate Judiciary Committee relies on the accuracy and thoroughness of screening by the ABA and the Justice Department to report nominations out of Committee – with the Senate thereafter functioning as a 'rubber stamp' by confirming judicial nominees <u>without</u> Senate debate – a real and present danger to the public currently exists.

It is not the philosophical or political views of the judicial nominees which are here at issue. Rather, the issue concerns whether present screening is making appropriate threshold determinations of fundamental judicial qualifications – i.e. competence, integrity, and temperament. Our critique of Andrew O'Rourke's nomination leaves no doubt that it is not." (Exhibit "B-1", p. 3, emphases in the original).

[p. 6] Thereafter, on July 17, 1992, The New York Times, published our Letter to the Editor, which it entitled "*Untrustworthy Ratings?*", about our Critique's findings – and about our request for a moratorium "[b]ecause of the danger of Senate confirmation of unfit nominees to lifetime Federal judgeships (Exhibit "B-2").

The Senate Judiciary Committee's response to CJA's fact-specific, documented Critique was to *refuse* to discuss with us *any* aspect of our evidentiary findings – and to call police officers to threaten me with arrest[3] when, after months of Committee inaction and footdragging, ignoring my many attempts to arrange an appointment with counsel, I traveled down to Washington in September 1992 to discuss the serious issues presented by the Critique and by the ABA's refusal to take corrective steps – while, meantime, the Senate was proceeding with confirmations of federal judicial nominees.

Likewise, the Senate Judiciary Committee's response to CJA's May 27, 1996 letter (Exhibit "A-1") – copies of which CJA also sent to *every* member of the Committee -- was to *refuse* to discuss the serious issues it presented, with substantiating proof, *to wit*, "that the problem with the ABA goes beyond incompetent screening. The problem is that the ABA is knowingly and deliberately

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[3] *See* CJA's October 13, 1992 letter to then Senate Judiciary Committee Chairman Joseph Biden, annexed as Exhibit "Z" to CJA's Correspondence Compendium I.

screening out information adverse to the judicial candidate whose qualifications it purports to review." Summarized by the May 27, 1996 letter (Exhibit "A-1", p.126) were facts showing that the Second Circuit representative of the ABA's Standing Committee on Federal Judiciary had wilfully failed to investigate documentary evidence, transmitted by an October 31, 1995 letter (Exhibit "C"), of Justice Kahn's on-the-bench misconduct as a New York Supreme Court judge in an important public interest Election Law case, which, to advance his own political self-interest, he "threw" by a factually fabricated and legally insupportable decision[4], and that the Chairwoman of the ABA's Standing Committee **[p. 7]** on Federal Judiciary was arrogantly disinterested in this wilful failure of the Second Circuit

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[4] The same standard should govern the evaluation of judicial fitness for the bench as governs – at least theoretically -- judicial removal. New York caselaw reflects the long-recognized standard for removal. Thus, in *Matter of Capshaw*, 258 A.D. 470, 485 (1st Dept. 1940), the Appellate Division, First Department added italics to emphasize the words from its then over 30-year old decision in *Matter of Droege*, 129 A.D. 866 (1st Dept. 1909),

> "*A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify removal...*"

See, also *Matter of Bolte*, 97 A.D. 551 (1st Dept. 1904), wherein the Appellate Division, First Department held:

> "A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another..." (at 568, emphasis in the original).
>
> "Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe." (at 574)

representative to investigate[5]. The result? In April 1996, President Clinton appointed Justice Kahn to the U.S. District Court for the Northern District of New York, presumably based on a bare-bones ABA rating that Justice Kahn was "qualified".

CJA's May 27, 1996 letter *expressly* stated:

> "Based upon what is herein set forth, we expect you will want to afford us an opportunity to personally present the within documentary proof – which we would have presented at the [May 21, 1996] hearing on "The Role of the American Bar Association in the Judicial Selection Process" – as to how the ABA fails the public, which is utterly disserved and endangered by its behind-closed-doors role in the judicial screening process." (Exhibit "A-1", p. 127)

I daresay most people reading the May 27, 1996 letter would have had a similar expectation – and especially, if they had before them the substantiating documentary proof it transmitted. Conspicuously, the "Editor's Note", appearing at the end of the letter as printed in the record of the Committee's May 21, 1996 hearing on the ABA's role, states: "Above mentioned materials were not available at presstime." (Exhibit "A-1", p. 127). This is most strange as *all* those materials were express mailed to the Committee together with the "hard copy" of the letter.

The *only* response we received to our May 27, 1996 letter (Exhibit "A-1") was a June 13, 1996 acknowledgement

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[5] That Second Circuit representative to the ABA Standing Committee on Federal Judiciary, Patricia M. Hynes, has since become – and currently is – the Committee's Chairwoman. This, because the highest echelons of ABA "leadership" have refused to address the evidence of Ms. Hynes' misconduct in connection with her "investigations" of the qualifications of Justice Kahn and Mr. Hellerstein (Exhibit "M-3") to fill District Court vacancies.

from Senator Strom Thurmond (Exhibit "D-1"), whose form-letter **[p. 8]** text repeated, *verbatim*, the Senator's statement at the May 21, 1996 hearing (Exhibit "D-2"), including that the Senate "carefully review[s]" these nominees, giving "due consideration to the view of others [apart from the ABA], "prior to a vote on confirmation".

The only *other* response CJA received – a June 12, 1996 letter from then Chairman Hatch (Exhibit "F") -- was, ostensibly, to CJA's April 26, 1996 letter to the Committee (Exhibit "E"), requesting to testify in opposition to Justice Kahn's confirmation, as well as answers to various procedural questions. One of these procedural questions, as highlighted in CJA's May 27, 1966 letter (Exhibit "A-1", pp. 126-7), concerned the change in Committee policy to preserve the confidentiality of ABA ratings of judicial nominees until the confirmation hearing.

By this June 12, 1996 letter, (Exhibit "F") Chairman Hatch denied, *without explanation*, CJA's written request to testify in opposition to Justice Kahn's confirmation. Although confirming the Committee's "practice" of not publicly releasing the ABA ratings in advance of the confirmation hearing, Chairman Hatch did not identify how long such "practice" had been in effect and the reason therefor, which is what CJA *expressly* requested to know. He did, however, admit, in response to another question in CJA's April 26, 1996 letter (Exhibit "E"), that "[T]he Judiciary Committee has no written guidelines in evaluating judicial nominees. Each candidate is reviewed on an individual basis by each Senator."

CJA responded with a June 18, 1996 letter (Exhibit "G-1"), requesting that Chairman Hatch explain his peremptory and precipitous denial of our request to testify and that he reconsider his denial based on facts therein set forth. We pointed out that he had not provided us with information as to "what the criterion is for presenting testimony at judicial confirmation

hearings". Additionally, we pointed out that no one from the Committee had ever contacted us as to the basis of our opposition to Justice Kahn, which had not been identified by our April 26, 1996 letter (Exhibit "E"), and that although such identification did appear in CJA's May 27, 1996 letter (Exhibit "A-1", p. 126), *to wit*, that Justice Kahn, as a New York Supreme Court Justice, had

> "used his judicial office to advance himself politically. Specifically,...[he] had perverted *elementary* legal standards and *falsified* the factual record to 'dump' a public interest Election Law case which challenged the manipulation of judicial nominations in New York State by the two major political parties" (emphases in the original),

[p. 9] no one had ever requested that we furnish the Committee with a copy of the substantiating file of that Election Law case for review.

Chairman Hatch *never* responded to this June 18, 1996 letter (Exhibit "G-1"). Rather, on June 25, 1996 at 9:45 a.m., a Committee staffer telephoned us to advise that the Committee's confirmation hearing on Justice Kahn's nomination – whose date we had repeatedly sought to obtain from the Committee, without success -- would take place at 2:00 p.m. *that afternoon*.

Such last-minute notice gave us just over four hours to get from Westchester, New York to Washington, D.C. – a logistical impossibility by surface transportation. At a cost of several hundred dollars, we arranged with a car service to speed me to the airport for a noon flight. At the same time, we sought to clarify from the Committee whether, in making this expensive trip down to Washington, I would be permitted to testify. No clarification was forthcoming (Exhibit "G-2").

The June 25, 1996 Committee "hearing" on Justice Kahn's confirmation – which was held simultaneously with the "hearing" for four other District Court nominees, and immediately following the confirmation "hearing" for a nominee to the Circuit Court of Appeals – fits the description of the Committee staffer quoted in the 1986 Common Cause study, Assembly Line Approval (at p. 10), who termed confirmation "hearings" "as pro forma as pro forma can be".

Apart from Senator Jon Kyl, who was chairing the "hearing" in Chairman Hatch's absence, only one other Committee member, Senator Paul Simon, was present for the boiler-plate questioning of the five District Court nominees, who were called up, *en masse*, to respond, in "assembly-line" fashion, to generic, boiler-plate questions, once questioning of the nominee for the Circuit Court of Appeals had been completed. Chairman Kyl then commended all the nominees as "exceptionally well qualified" and prepared to conclude the "hearing". This, *without* inquiring whether anyone in the audience had come to testify[6] and *without* identifying whether the Committee had received opposition to any of the nominees and its disposition thereof.

[p. 10] It was then that I rose from my seat. Beside me was the box I had brought with me from New York containing the very file evidence of Justice Kahn's on-the-bench misconduct in the Election Law case, which the ABA representative for the Second Circuit had wilfully failed to examine. The transcript of the June 25, 1996 Senate Judiciary Committee "hearing" reflects the following colloquy between me and Chairman Kyl

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[6] By contrast, page 234 of The Judiciary Committees, *supra*, describes the Committee's April 21, 1971 hearing to confirm seven judicial nominees. Senator Roman Hruska was presiding. *"Hruska asked if anyone in the room wished to speak on behalf of or against the nominee.* The subcommittee then moved on to the next nominee." (emphasis added).

(Exhibit "H", pp. 790-791):

Sassower: "Senator, there is citizen opposition to Judge Kahn's nomination"

Sen. Kyle: "Let me just conclude the hearing, if we could."

Sassower: "We request the opportunity to testify."

Sen. Kyle: "The committee will be in order."

Sassower: "We requested the opportunity 3 months ago, over 3 months ago[7] -- "

Sen. Kyle: "The committee will stand in recess until the police can restore order."
[Recess]

Sen. Kyle: "As the chair was announcing, we will keep the record open for 3 days for anyone who wishes to submit testimony, and that includes anyone in the audience, or questions from the members of the committee to the panel. Should you have any additional questions, of course, you are welcome to discuss with staff any other questions you have

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[7] Out of nervousness, I erred. April 19, 1996 – the date I had contacted the Committee regarding CJA's request to testify in opposition to Justice Kahn's confirmation – was more than two, not three, months earlier.

concerning the procedure.

The full committee will take up the full slate of nominations both for the circuit court and for the district court at the earliest opportunity. I cannot tell you exactly when, but I will certainly recommend that it be done at the earliest opportunity and I do not see any reason for delay.

Senator Simon, do you have anything else that you wish to add?"

[p. 11]

Sen. Simon: "No. I think we have excellent nominees before us and I hope we can move expeditiously."[8]

Sen. Kyle: "I certainly reflect that same point of view.

Thank you again for being here. We thank everyone in the audience, and I again would say there are 3 days for anyone in the audience to submit any additional statements if you have them. Thank you.

The committee stands adjourned."

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[8] This statement by Senator Simon should be viewed not only in the context of the opposition to Justice Kahn and request to testify, which I articulated in his presence only moments earlier, but in the context of his counsel's representation to CJA in a October 8, 1992 letter, returning the copy of the Critique we had hand-delivered to his Senate office. "While the [ABA] rating does carry weight, *I can assure you* that information provided by individuals who know the nominee, who have practiced before him or her, or otherwise have an interest and contact us is *given every consideration*." (emphases added) *See* Exhibits "U" and "Y" to CJA's Correspondence Compendium I.

It must be noted that in the "recess" noted by the transcript (Exhibit "H", p. 791), which was truly momentary, at least one police officer rushed to me and threatened that I would be removed if I said another word. This officer was one of about five other police officers who were waiting at the side of the room, summoned, I believe, by the Committee's Documents Clerk for the purpose of intimidating me. This, because I had refused to be intimidated by the Clerk's inexplicable surveillance of me, which included his shadowing me about the Senate Judiciary Committee's hearing room from the time I walked in shortly before 2:00 p.m., bullying me and gratuitously warning he was going to have me removed.

As the audience dispersed and Chairman Kyl approached the judicial nominees to congratulate them, I tried to speak with him about the serious nature of CJA's document-supported opposition to Justice Kahn. Chairman Kyl just waved me off. By then, the Committee's Documents Clerk was again at my side, threatening to have me removed for harassing the Committee. I told him then – as I had previously – that I had no desire to harass anyone, but simply wished to discuss CJA's opposition with the appropriate individuals. Yet, I searched in vain for Committee counsel to speak with about CJA's opposition and request to testify. This included approaching the fifteen or so persons who had sat in the chairs behind those reserved for the Senators at the dais. None would identify themselves as counsel or staff with whom I could speak. Nor was there any counsel available at the Committee's adjoining office. Meantime, the Committee's Document Clerk, with three police officers in tow, was again trailing and bullying me.

[p. 12] In the end, I obtained from the Documents Clerk the until-then-withheld ABA rating for Justice Kahn. Of all the judicial nominees up for confirmation, he had

received the lowest: a majority of the ABA Standing Committee on Federal Judiciary voting him "qualified" and a minority voting him "not qualified". However, no sooner did I leave the Senate Judiciary Committee, indeed, in the corridor directly outside its door, I was *arrested* by Capitol Hill police on a completely trumped-up charge of "disorderly conduct" – *and hauled off to jail.*

The shocking particulars of the orchestrated intimidation and abuse to which I was subjected at the Senate Judiciary Committee's June 25, 1996 "hearing" on Justice Kahn's confirmation are chronicled in CJA's June 28, 1996 letter to Chairman Hatch (Exhibit "I-1"), which was submitted for "the record"[9]. This letter, additionally, recites the no less shocking fact that on June 27, 1996, *without* waiting the announced three days for "the record" to be closed and written submissions received, the Committee voted to approve Justice Kahn's confirmation[10].

Thus, CJA's June 28, 1998 letter (Exhibit "I-1") begins:

> "This letter is submitted to vehemently protest the fraudulent manner in which the Senate Judiciary Committee confirms presidential nominees to life-time appointments on the

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9 CJA's June 28, 1996 letter is printed in the record of the Committee's June 25, 1996 "hearing" on Justice Kahn's confirmation (at pp. 1063-1074), but *without* its annexed exhibits. According to the "Editor's note" appearing at the end of the printed letter, "Exhibits A through I are retained in the Committee files" (at p. 1074).

10 As pointed out by CJA's June 28, 1998 letter (Exhibit "I-1", p. 2), in September 1992, when the Committee was trying to deflect the significance of CJA's Critique by pretending it does a "thorough and independent" investigation of judicial nominees, its counsel stated that the Committee waits "at least one week" following the hearing before voting on the nominee [*See* Exhibit "B" to CJA's June 28, 1998 ltr: also annexed to CJA's Correspondence Compendium I as Exhibit "V"].

For a summary of the minutes of the July 27, 1996 Committee meeting pertaining to the judicial nominees, *see* Exhibit "J-7", pp. 4-5 herein.

federal bench and its abusive treatment of civic-minded representatives of the public who, without benefit of public funding, give their services freely so as to assist the Committee in performing its duty to protect the public from unfit judicial nominees.

This letter is further submitted in support of [CJA's] request for immediate reconsideration and reversal of the Committee's illegal vote yesterday, approving confirmation of Justice Lawrence Kahn's nomination as a district court judge for the Northern District of New York...such Committee vote was taken prior to the expiration of the announced deadline for closure of the record **[p. 13]** and without any investigation by the Senate Judiciary Committee into available documentary evidence of Justice Kahn's politically-motivated, on-the-bench misconduct as a New York state court judge, for which he has been rewarded by his political patrons with a nomination for a federal judgeship.

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

> Copies of that letter were sent to every member of the Senate Judiciary Committee – including yourself." (emphases in the original)

Once again, as with CJA's May 18, 1992 letter to Senate Majority Leader Mitchell (Exhibit "B-1") and CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A-1"), CJA sent copies of the June 28, 1996 letter (Exhibit "I-1") to *every* member of the Senate Judiciary Committee. Additionally, copies were sent, both my mail and fax[11], to then Senate Majority Leader Trent Lott and then Senate Minority Leader Thomas Daschle (Exhibit "I-2")[12].

Further underscoring the Committee's profound dysfunction and bad-faith was information CJA unexpectedly received within the next days. This information was from two New York citizens active in the fight for good government and constitutional reform, Bill Van Allen and Faye Rabenda. They advised me that on June 7, 1996 -- just five days before Chairman Hatch's June 12, 1996 letter denying CJA's request to testify against Justice Kahn (Exhibit "F") -- they had made a trip to Washington to apprise the Committee of their strong opposition to Justice Kahn's confirmation. This, based on his politically-motivated decision in a public interest case involving local corruption in Duchess County. Such opposition, coming from **[p.14]** individuals who were separate and unrelated to CJA, should have reinforced for the Committee its duty to examine the file of that public interest case, as likewise the file of the public-interest Election Law case which was the basis of CJA's opposition to Justice Kahn for his politically-motivated decision therein. Yet, the Committee recognized no such

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[11] The July 1, 1996 fax coversheets to CJA's June 28, 1996 letter read "Formal Request for Senate moratorium on all judicial confirmations and, in particular, opposition to confirmation of Lawrence Kahn (for N. District – NY)." (Exhibit "I-2").

[12] CJA sent copies of the June 28, 1998 letter to all the indicated recipients (Exhibit "I-1", p. 12), except for President Bill Clinton.

duty. Just as no Committee counsel had interviewed us or requested the substantiating file of the Election Law case, so, likewise, no Committee counsel interviewed Mr. Van Allen and Ms. Rabenda or requested from them their substantiating case file evidence. Indeed, the Committee did not even notify Mr. Van Allen and Ms. Rabenda of the June 25, 1996 "hearing" on Justice Kahn's confirmation or invite them to submit written opposition.

As a result of this unexpected information, which I learned of on or about Friday, July 12th, I telephoned the Senate leadership on the morning of the first business day thereafter, Monday, July 15th. It was then that I learned from the office of then Senate Majority Leader Lott that an "agreement had been reached" between Republicans and Democrats for Senate confirmation the next day of judicial nominees – Justice Kahn, among them. This is reflected by CJA's July 15, 1996 memo to Senate Judiciary Committee counsel (Exhibit "J-1"), faxed to the Committee's office and the offices of the Senate Majority and Minority Leaders (Exhibits "J-2", "J-3"), as well as by CJA's July 15, 1996 letter to Chief Counsel to Senator Herbert Kohl, a Committee member, (Exhibit "J-4")– copies of which were faxed to the Senate Judiciary Committee and Senate Majority and Minority Leaders. As these documents reflect, no Committee counsel saw fit to speak with me and, indeed, I could not even obtain confirmation that the evidentiary materials we had transmitted to the Committee under our May 27, 1996 letter (Exhibit "A-1") would be *immediately* transmitted to the Majority Leader's office, as requested by CJA's July 15, 1996 fax memo to Committee counsel (Exhibit "J-1"):

> "We do not know the status of our transmittal request inasmuch as the Senate Judiciary Committee receptionists have refused to even verify that our fax has been given to its counsel – whose identity I was told is 'confidential' – and have refused to confirm that the materials will, as requested, be transmitted [to the Majority

Leader's office]..." (Exhibit "J-4", p. 2)[13]

CJA also phoned Mr. Van Allen and Ms. Rabenda, who then contacted the Committee, by phone and in writing (Exhibit "K"), requesting that it provide the Senate Majority Leader with **[p. 15]** any "documentation created by the Senate Judiciary Committee staff relating to [their] strong opposition" to Justice Kahn's confirmation, including relating to their June 7th visit to the Committee when they "spoke for approximately 5-10 minutes" with a "staff member".

The upshot of CJA's vigorous efforts to prevent the Senate rubber-stamp confirmation of Justice Kahn's nomination, including a great many long distance phone calls, only partially reflected by the annexed phone bill (Exhibit "J-6")[14], was that, upon information and belief, that nomination, as well as the others, were approved by the usual undebated vote on July 16, 1996 in Executive Session (Exhibit "L").

The flagrant misfeasance of the Senate Judiciary Committee and Senate leadership, chronicled by the annexed exhibits and further established by CJA's voluminous correspondence and substantiating documents that should be stored somewhere in the Senate Judiciary Committee's files, serves no purpose but to enable Senators to continue to "wheel and deal" judicial nominations, cavalierly using them for patronage or for trading with their Congressional colleagues and the President for other valuable consideration or promises thereof – to the lasting detriment of the People of this

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[13] As reflected by my Descriptive Chronology (Exhibit "J-7"), not only did Committee counsel never see fit to speak with me, but such counsel purportedly decided that CJA's documentary materials needed to remain at the Senate Judiciary Committee (Exhibit "J-7", p. 4).

[14] I made contemporaneous notes of some of my July 15-16, 1996 phone conversations. These are retyped and annexed as Exhibit "J-7".

nation.

Obviously, a Senate Judiciary Committee which so shamelessly spurns the evidence-based presentations of a non-partisan, non-profit citizens' organization, whose advocacy meets the highest standards of professionalism[15], is not treating with greater respect and decency the average citizen who comes forward to oppose confirmation of individual judicial nominees. This certainly is reflected in the way the Committee treated good government activists Bill Van Allen and Faye Rabenda (Exhibit "K"), whose opposition to Justice Kahn should not have been rejected by the Committee, without further inquiry, and all the more so as their opposition reinforced the significance of CJA's own.

[p. 16] Hopefully, with your chairmanship of the Subcommittee on Administrative Oversight and the Courts – and your vision of this and the upcoming three hearings "at least" as an "important dialogue" on the Senate's role in judicial nominations – essential reforms will be made in how the Senate Judiciary Committee – and the Senate -- discharge the "advice and consent" function. Certainly, the absolute necessity that the Committee and Senate scrutinize the competence, integrity, and temperament of judicial nominees is reinforced by the fact that the mechanisms for disciplining and removing incompetent, dishonest, and abusive federal judges from the bench are *verifiably* sham and dysfunctional.

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[15] Adding to the Senate Judiciary Committee's shameless and dishonest treatment of us in 1992 and 1993, in connection with our Critique and moratorium request, and in 1996, in connection with our opposition to Justice Kahn's confirmation and further moratorium request, is its behavior toward us in 1998 in connection with our opposition to Alvin Hellerstein's confirmation. This behavior is reflected by the recitation appearing in CJA's July 30, 1998 and August 3, 1998 letters to Committee staff (Exhibits "M-1" and "M-2"), as well as in the recitation and question in CJA's August 19, 1998 letter (Exhibit "M-3")– to which, tellingly, we received NO response.

On this vital subject, I would note that when I handed you a copy of CJA's informational brochure on March 20, 1998 – following your lecture at Ansche Chesed Synagogue on New York's Upper West Side – I also gave you a copy of my published article, "*Without Merit: The Empty Promise of Judicial Discipline*" (The Long Term View, Massachusetts School of Law, Vol. 4, No. 1 (Summer 1997)). It exposes the *façade* that passes for the disciplinary complaint mechanism for federal judges under 28 USC §372(c) and the House Judiciary Committee's *non-existent* capacity and willingness to investigate judicial impeachment complaints (Exhibit "N-1"). A copy of this important article had been sent to the House Judiciary Committee – *of which you were then a member* – under a March 10, 1998 memorandum addressed to the House Judiciary Committee's Chairman and members, a copy of which I also handed you (Exhibit "N-2").

In the event you harbor the unwarranted belief that the House Judiciary Committee is any different from the Senate Judiciary Committee in its flagrant disrespect for fully-documented written presentations, enclosed is CJA's Statement for the record of the House Judiciary Committee's June 11, 1998 "Oversight Hearing of the Administration and Operation of the Federal Judiciary", held by the Courts Subcommittee (Exhibit "O-1")[16]. Its opening sentence *expressly* identifies that it is presented

> "so that members of Congress and the interested public are not otherwise misled into believing that the House Judiciary Committee or its Subcommittee is meaningfully discharging its duty to oversee the federal judiciary. It is not."

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[16] A copy of the documentary Compendium substantiating CJA's Statement should be in the possession of the Senate Judiciary Committee – having been furnished by CJA's August 19, 1998 letter to it ("Exhibit "M-3"). The coverpage to that Compendium is annexed hereto as Exhibit "O-2".

Described therein is the failure and refusal of the House Judiciary Committee to respond to CJA's March 10, 1998 memorandum (Exhibit "N-2/N-1") and to a further March 23, 1998 **[p. 17]** memorandum (Exhibit "N-3"), substantiated by CJA's transmittal of *readily-verifiable* documentary proof that the mechanisms for ensuring the impartiality of federal judges -- and for disciplining and removing those who are unfit -- have been reduced to "empty shells". Detailed, as well, is the refusal of the House Judiciary Committee's Courts Subcommittee to permit CJA to testify on the subject at its June 11, 1998 "oversight hearing" – where the *only* witnesses allowed to testify were representatives of the judiciary. The Subcommittee responded to this Statement (Exhibit "O-1") by excluding it from the printed record of its June 11, 1998 "oversight hearing" – which it did wholly without notice to CJA (Exhibit "O-3").

Since your Subcommittee on Administrative Oversight and the Courts, assumedly, has concurrent jurisdiction with the House Courts Subcommittee, CJA respectfully requests that while you are clarifying with the Senate Judiciary Committee the whereabouts of CJA's 1992 Critique and voluminous document-supported correspondence, you also clarify with the Courts Subcommittee of the House Judiciary Committee the whereabouts of the voluminous documentation CJA provided to that Committee, substantiating, *incontrovertibly*, that the federal judiciary has gutted the federal statutes relating to judicial discipline and recusal and that the House Judiciary Committee has abandoned its oversight over federal judicial discipline, including its impeachment responsibilities. In the event the Senate and House Judiciary Committees are unable to locate this dispositive documentation, CJA will furnish you with duplicate copies.

We look forward to testifying at upcoming hearings of

your Subcommittee – which should be on issues of *both* federal judicial selection and federal judicial discipline. **As the situation currently exists, with the Senate Judiciary Committee *demonstrably* disregarding its duty to scrutinize qualifications of judicial nominees and the House Judiciary Committee *demonstrably* disregarding evidence of serious judicial misconduct, the lives and liberties of this nation's citizens are at the mercy of judges who should *not* be on the bench in the first place and who grossly abuse their judicial powers after they get there, *without* the slightest fear of discipline, let alone removal.**

[p. 18] We welcome your able leadership. Ensuring that the public is protected by properly functioning processes of federal judicial selection and discipline should be a *top priority*.

Yours for a quality judiciary,
s/
ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc. (CJA)

Enclosure: CJA's informational brochure

cc: President George W. Bush
Senate Majority Leader Thomas Daschle
Senate Minority Leader Trent Lott
Senator Hillary Rodham Clinton
Senate Judiciary Committee members
(w/o exhibits)
House Judiciary Committee
Common Cause
The Century Foundation
Ralph Nader,
Center for the Study of Responsive Law
American Bar Association
Association of the Bar of the City of New York
Bill Van Allen/Faye Rabenda (w/o exhibits)