No. 98-106

In the

SUPREME COURT OF THE UNITED STATES

October Term 1997

DORIS L. SASSOWER,

Petitioner,

- against -

HON. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S PETITION FOR REHEARING

DORIS L. SASSOWER
Petitioner, *Pro Se*
283 Soundview Avenue
White Plains, New York 10606
914-997-1677

Exhibit E-1

PETITION FOR REHEARING

Preliminary Statement

Out of respect for the venerable institution represented by our nation's highest Court, of whose bar petitioner is a member in good standing[1], this petition is offered to give the Justices a "last clear chance" to meet their constitutional, statutory, and ethical duty to uphold the Constitution and the rule of law.

Like the petition for a writ of certiorari, this petition for rehearing is not about the Court's discretionary power. It is about the Court's mandatory duty to respect ethical rules of judicial disqualification, which Congress, by statute, made applicable to its Justices, and to preserve the Constitution, which is its essential function.

The issue presented by the cert petition was corruption in the lower federal judiciary -- covering up state judicial corruption -- accomplished by its wilful subversion of the very statutes whose purpose is to ensure judicial impartiality and integrity: 28 U.S.C. §455 [A-3], relating to disqualification and disclosure, and 28 U.S.C. §372(c) [A-3], relating to judicial misconduct complaints. The issue has shifted on this rehearing petition to corruption in our highest federal judiciary, accomplished by its *own* wilful subversion of §455 and furthered by its purposeful failure to create a mechanism for disposition of judicial misconduct complaints against its Justices.

The Court's one-word denial of the cert petition -- with no disciplinary or criminal referral of the lower federal judges, whose corruption was documented therein -- is an unpardonable betrayal of its sacred constitutional duties. It further demonstrates the *actual* bias of its Justices, who have long-standing, personal and professional relationships with those lower federal judges. The appearance of such bias was the subject of petitioner's fact-specific and documented disqualification/disclosure application under §455 [RA-7]. The application was pending unadjudicated before the Justices when they denied the cert petition.

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[1] The Court has failed to act on petitioner's Rule 8 request for a show cause order, as set forth in her recusal/disclosure application [RA-14].

Procedural Posture of the Case

This rehearing petition is compelled by the Court's failure to act on petitioner's written request for recall/vacatur of its October 5, 1998 order [RA-2], summarily denying the cert petition. Said recall/vacatur request was incorporated in a judicial misconduct complaint against the Justices, dated October 14, 1998 [RA-52], based on their wilful failure to adjudicate petitioner's September 23, 1998 disqualification/disclosure application, pursuant to 28 U.S.C. §455 [RA-6]. The judicial misconduct complaint asserted that "absent legal authority or argument showing that the Justices were not obligated to adjudicate" that application, the October 5, 1998 order should be promptly recalled and vacated [RA-57].

By Order dated October 20, 1998 [RA-5], Justice Ruth Bader Ginsburg, without addressing the judicial misconduct complaint, including her own disqualifying bias, summarily denied that portion thereof as requested an extension of time for petitioner to file a rehearing petition pending the Justices' determination of the misconduct complaint and its recall/vacatur request [RA-57].

Petitioner's further request, contained in the judicial misconduct complaint and directed to the Court's Clerk, for information as to the Justices' procedures for handling misconduct complaints against themselves has also been ignored [RA-55]. The Chief Deputy Clerk has orally advised that none will be forthcoming [RA-59; RA-62].

The Issue: The issue on this petition for rehearing is the Justices' official misconduct herein, whose serious nature and gravity rise to a level warranting impeachment.

The Argument

On October 5, 1998, the very day on which the Court announced its denial of the cert petition [RA-2] -- turning its back on the annihilation of *all* adjudicatory and ethical standards by Second Circuit judges, whose judicial decisions were shown to be outright lies -- the House Judiciary Committee was deliberating as to whether lying under oath, false statements, and obstruction of justice by a public officer, even when committed in the context of a private civil litigation,

could be ignored, without serious consequences to the rule of law:

> "If lying under oath is tolerated, and when exposed is not visited with immediate and substantial consequences, the integrity of this country's entire judicial process is fatally compromised and that process will inevitably collapse."

This view by Majority Counsel at the opening of the Committee's proceeding was reiterated by Committee members on that day, "Truthfulness is the glue that holds our justice system together", and three days later, by members of the House of Representatives, voting for an impeachment inquiry:

> "Lying under oath and obstruction of justice are ancient crimes of great weight because they shield other offenses, blocking the light of truth in human affairs. They are daggers in the heart of our legal system and our democracy."[2]

Among House members, there was no partisan dispute that lying under oath, false statements, and obstruction of justice, committed by a public officer in the performance of his official duty, would be impeachable. That was uniformly recognized in the nationwide debate that raged non-stop throughout the preceding weeks and well before the September 9, 1998 date on which Independent Counsel, himself a former federal judge, delivered his report to Congress of "substantial and credible information", constituting potential grounds to impeach the President.

It was in this historic period that the cert petition presented the Court with "substantial and credible" evidence of heinous official misconduct by Second Circuit judges, expressly identified as both impeachable and criminal. For that reason, the petition did not seek discretionary action, but asserted (at 23-26) the Court's mandatory duty to grant review under its "power of supervision" or, at very least, under ethical codes, to make disciplinary and criminal referrals of the

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[2] The foregoing three quotes are, respectively, from statements of Majority Counsel David Schippers and Representative Bill McCollum on October 5, 1998 and from Representative Ileana Ros-Lehtinen on October 8, 1998.

subject federal judges. Such referral request was predicated on the petition's showing that, absent review, there was no remedy in the Judicial Branch for the systemic judicial corruption the petition particularized. Consequently, action would be necessary by the two other government Branches and, specifically, impeachment by the House Judiciary Committee and criminal prosecution by the Public Integrity Section of the Justice Department's Criminal Division. The Court was requested to include in its referral a statement that: "judges who render dishonest decisions -- which they *know* to be devoid of factual or legal basis -- are engaging in criminal and impeachable conduct." (at 26)

Petitioner's supplemental brief reinforced the exigent need for the Court's action. Detailing her unsuccessful attempts to independently obtain action by the House Judiciary Committee and Public Integrity Section, the supplemental brief showed that not only were all checks on judicial misconduct within the Judicial Branch corrupted, but, likewise, the checks within the Legislative and Executive Branches. Indeed, such showing was made not only as to the judicial misconduct in *this* case, but was demonstrated to be the *general* reality *vis-a-vis* individual judicial misconduct complaints filed with the House Judiciary Committee and the Public Integrity Section, as well as complaints filed with the federal judiciary under §372(c)[3].

The supplemental brief highlighted the profound constitutional significance of what was before the Court:

> "...the constitutional protection restricting federal judges' tenure in office to 'good behavior' does not exist because all avenues by which their official misconduct and abuse of office might be determined and impeachment initiated (U.S. Constitution, Article II, §4 and Article III, §1 [SA-1]) are corrupted by political and personal self-interest. The

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[3] *See* SA-18-19 as to the federal judiciary's subversion of §372(c), including its own statistics [SA-19]; *See* SA-17-28 as to the House Judiciary Committee's wilful abandonment of its "oversight" role, either of the federal judiciary's implementation of §372(c) or by its own investigation of individual complaints of impeachable conduct, not even statistically reporting the numbers of such complaints it receives each Congress [SA-22]; *See* SA-47-59, especially A-54-9 as to the Public Integrity Section, including its failure to issue an Annual Report since 1995 [SA-59].

> consequence: federal judges who pervert, with impunity, the constitutional pledge to 'establish Justice', (Constitution, Preamble [SA-1]) and who use their judicial office for ulterior purposes." (Supplemental Brief, at 2)

The complete truth and accuracy of the factual recitation in the petition and supplemental brief was beyond question, each fact-specific and supported by appendix documents and, additionally, by corroborating materials lodged with the Clerk [RA-20]. The petition, which was *unopposed*, expressly urged that any doubt as to the Court's mandatory duty should be resolved by "requisitioning the record, which, since the case was 'dumped' in its pre-discovery stage, is not unduly voluminous" (at 25). The supplemental brief expressly urged the Court to elicit the views of the appropriate public officials in the three government Branches, each of whom petitioner had previously supplied with the record and cert petition (at 10). Specifically identified was the U.S. Solicitor General. Thereafter, in the context of petitioner's §455 disqualification/disclosure application, the Court was apprised that petitioner had provided those government Branch officials with her supplemental brief and had, herself, sought their response [RA-25]. Petitioner asserted that their failure to respond "must be deemed a concession as to the breakdown of all checks on federal judicial misconduct..." [RA-15].

It was in face of this undenied, evidence-supported presentation of the federal judiciary's corruption of the rule of law and the collapse of all government checks and against the historical backdrop of intense debate as to the importance of upholding the rule of law and of impeachment standards, that the Court, without dissent, and without adjudicating petitioner's §455 disqualification/disclosure application [RA-6], issued its October 5, 1998 order, summarily denying the cert petition [RA-2]. Such denial was without the requested requisitioning of the record or invitation of a response from government Branch officials -- including the U.S. Solicitor General. In so doing, the Justices, any one of whom could have invited a response from the Solicitor General[4], demonstrated that they did not

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[4] *"Riding the Coattails of the Solicitor General"*, by John G. Roberts, Jr., Legal Times, March 29, 1993

want confirmation of what they already knew to be true from the submissions before them.

No fair and impartial tribunal -- and, certainly, not one charged with ultimate constitutional duties -- could ignore those submissions without committing impeachable offenses. Those documents showed that the Court was the People's last and only defense to a corrupt federal judiciary's deadly assault on the Constitution and rule of law, abetted by collusively-acting public officials in the other two federal Branches. The circumstances at bar showed that the Court was also the last and only defense to a corrupt New York state judiciary, which had retaliated against the lawyer-petitioner for her judicial whistle-blowing advocacy in defense of the People's voting rights in judicial elections, indefinitely suspending her law license, *without* written charges, *without* a hearing, *without* findings, *without* reasons, and *without* a right of appeal (cert petition, 2-5).

By denying the cert petition, without disciplinary and criminal referrals, the Court put its official imprimatur on federal and state subversion of the justice system without which constitutional government and democratic values cannot survive. Such denial not only emboldens the judicial corrupters, but discharges the legal community of its mandatory obligations under ethical codes to report judicial misconduct so as to preserve the integrity of the Constitution and the rule of law. The supplemental brief highlighted that the breakdown of checks on judicial misconduct went beyond the three Branches to include the leadership of the organized bar, such that there was no one protecting the public -- except for a few brave whistle-blowing lawyers, like petitioner, who took their ethical duties seriously.

In the current debate as to impeachment standards, the House Judiciary Committee's Ranking Member has cited the House Judiciary Committee's 1974 report when it considered impeachment of an earlier President:

> "'Impeachment is a constitutional remedy addressed to serious offenses against the system of government. And it is directed at constitutional wrongs that subvert the structure of government or undermine the integrity of office and even the Constitution itself.
>
> These words are as true today as they were in 1974.

> An impeachment is only for a serious abuse of official power or a serious breach of official duties. On that, the constitutional scholars are in overwhelming agreement."

By that definition, the Court's failure to recognize *any* mandatory duty herein is impeachable.

Adding to its subversion of the Constitution is its subversion 28 U.S.C. §455 [A-3]. That statute, applicable to all federal judges -- including this Court's Justices -- codified what is now Canon 3E of the ABA's Code of Judicial Conduct [A-17]. Indeed, in 1974, when Congress enacted the current §455, it was over the vote of the Judicial Conference, disapproving it as "unnecessary" because "...the ABA Code, relating to disqualification, is already in full force and effect in the Federal Judiciary by virtue of the adoption of the Code of Conduct for United States Judges by the Judicial Conference", H.R. 93-1453, pp. 9-10. Among the precipitating events leading to the enactment was then Associate Justice Rehnquist's failure to disqualify himself in *Laird v. Tatum*, 409 U.S. 824 (1972), reference to which appears in the legislative history. That failure has been characterized as "one of the most serious ethical lapses in the Court's history", in a book published before the current §455 was enacted, MacKenzie, John P., The Appearance of Justice, at 209, (1974)[5].

The Court is well familiar with §455, a majority of its Justices having decided two important cases involving it, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987), and *Liteky v. U.S.*, 510 U.S. 540 (1994). At issue in each of these cases was §455(a) -- the very subdivision to which petitioner's disqualification/disclosure application was addressed [RA-6].

The Court has recognized that §455 imposes "the obligation to identify the existence of...grounds [warranting disqualification] upon the judge himself" *Liteky*, at 548. Petitioner's §455 application identified that it was "'intended to assist the Justices in *sua sponte*

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[5] "That the new [ABA] code could not induce proper conduct by Justice Rehnquist at the ethical watershed of his first term on the Supreme Court is simply another indication that action by Congress is essential and overdue, *id.*, at 228. [MacKenzie's Appearance of Justice is cited in Wright, Miller & Cooper, Vol. 13A, Federal Practice and Procedure, 1995 supplement, at 551].

meeting their duty thereunder", "consistent with the view" of the *Liljeberg* dissenters that "'a judge considering whether or not to recuse himself is necessarily limited to those facts bearing on the question of which he has knowledge' (at 872).'" [RA-8]. Petitioner submitted that the facts set forth in her application "meet the standard for judicial disqualification under §455(a) [A-3] in that they raise reasonable question as to the Justices' impartiality." However, she pointed out that §455(e) allows "a party to waive disqualification after "full disclosure on the record [A-7]."

The Court's wilful failure to adjudicate that application not only flouts the very purpose of §455, designed "to promote confidence in the integrity of the judiciary by avoiding the appearance of impropriety whenever possible" [RA-7], but replicates the exact conduct of the Second Circuit, challenged in the cert petition as being a denial of constitutional due process, judicial misconduct *per se*, and as "make[ing] a travesty of the statute designed to foster confidence in the judiciary." Indeed, the issue presented by the cert petition (at 26-30) -- second only to the Court's mandatory duty under its "power of supervision" and ethical codes -- was the Second Circuit's wilful non-adjudication of petitioner's fact-specific, documented §455 recusal applications, or its denial thereof, without reasons.

That the Justices have not come forth with any "legal authority or argument" to justify their failure to adjudicate petitioner's disqualification/disclosure application, as requested in her judicial misconduct complaint [RA-57], shows they consider themselves "above the law" -- a constitutional anathema.

The Justices' *sub silentio* judicial repeal of §455 is a direct affront to Congress and violation of the solemn oath of office to which each justice swore (U.S. Constitution, Article VI, §3, 28 U.S.C. 453 [RA-1]). That oath expressly obliges each one to "faithfully and impartially discharge and perform all the duties incumbent upon [him] under the Constitution and laws of the United States". Not only is §455 one of those laws, but it is the fundamental law implementing the constitutional duty of impartiality, imposed by the oath of office, particularly where, as here, the perceived apparent bias of the Justices reflects their *actual* bias. From the current impeachment proceedings, it is clear that the oath of office is given great weight in evaluating the seriousness of the breach of official duty.

Unlike the President, federal judges do not serve for a fixed

period of years, but "during good behavior", Article III, §1 [SA-1]. As Alexander Hamilton put it in Federalist Papers, No. 79 , "...with regard to the judges...if they behave properly, [they] will be secured in their places for life...". Such tenure provision was propounded as "the best expedient which can be devised in any government to secure a steady, upright, and *impartial* administration of the laws", Federalist Papers, No. 78 (emphasis added), and was fortified with the further provision for undiminished financial compensation while in office. Together, these two constitutional provisions form the source of "judicial independence", whose intended purpose is to ensure fair and impartial judgments. Chief Justice Rehnquist has characterized judicial independence as "one of the crown jewels of our system of government", (April 9, 1996 speech, "The Future of the Federal Courts", American University).

The inextricable connection between judicial independence and judicial ethics was described in a speech by Justice Kennedy, a copy of which was annexed to petitioner's disqualification/disclosure application [RA-35-48, at 36]:

> "...there can be no judicial independence if the judiciary, both in fact and in public perception, fails to conform to rigorous ethical standards. Judicial independence can be destroyed by attacks from without, but just as surely it can be undermined from within. There is no quicker way to undermine the courts than for judges to violate ethical precepts that bind judicial officers in all societies that aspire to the Rule of Law."

Justice Kennedy stated "three important principles [which] must be observed if a judiciary is to establish and maintain high standards of judicial ethics, consistent with preserving its independence." [R-36]:

> (1) "judges must honor, always, a personal commitment to adhere to high standards of ethical conduct in the performance of their official duties..."; (2) "the judiciary itself must adopt and announce specific, written codes of conduct to guide judges in the performance of their duties"; and (3) "adequate mechanisms and procedures for the judiciary itself to receive and investigate allegations of misconduct and to take action where warranted, so that the public has full assurance that its interest in an ethical judiciary is enforced

and secured."

By Justice Kennedy's test, the "crown jewel" has been wholly despoiled. Not only have the Justices failed to adhere to rudimentary ethical standards of judicial impartiality, albeit set forth in their *own* Code of Conduct for U.S. Judges [A-17], annexed by Justice Kennedy to his speech [RA-48], but they have also violated the statute embodying its disqualification/disclosure standards, 28 U.S.C. §455. On top of this, they have failed to develop a disciplinary mechanism for misconduct complaints against the Justices [RA-63], although recommended five years ago by the National Commission on Judicial Discipline and Removal [RA-55].

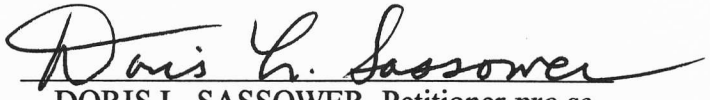
Justice Kennedy is not alone among the Justices in professing the federal judiciary's adherence to ethical standards and existence of adequate disciplinary mechanisms for ensuring compliance. This case resoundingly proves the contrary and provides a basis for an additional impeachment charge against the Justices for "lying to the American People" -- a charge being sought against the President.

Once Congress has concluded its impeachment deliberations as to the President, it will have the benefit of its newly-acquired expertise to turn its attention to the indisputably impeachable conduct of the federal judiciary.

CONCLUSION

> "A court's judgments will be given no serious consideration, no examination at all, if the public is not confident that its judges remain committed to neutral and principled rules for the conduct of their office." Justice Kennedy [RA-36]

The October 5, 1998 order summarily denying the cert petition must be recalled and vacated; the September 23, 1998 recusal/disclosure application must be adjudicated, and the cert petition must be granted in all respects, together with such other and further relief as may be just under the circumstances.



DORIS L. SASSOWER, Petitioner *pro se*
Member of the U.S. Supreme Court Bar