CENTER for JUDICIAL ACCOUNTABILITY, INC.

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Box 69, Gedney Station
White Plains, New York 10605

March 28, 1996

Hon. Nita Lowey
2421 Rayburn House Office Building
Washington, D.C. 20515

ATT: Sharon Levin, Legislative Assistant

Dear Ms. Levin:

Thank you for taking the time to briefly meet with me on February 5th. We regret that you were unable to join us on that day for our meeting at the House Judiciary Committee's Subcommittee on Courts and Intellectual Property with its Chief Counsel, Tom Mooney.

To update you on that meeting, I enclose a copy of my letter of today's date with Mr. Mooney, together with a copy of the §372(c) complaint we filed with the Second Circuit on March 4, 1996. Congresswoman Lowey is an indicated recipient of that complaint.

We'll keep you posted.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures

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By Certified Mail/RRR: P-624-546-596

March 28, 1996

Tom Mooney, Chief Counsel
Subcommitee on Courts and Intellectual Property
B-351-A Rayburn Building
Washington, D.C. 20515

RE: Amending 28 U.S.C. §372(c)
Our 6/9/93 judicial misconduct complaint

Dear Mr. Mooney:

We thank you for having personally met with us for 45 minutes on February 5th and look forward to assisting the Subcommittee in ensuring the efficacy of procedures for reviewing and investigating complaints of misconduct by federal judges.

Immediately following our meeting, we arranged with the Federal Judicial Center to send you the three-volume research papers and hearing testimony for the Report of the National Commission on Judicial Discipline and Removal.

Michael Straight's important recommendation as to the need to amend 28 U.S.C. §372(c) to prevent the Circuits from dismissing bias complaints as "merits related" may be found in Volume II, at page 1747. His observation about such dismissals is set forth at page 1704--with his pertinent footnote 43 spanning to page 1706. For your convenience, those pages are annexed.

As you know, for over two and a half years, we tried to get an answer from the House Judiciary Subcommittee as to whether the bias complaint we filed with it on June 9, 1993 would be justiciable under §372(c) or would be dismissed as "merits related". We received no answer from it, any more than we had from the National Commission on Judicial Discipline and Removal.

Pursuant to our discussions together last month, we have now filed our bias complaint with the Second Circuit as a complaint under §372(c). A copy of that §372(c) complaint, dated and filed on March 4th, is enclosed, as are copies of the Second Circuit's two letters of acknowledgement.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

cc: Michael Straight, Esq.
Congresswoman Nita Lowey
Congressman Jerrold Nadler

complainant may cite the alleged misconduct as ground for recusal or disqualification of the judge or as a basis for an appeal on the merits.

The fact that a litigant has a potential remedy at law does not mean that a §372(c) complaint should necessarily be dismissed. Having to take an appeal or spend a large amount of money to challenge the judge or the judge's conduct should not be the litigant's only option. The potential complainant may reasonably expect an apology or perhaps some other §372(c) sanction for the judge's use of derogatory or demeaning or stereotype terms about one's race, religion, ethnic background, or gender.

The judiciary's own interest in preventing or quickly and publicly correcting bias misconduct suggests that the §372(c) process be open to litigants who are the victims of bias misconduct, particularly such misconduct as racial or ethnic slurs or inappropriate use of terms of endearment. A number of chief judges have been willing to use §372(c) in such circumstances, but rule changes appear necessary to prevent other chief judges or circuit councils from dismissing all such complaints as being merits-related or the subject of disqualification or removal even when the litigant is not pursuing such a remedy or an appeal. Such rule changes should be accomplished narrowly without the chief judge or circuit council becoming involved in the merits of the litigation. The judiciary may wish to determine whether the 1980 Act allows enough flexibility in the "directly related" language to accomplish the objective. If necessary, consideration should be given to amending the 1980 Act to allow additional flexibility without interfering with the appellate process.

4. The Judicial Conference should conduct a study of bias misconduct, including sexual harassment, by federal judges. The study should determine the nature and frequency of such misconduct and devise procedures that will (1) facilitate the filing of meritorious complaints, (2) ensure a proper investigation of such complaints, and (3) ensure that judges who have engaged in such misconduct are treated so as to deter similar misconduct and to maintain public confidence in the judiciary. The §372(c) orders should contain substantial information about the conduct and the discipline imposed. The procedure should also ensure referral to the House of Representatives and/or appropriate law enforcement authorities whenever there are credible allegations that a federal judge has engaged in quid pro quo sexual harassment or other misconduct

- a lawyer's allegations of racial bias by a judge in sanctioning the lawyer—with the allegations being based on the lawyer's conversations with other persons—were dismissed by the chief judge with no mention of the allegation of racism.[42]

These dismissals suggest the possibility that superficially plausible charges of bias misconduct may, upon examination, prove to be without merit.

In addition, circuit chief judges have dismissed numerous other complaints alleging bias, usually on the statutorily-authorized grounds that the complaints were merits-related or not in conformity with the 1980 Act (*e.g.*, not factually detailed).[43]

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[41](...continued)
interview and concluded that the judge had made an "untrue and regrettable statement" but that he did not intend this implication and that it "is inconsistent with the general tenor of the interview and with the well known and documented concern of [the judge] for racial justice." The judge submitted a letter emphasizing that he never meant his remarks to be taken as disparaging. By a divided vote, the judicial council dismissed the complaint. Concurring judges emphasized that even if the judge had entertained certain opinions, "merely holding an opinion cannot be prejudicial to the effective and expeditious administration of the business of the courts." Dissenters found the statement to be racist and called for a reprimand.

[42] *See* Marcus Report at 438:

> An attorney was sanctioned by a district judge and complained that this was due to racial bias "based on conversations [complainant has] had with others." Although the complaint seems subject to dismissal on the ground that it provides no basis for the conclusion that the judge is guilty of bias, the chief judge's order of dismissal said: "to the extent the complaint involves demeanor of the judge, the facts as alleged do not constitute 'conduct prejudicial . . .'" The dismissal order made no mention of the racism allegation.

[43] The §372(c) orders made available to the Commission by the Federal Judicial Center included the following chief judge orders that refer expressly to alleged bias by federal judges: Judicial Council No. 91-46 (3d Cir., Jan. 9, 1992) (ethnic bias complaint dismissed for lack of factual support or detail offered by complainant); In re Charge of Judicial Misconduct, No. 91-80035 (9th Cir., Dec. 26, 1991) (race bias complaint dismissed as being merits-related and lacking factual support or detail); In re Complaint of Judicial Misconduct, No. 91-6-372-27 (6th Cir., Oct. 21, 1991)(racial bias allegations dismissed as being merits-related); In the Matter of a Judicial Complaint Under 28 U.S.C. §372, No. 91-9027 (4th Cir., Oct. 7, 1991)(racial discrimination allegations dismissed as being merits-related); Judicial Council No. 91-37 (9th Cir., Sep. 10, 1991) (race bias complaint dismissed as being merits-related and as being proper subject for recusal/disqualification motions); In re Charge of Judicial Misconduct, No. 91-80029 (9th

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[43](...continued)
Cir., July 22, 1991) (complaint alleging bias against "Iranians, Middle-Easterners, Muslims and [persons] of other faiths" dismissed as merits-related and lacking factual support or detail); In re Charge of Judicial Misconduct, No. 91-80020 (9th Cir., July 22, 1991) (race bias allegations—including complainant's statement that his attorney told him that the judge was not "going to give a Black defendant a bail" or that the judge was "sick and tired of having a Black defendant interrupting his court"—dismissed as being merits-related and lacking factual support or detail), aff'd (9th Cir. Judicial Council, Dec. 24, 1991); Judicial Council No. 91-05 (3d Cir., Jan. 24, 1991) (race bias complaint dismissed as being merits-related and uncorroborated); No. 88-10-372-2 (10th Cir., May 16, 1990) (complaint against several judges alleging discrimination or bias against Hispanics dismissed as merits-related, lacking factual support or detail, and as being proper subject for recusal/disqualification motions); In the Matter of a Judicial Complaint Under 28 U.S.C. §372, No. 90-9003 (4th Cir., Feb. 24, 1990)(racial bias allegations dismissed as being unsupported by record); In re Charges of Judicial Misconduct, Nos. 89-80227, 89-80228, and 89-80229 (9th Cir., Jan. 18, 1990) (complaint against two district judges and a magistrate judge alleging conspiracy against persons of "Magyar-Hungarian and Latin-Italian" heritage dismissed as being merits-related and lacking factual support or detail); In re Charge of Judicial Misconduct, No. 89-80218 (9th Cir., Sep. 29, 1989) (complaint against bankruptcy judge alleging bias against people of Filipino heritage dismissed as frivolous by virtue of being merits-related and lacking factual support or detail); In the Matter of a Judicial Complaint Under 28 U.S.C. §372, No. 89-9023 (4th Cir., Aug. 23, 1989)(racial bias complaint dismissed as being merits-related); In the Matter of a Judicial Complaint under 28 U.S.C. §372, No. 88-9020 (4th Cir., Sept. 7, 1988)(racial bias allegations dismissed as being merits-related); In re Complaint Against a District Judge (7th Cir., June 30, 1988)(race and color bias allegations dismissed for lack of factual support or detail offered by complainant); In the Matter of a Judicial Complaint Under 28 U.S.C. §372, No. 88-9003 (4th Cir., June 16, 1988)(handicap and religious bias allegations dismissed for lack of factual support or detail offered by complainant); In the Matter of a Judicial Complaint Under 28 U.S.C. §372, No. 88-9002 (4th Cir., Mar. 25, 1988)(race and national origin bias allegations dismissed as frivolous and as merits-related); In re Charge of Judicial Misconduct, No. 87-8165 (9th Cir., Dec. 23, 1987) (allegations of "religious and political prejudice" against three judges for failure to recuse dismissed as being merits-related, lacking factual support or detail, and lacking a showing of effect on the judges' ability to discharge duties); In re Complaint against District Judge Thomas J. Curran, No. 87-7-372-5 (7th Cir., June 1, 1987)(race bias complaint dismissed as being merits-related and lacking factual support or detail); No. 87-10-372-8 (10th Cir., May 28, 1987) (race bias complaint against three judges dismissed as being merits-related, lacking factual support or detail, and lacking a showing of effect on the judges' ability to discharge duties); In re Charge of Judicial Misconduct, No. 86-8059 (9th Cir., Mar. 21, 1986), described in American Judicature Society's Judicial Discipline and Disability Digest 1980-1986 at FED 46 (race bias allegations dismissed for lack of factual support or detail offered by complainant); In re Charge of Judicial Misconduct, No. 85-8051 (9th Cir., Mar. 27, 1985), described in American Judicature's Judicial Discipline and Disability Digest 1980-1986 at FED 25 (ethnicity bias allegation dismissed because of

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ii. Corrective Action

The FJC Report and Marcus Report refer to three instances of corrective action taken in response to complaints alleging racial, religious or ethnic bias.

- a complaint alleging racial bias by a judge (who said in sentencing a white woman that she must have been under the spell of her black male companion or involved with drugs because of the city's racial composition) was resolved by a chief judge's determination of corrective action, namely that the judge had explained that he recognized the problem and would avoid repetition thereof (this is also discussed below as a gender bias complaint);[44]

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[43](...continued)
availability of disqualification statutes); In re Complaint of Judicial Misconduct, No. 83-6-372-03 (6th Cir., Apr. 29, 1983)(race bias allegations dismissed as being merits-related); In re Complaint of Judicial Misconduct, No. 82-6-372-04 (6th Cir., Dec. 14, 1982)(race bias allegations dismissed for lack of factual support or detail offered by complainant).

This is not a complete list because not all circuits have sent their orders to the FJC.

Based on a reading of these orders (the complaints for which are non-public), it appears that many of the complainants are disgruntled litigants who have made assertions of judicial bias without providing any detail or specifics of such bias.

To date, except for the FJC research team's review of any of these orders that may have been in the sample the team examined and except for Professor Marcus' review of available orders, there has been no substantive or systematic review of these orders and the associated complaints. Because the complaints are non-public, only the FJC and individual circuits and the Administrative Office of United States Courts are in the position of being able to conduct a proper review and analysis. Part of any such review should be an examination of complaints dismissed as being merits-related. Such dismissal does not mean that an allegation of misconduct is without merits. Instead, it means that dismissal is proper under the 1980 Act because a litigant can (in theory, at least) raise the issue on appeal in the litigation. It would be helpful to know whether any of the allegations were meritorious despite the fact that the 1980 Act is not the proper mechanism for determining whether bias misconduct actually occurred.

[44] *See* FJC Report at 561, 653–54:

> A statewide coalition of at least eight public interest organizations complained that a district judge made statements in imposing sentence that a female defendant must have been under an hypnotic spell of her male companion and that drugs must have been involved because they lived in a predominately black city. After communicating with the district judge, the chief judge dismissed the complaint, stating that the judge "recognizes that certain comments, made while searching for grounds that could justify

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