DORIS L. SASSOWER

283 SOUNDVIEW AVENUE • WHITE PLAINS, N.Y. 10606 • 914/997-1677 • FAX: 914/684-6554

July 21, 1993

Honorable Nita Lowey
House of Representatives
1424 Longworth Building
Washington, D.C. 20515

RE: Needed Investigation of Judicial Misconduct
of Federal Judges of the Second Circuit

Dear Congresswoman Lowey:

Transmitted herewith is a copy of our July 14, 1993 letter to Michael J. Remington, Director of the National Commission on Judicial Discipline and Removal. Also enclosed is the response, just received from William J. Weller, Deputy Director of the National Commission, in which he states:

> "The record evidenced by the materials you have filed with Mr. O'Connell [Counsel, House Judiciary Subcommittee] strongly suggests that you have arduously tried to avail yourself of all avenues of appeal short of a request for review of your complaint by the House of Representatives." (emphasis added)

We are, therefore--as your constituents--requesting that you take the steps necessary to initiate such review by the House of Representatives of the record in the subject case. That record irrefutably establishes that District Court Judge Gerard L. Goettel and Circuit Court Judge Jon O. Newman knowingly and deliberately falsified and fabricated facts and knowingly and deliberately disregarded black-letter law so as to sustain a $100,000 sanctions award against us in our civil rights action brought under the Fair Housing Act. Such perversion of the judicial function was for the ulterior purpose of retaliation against us for reasons having nothing to do with the merits of the case or our conduct of the litigation.

That such perversion should have been accomplished by exercise of the court's so-called "inherent power" represents a still further abuse of the judicial function, which is designed to enforce the law and uphold the Constitution, as reflected in the balance of powers therein created. The use of "inherent power" to by-pass and circumvent congressional intent--as reflected in the Fair Housing Act, Rule 11, and 28 U.S.C. §1927--must, therefore, be recognized as a clear threat to our democratic process. It must be a matter of exigent concern to the Congress when, as

documented by our case, its legislative workproduct is so easily swept aside by the judiciary's unauthorized self-arrogation of power--without the slightest necessity therefor.

Because of the profound constitutional issues presented by such unwarranted expansion of "inherent power", we respectfully request that this matter not only be referred for disciplinary investigation of the federal judges involved, but also for consideration by all congressional committees studying the proposed changes of the Federal Rules of Civil Procedure. In that connection, we enclose a copy of our three-page statement of the "Reasons for Granting the Writ", which was part of our Petition for Certiorari to the U.S. Supreme Court.

A full set of our appellate papers before the Circuit Court and the U.S. Supreme Court were sent to Mr. O'Connell, who transmitted them to the National Commission on Judicial Discipline and Removal. It appears from Mr. Weller's letter that such papers have now been returned to Mr. O'Connell. Should you have any question as to the serious judicial misconduct documented therein--and the constitutional magnitude thereof--we suggest that you review such materials directly.

Of course, we are ready to personally meet with you, your staff, or other members of Congress, to answer all questions regarding this formal complaint and to testify, under oath, with respect to same.

Very truly yours,

DORIS L. SASSOWER

ELENA RUTH SASSOWER

DLS/er
Enclosures:
(1) our 7/14/93 ltr to Mr. Remington
(2) Mr. Weller's 7/20/93 ltr to us
(3) "Reasons for Granting the Writ": Petition for Certiorari

cc: William J. Weller, Deputy Director
National Commission on Judicial Discipline and Removal
Edward O'Connell, Counsel
House Subcommittee on Intellectual Property
and Judicial Administration
Charles Stephen Ralston, Esq.
NAACP Legal Defense & Educational Fund

DORIS L. SASSOWER

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By Fax and Express Mail
202-254-8175

July 14, 1993

Michael J. Remington, Director
National Commission on Judicial
Discipline and Removal
Suite 690
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037-3202

RE: Judicial Discipline and Removal

Dear Mr. Remington:

Following up our telephone conversations earlier this week with Edward O'Connell, counsel to the House Committee on the Judiciary, and his assistant, Timothy Steinson, we are writing to you directly so that you can better understand the materials we sent them, under our cover letter dated June 9, 1993. Mr. Steinson informed us that our materials would be promptly passed on to you "with a recommendation for action".

We ask that you consider the aforesaid transmittal as a formal complaint by myself and my daughter concerning, specifically, the conduct of Gerard L. Goettel, a judge in the Southern District of New York, as well as Jon O. Newman, now Chief Judge of the Second Circuit. Each of those judges authored decisions[1] for the illegitimate ulterior purpose of retaliation--which were knowingly false and fabricated as to all material facts and in knowing disregard of controlling black-letter law.

Such judicial decisions should be of particular concern to the Commission which, in its June 1993 "Draft Report" (at pp. 104-5), acknowledges the widespread fear of retaliation that exists among lawyers who believe that complaints against judges will result in vindictive retribution against them or their clients. The Draft Report notes that even government lawyers of the Justice Department will not risk alienating judges before whom they appear by filing complaints of improper judicial conduct (at pp. 72-4).

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[1] The decisions of Judge Goettel and Judge Newman appear in our Petition for Certiorari at CA-28 and CA-6, respectively.

Our case unequivocally establishes the legitimacy of those fears and the extent to which members of the federal judiciary use their power to crush and destroy those who speak out against judicial abuse or are associated with "judicial whistle-blowers". It further proves that vindictive use of judicial power is not confined to the District Court level, but is tolerated--and actively engaged in--by the Circuit Court as well.

The nightmarish retaliation to which we, as party plaintiffs in the case of Sassower v. Field, were subjected is described in our Petition for Rehearing to the Supreme Court, as well as our Supplemental Petition for Rehearing. As set forth in our letter to Mr. O'Connell (p. 2, ¶ 2)--a copy of which we herein enclose--these two documents should be the "starting point for your review".

Since the Supreme Court grants certiorari in only a tiny fraction of the cases for which it is applied, appellate review of Circuit Court decisions effectively does not exist. It certainly did not exist for us--notwithstanding that we expressly called upon the Supreme Court to exercise its "power of supervision" under Rule 10.1(a)[2]. As set forth in our Supplemental Petition for Rehearing:

> "The gravity of the charges raised in the Petition for Rehearing--that federal judges, sworn to uphold the rule of law, have knowingly and deliberately perverted our sacred judicial process[3] to advance ulterior retaliatory goals--removes this case from the ordinary discretionary review presented by other applications for certiorari. This is particularly so where, as here, the District and Circuit Courts' Decisions are so aberrant on their face[4] as to be suspect." (at p. 8) (emphasis in the original)

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[2] See Petition for Certiorari, at pp. 19, 28; Reply Brief, at p. 9; Petition for Rehearing, at p. 8; Supplemental Petition for Rehearing, at p. 9.

[3] The lack of factual support for the Second Circuit's decision was set forth in the Petition for Certiorari, at pp. 22-3; Reply Brief, at p. 6, fn. 6; Petition for Rehearing, at p. 1; Supplemental Petition for Rehearing, at pp. 3, 6-7.

[4] The facial deficiencies of the Second Circuit's decision were summarized at pp. 4-6 of the Supplemental Petition for Rehearing.

Yet, the Supreme Court neither exercised its "power of supervision" nor referred our case for investigation--relief clearly warranted by the submissions before it. Indeed, following denial of our Petition for Rehearing, we learned that the Supreme Court has no mechanism to segregate petitions for certiorari which complain of judicial misconduct and request it to invoke its "power of supervision".

Review of the appellate papers--a full set of which was supplied to Mr. O'Connell and should comprise his transmission to you--will establish the utter failure of the appellate process within the federal judiciary--both on the Circuit Court and Supreme Court level--to serve in any effective way as the "fundamental check" against judicial misconduct referred to by the "Draft Report" (at p. 1).

Likewise, "peer pressure", another "check" to which the Draft Report alludes (at p. 2), did not work in this case--where the Second Circuit denied our Petition for Rehearing En Banc of a decision which was patently illogical and inconsistent and which flouted bedrock law of both the Supreme Court and the Second Circuit itself. That Jon Newman, now Chief Judge of the Second Circuit, should have authored such decision is most revealing--not only because it flies in the face of categorical decisions written by him and by Second Circuit panels on which he sat[5]--but because Judge Newman is the leading exponent of the view that the federal judiciary should be kept small. According to the Draft Report (at p. 2), it is in a small judiciary where "peer disapproval" is of greatest effect. Yet, Judge Newman was not the least concerned about the possible "peer disapproval" of the small group constituting his fellow judges of the Second Circuit, who would be reading his facially aberrant decision in this case or our devastating Petition for Rehearing En Banc.

Nor did Judge Newman express his own "peer disapproval", as warranted by Judge Goettel's egregious violation of controlling law and judicial standards in the decision being appealed from. Such violations were meticulously documented by our Appellants' Brief--and unrefuted by Respondents[6]. Indeed, even where our

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[5] See Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986), discussed in our Petition for Rehearing En Banc, at pp. 9-10; and New York Association for Retarded Children v. Carey, 711 F.2d 1136 (2nd Cir. 1983), discussed in our Petition for Rehearing En Banc, at p. 15.

[6] The factual baselessness of Judge Goettel's decision was detailed at pp. 8-40 our Appellants' Brief--and unrebutted by Respondents in their Opposing Brief (see our Appellants' Reply Brief at pp. 1-2, 9-12, 15-16, 22-23). The legal baselessness of

Brief pointed out that Judge Goettel had, sua sponte, relied on false and defamatory dehors the record material--in and of itself requiring reversal as a matter of law[7]--Judge Newman chose to republish such defamation in his decision, further adding false and defamatory dehors the record matter of his own[8]. So much for "peer pressure" as a check against judicial misconduct.

We have read Judge Newman's recent remarks to the Commission in which he expresses great concern that judges who are the subject of complaint be accorded maximum confidentiality. Yet Chief Judge Newman had no such concern for our good name and reputation where--as he knew from the record before him--there was not the slightest factual basis for the false and defamatory statements by the District Court, adopted by him, or for his own embellishments thereof. Judge Newman knew that widespread publication of his deliberately maligning decision would result in a reputational injury to us far beyond the economic loss reflected by the nearly $100,000 sanction award against us, plus the costs of the appeal he added thereto. Indeed, inasmuch as Judge Newman sought to punish us for reasons having nothing to do with the merits of the appeal--the result of the appellate process for us was simply to cover-up and intensify the injury we had suffered at the hands of Judge Goettel.

We are most impressed by the care given by the Commission to the constitutional ramifications of its recommendations for reform, which it states it considered "in virtually every aspect of its work" (at p. 143). By contrast, Judge Newman, in furtherance of his retaliatory goals, did not view the Constitution as a restraint upon his actions. His use of "inherent power" to sustain Judge Goettel's otherwise unsustainable $100,000 sanction award against us--represented a knowing nullification of the constitutional balance of powers, reflected in text-based rules and statutes. Such nullification was not predicated on any need to protect the integrity of the judicial process. Rather, it reflected Judge Newman's willingness to cover-up the corruption of the judicial process that had taken place under Judge Goettel, as unequivocally reflected by the record--and highlighted by our Rule 60(b)(3) motion.

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said decision was discussed at pp. 42-54 of our Appellants' Brief and at pp. 1-2, 12-14, 16-18, 23-26 of our Reply.

7 See our Appellants' Brief, at p. 54; and errata sheet; Petition for Certiorari, at p. 8.

8 See Petition for Certiorari, at p. 10 and, particularly, fn. 8 at p. 11; and Petition for Rehearing, at pp. 4-5 and, particularly, fn. 4).

We believe that the Commission needs to realize the retaliatory implications of "inherent power" as demonstrated by our case, which now stands as precedent. Indeed, whereas previously "judicial whistle-blowers", who incurred the wrath of biased judges, at least technically enjoyed the legal protections found in written statutes, rules, and due process safeguards, such protections--as we can attest--have now been obliterated. The judiciary has now forged a new weapon to cover-up judicial misconduct and to protect itself against lawful and meritorious challenges to its authority.

The record in our case is stark and unobscured. Our fully-documented and uncontroverted Rule 60(b)(3) motion before Judge Goettel established not only that the applications of defense counsel for attorney fee sanctions were fraudulent and perjurious, but that outright fraud, perjury and other misconduct were the modus operandi of the defense throughout the litigation. Any objective review of that breath-taking motion leads only to one conclusion: that Judge Goettel knowingly permitted the defense misconduct detailed therein because it satisfied his ulterior purpose, which was to force us to abandon our most meritorious case--or lose it if we persisted to the end. We welcome the opportunity to make such dispositive document available to your investigative staff upon request.

You may be assured of our complete cooperation with the investigation of our case which we are requesting your Commission to undertake. Such investigation will readily reveal that the decisions of District Judge Goettel and Circuit Court Judge Newman are thoroughly dishonest and retaliatory and that the $100,000 sanctions imposed upon us constitutes nothing less than the outright larceny of our property by those two judges. This is quite apart from the beyond-monetary-measure theft of our good name and reputation by their deliberate defamation--which represents another unlawful taking of our property by them.

What was done in our case--as documented by the record--establishes, prima facie, that District Judge Goettel and Circuit Court Judge Newman have wilfully violated the public trust reposed by their lifetime appointment to judicial office and that disciplinary steps must be taken to protect the public from such vicious and clearly unfit judges.

Although we do not possess information sufficient to comment on the fitness of Messrs. Goettel and Newman at the time of their appointment, their demonstrated misconduct raises serious doubt as to same. We note that the Commission's Draft Report makes the following observation:

> "...the appointments process is relevant in a prophylactic sense to the question of

> judicial discipline and removal. If the appointments process operated perfectly to select only the most highly qualified and honest judges, the need for disciplinary action should be significantly reduced, if not eliminated. For this reason it has often been suggested that the solution to the problem of misconduct within the federal judiciary is not an improved disciplinary process, but rather a more careful appointments process." (at pp. 83-4)

The Draft Report then goes on to state:

> "It would be useful to know if and how the nomination and confirmation process went wrong in the cases of the five recently prosecuted judges. The purpose of such inquiry would not be to fix blame, but to assess whether there are structural defects in the process, and to learn from past mistakes..." (at p. 85)

We are uniquely able to give the Commission the benefit of our research on the "structural defects in the [judicial screening] process"--a subject we have studied in some depth. As Director and Coordinator, respectively, of the Ninth Judicial Committee, a non-partisan citizens group which, since 1989, has been working to improve the quality of the judiciary, we embarked upon a six-month investigation, focused on one federal judicial nomination then under consideration as a case in point. Our research culminated in a written critique to the Senate Judiciary Committee in May of last year--and a call to the Senate leadership to <u>halt</u> confirmation of all judicial nominees pending an official investigation and the setting up of safeguards. As found by us:

> "...a serious and dangerous situation exists at every level of the judicial nomination and confirmation process--from the inception of the senatorial recommendation up to and including nomination by the President and confirmation by the Senate--resulting from the dereliction of all involved, including the professional organizations of the bar." (at p. 2 of our critique)

To aid you in evaluating the importance of our findings--and the impact of same on the conclusions of your Draft Report--we are pleased to enclose a copy of our critique, together with two of the letters sent by our Committee to Senate Majority Leader George Mitchell relative to our findings.

It may be noted that Judge Newman's factually and legally unfounded decision upholding $100,000 sanctions against us was issued less than a month after the July 17, 1992 publication by The New York Times of our Letter to the Editor relative to the findings of our critique. A copy of said letter is also enclosed for your review.

We would add that following submission of our critique, we acquired a substantial amount of additional information, fully validating the views set forth therein. We believe such information would be invaluable to your Commission prior to rendition of its Final Report, as well as future reports on the subject. For your further information, our biographic credentials appear at the end of the enclosed critique.

We thank you for your attention herewith and respectfully request that this letter be considered as our written statement in lieu of oral presentation at a hearing of your Commission--and that copies thereof be furnished to all Commissioners, as indicated in the Notice set forth at the outset of your Draft Report--so it can be made part of the record underlying your Final Report, which we understand is due early next month.

Very truly yours,

DORIS L. SASSOWER

ELENA RUTH SASSOWER

Enclosures:

(a) 6/9/93 letter to Edward O'Connell, Esq.
(b) Critique and Compendium of Exhibits
(c) 5/18/92 letter to Senate Majority Leader Mitchell
(d) 6/2/92 letter to Senate Majority Leader Mitchell
(e) Letter to the Editor, "Untrustworthy Ratings?", The New York Times, 7/17/92

cc: Edward O'Connell, Counsel
House Subcommittee on Intellectual Property and Judicial Administration
Congresswoman Nita Lowey
Charles Stephen Ralston, Esq.
NAACP Legal Defense and Educational Fund

Robert W. Kastenmeier
Chairman

Judge S. Jay Plager
Vice Chairman

Michael J. Remington
Director

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July 20, 1993

Ms. Doris L. Sassower
283 Soundview Avenue
White Plains, NY 10606

Dear Ms . Sassower:

On July 14, your letter of that date to Michael Remington arrived in our offices by fax. On the same day we received a July 12 letter from House Judiciary Subcommittee Counsel Edward O' Connell, conveying "the extensive record" of your case, in which he informed us that he was forwarding that material for our consideration at your request. A copy of Mr. O'Connell's letter is enclosed. As you will note, your materials were not forwarded "with a recommendation for action".

I regret that your conversations with Mr. O'Connell and Mr. Steinson led you to believe the Commission could "take action" in the context in which your letter asks that it consider your materials -- "as a formal complaint." The Commission's grant of authority is explained in the Preface to the June 1993 Draft Report, which you cite in your correspondence. That grant of authority does not confer power to investigate, or "take action" in relation to, any individual complaint.

You also, of course, requested that your July 14 letter be considered as your written statement in response to the Notice published in our Draft Report. The Commission accepts your letter as such, and thanks you for submitting it. Copies of both the July 14 letter, as received by mail on July 15, and the modified text which we received by mail on July 19, along with a copy of Mr. O'Connell's July 12 letter, are being sent to each commissioner today. Those "Ninth Judicial Committee" materials forwarded to us with your letter will be included in the Commission's records.

The record evidenced by the materials you have filed with Mr. O'Connell strongly suggests that you have arduously tried to avail yourself of all avenues of appeal short of a request for review of your complaint by the House of Representatives. Mr. O'Connell's referral of these materials to the Commission, as an example of such a case, has been very helpful. However, because we have no authority to "take action" in response to your specific request for an investigation, we are returning to Mr. O'Connell all of the materials which he sent to us with his July 12 letter.

Thank you for your contribution to the Commission's study.

Sincerely,

William J. Weller

WILLIAM J. WELLER
Deputy Director

cc: Mr. Edward O'Connell

REASONS FOR GRANTING THE WRIT

Inherent power, as expanded by the Second Circuit, has not only injured the civil rights plaintiffs, who were thereby made the victims of a gross injustice, but directly impacts on all federal litigants and their lawyers. No longer can they rely on rules and statutes, whose standards provide protection from the undefined discretion and vagaries of individual judges.

What is here involved is so extreme a misapplication of existing rules and statutory provisions as to be a compelling catalyst for remedial action to define and limit inherent power.

This case is a microcosm of the very issues now under study by this Court in connection with the proposed amendments to the Federal Rules of Civil Procedure--Rule 11, discovery, and case management. Those proposed amendments are the product of hundreds of written comments from the bench, bar, and public over a three-year period and of public hearings. Yet, as this case illustrates, the enormous effort expended in the rule-making process is all for naught if inherent power is to be a "fall-back" for federal courts unwilling to adhere to the text-based requirements of those rules, amended or not.

This case is the *right* vehicle for this Court to define the interface of inherent power and rule and statutory provisions--the issues being clear, unobstructed and ripe for resolution.

The need for this Court's authoritative voice is highlighted by the Advisory Committee Notes to the proposed amendments, which refer to Chambers v. Nasco, supra, and G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. en banc 1989) (at 58, 71). Those two opinions are so sharply divided on the subject of inherent power that

they cannot serve as guide to the lower courts[10]. Together with the Advisory Committee Notes' citation to Willy v. Coastal Corp., ____ U.S. ____, 112 S.Ct. 1076 (1992), (at 55), those cases only add to litigation-producing confusion.

It is the unrestricted use of inherent power by the Second Circuit, purportedly relying on Chambers, that has generated the alarming precedent which plaintiffs here seek to have reviewed. It is one confirming Justice Kennedy's worst fears, as expressed in his Chambers dissent.

This case also offers a context for this Court to implement the spirit of the "Resolution on Bias in the Federal Judiciary", recently adopted by the Judicial Conference, which recognizes that "bias...presents a danger to the effective administration of justice in the federal courts" Report of the Proceedings of the Judicial Conference of the United States, September 22, 1992. The District Court's hostility to plaintiffs' efforts to obtain critical documents and information, essential to proving their discrimination cause of action, coupled with its failure to follow or even cite this Court's guidepost decision of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), setting forth the standards of fee awards to defendants in civil rights actions, confirms the need to "sensitize" the federal judiciary as to civil rights. A resounding decision from this Court on that subject can do more, far quicker, than educational programs which do not have the force of "the law of the land".

The civil rights issues in this case are of broad national concern, additionally affecting federal rights under all fee-shifting statutes. The retroactivity issue herein is "the

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[10] The need for greater clarity in the Chambers and Heileman decisions has been the subject of numerous law review articles. As to Chambers, see particularly, Harvard Law Review, Vol. 105 (Nov. 1991), 349-360; Nova Law Review, Vol. 16 (1992), 1527-1566; Tulane Law Review, Vol. 66 (1991), 591-603; also Baylor Law Review, Vol. 43 (1991) at 652-654, 669-670. As to Heileman, see particularly, Indiana Law Journal, Vol. 66 (1991), 977-998; John Marshall Law Review; Vol. 23 (1990), 518-535.

other side of the coin" to cases now on this Court's docket involving the 1991 amendments to the Civil Rights Act. Rivers v. Roadway Express, #92-938; Landgraf v. U.S.I. Film Industries, 92-757; Johnson v. Uncle Ben's, 92-737; Kuhn v. Island Creek Coal Co., 92-787, all pending decision on certiorari applications. This case also is relevant to an issue presented by a case already granted certiorari, Columbia Pictures v. Professional Real Estate Inv., #91-1043, involving attorney fees for alleged sham litigation.

POINT I

The Judicial Remedy Of Fee-Shifting Under Inherent Power Is Barred By Retroactivity And Preemption

The legislative background and the statutory language of civil rights laws, in general, and the Fair Housing Act of 1968, in particular, show that Congress' intent in adopting fee-shifting provisions was to encourage private enforcement in furtherance of our national commitment to a discrimination-free society.

The history of the Fair Housing Amendments Act of 1988 shows that its overriding purpose was to broaden the law and to strengthen its private enforcement[11]. The change in its attorney-fee provision made it uniform with other civil rights laws in effect, which by then had given the term "prevailing party" a settled judicial interpretation, not inconsistent with Congress' purpose. Legislative History of the Fair Housing Amendments Act of 1988, House Report No. 100-711.

That interpretation is found in the seminal case of Christiansburg Garment Co. v. EEOC., supra, which held that

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[11] The amendment not only extended coverage to the handicapped and families with children, but removed the $1,000 cap on punitive damages. 42 U.S.C. §3613(c) (CA-1).

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JUL 1993
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