

**Cyrus Mehri's Response to Written Questions  
from the Honorable Arlen Specter  
Regarding the U.S. Senate Judiciary Committee Hearing on  
Barriers to Justice: Equal Pay for Equal Work**

**Questions for Cyrus Mehri**

**Question 1:** In your testimony, you cited the Clermont-Schwab study as “confirming that thousands of American workers encounter a double standard in the U.S. Appellate Courts.” The study, however, does not account for the particulars of any given case. Moreover, it does not account for several other important factors, such as the increase in wage and hour litigation, the Equal Employment Opportunity Commission’s expansion of its efforts to resolve discrimination claims at the mediation stage, Supreme Court decisions holding that parties may agree to arbitrate employment discrimination claims, and plaintiffs pursuing claims under state law statutes that have little or no damage caps:

- How can the conclusion of the study be said to be reliable if none of the foregoing factors are accounted for?

**Answer 1:** The factors cited in your question do not change the fundamental results of the empirical study by the Cornell law professors.<sup>1</sup> Empirical legal studies scholars generally analyze systems and data sets rather than the particulars of individual cases. Professor Clermont and Dean Schwab used a data set coded by the Administrative Office of the United States Courts as “442 - Civil Rights: Jobs” or “Employment,” which contained tens of thousands of cases spanning several decades. Their approach is consistent with professional standards and recognized by academic institutions such as Cornell Law School, New York University School of Law, and the University of Texas School of Law, all of which have sponsored an annual Conference on Empirical Legal Studies.

As I stated in my testimony, the double standard that American workers face on appeal in employment discrimination cases, which was revealed by Professor Clermont and Dean Schwab, is quite startling. They found that the U.S. Courts of Appeals reverse employer district court victories 8.72% of the time and employee district court victories 41.10% of the time. Particulars of individual cases cannot account for this disparity. Individual case studies to understand “the particulars” of a case (as you suggest) may be interesting, but the outcomes of individual cases might be aberrations. The Cornell study examines the outcomes of employment cases on appeal in the aggregate. Of course, we encourage further research, including a random sampling of case studies or an analysis of the data by type of case (i.e., race, sex, age, or religious

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<sup>1</sup> Stewart J. Schwab & Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. (forthcoming 2009), available at [http://www.hlpronline.com/Vol3.1/Clermont-Schwab\\_HLPR.pdf](http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf).

discrimination), but it is unlikely that additional research would alter the fundamental conclusion that the data show a double standard on appeal.

Similarly, an increase in wage and hour litigation would not impact the study's analysis of appellate courts' reversal rates in employment discrimination cases because wage and hour litigation is given a separate code by the Administrative Office of the United States Courts – "710." Traditional wage and hour litigation was not part of the study's data set. The EEOC's efforts regarding mediation and the Supreme Court's decisions regarding arbitration also do not directly impact the Cornell study's conclusion regarding of the U.S. Courts of Appeals' reversal rate of district courts' employment discrimination decisions. The cases that are part of the study's appellate analysis are cases that have proceeded to trial, regardless of mediation or arbitration efforts. Cases that have made it to trial likely have gone through an extensive vetting process, including some, if not all, of the following: screening by the employee's attorney, pre-trial motions to dismiss, summary judgment motions, and other dispositive motions. It is also important to remember that when appellate courts reverse trial judgments, they are usually evaluating the rulings of district court judges for error or abuse of discretion, not engaging in a free-floating review of the merits of the cases. The extent to which these cases are screened makes the 8.72% versus 41.10% reversal rate on appeal even more troubling.

The final factor you cite, that some plaintiffs may be pursuing claims under state law statutes, also does not impact the statistical analysis that employment discrimination cases are subject to a double standard on appeal in the *federal* courts. It may or may not be true that employment discrimination plaintiffs fare differently in state courts, but that has no bearing on how they are faring in federal courts. State law employment discrimination cases are not part of Clermont and Schwab's analysis except to the extent they are prosecuted in federal court either pursuant to diversity jurisdiction or alongside federal claims.

In addition to finding a double standard on appeal in employment discrimination cases, Professor Clermont and Dean Schwab also found a 37% drop in employment discrimination cases in federal court from 1999-2007. The number of such cases fell from 23,721 in 1999 to 18,859 in 2005. They declined even more sharply in the last two years of the data from 18,859 in 2005 to 15,007 in 2007. Information provided by the EEOC shows that EEOC charges have remained steady or slightly increased from 1997 (80,680 charges) to 2007 (82,792 charges).<sup>2</sup> In 2008, the EEOC has experienced a 15% rise in charges compared with last year. The rise in EEOC charges suggests that discrimination in the workplace has not decreased.

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<sup>2</sup> Stewart J. Schwab, Dean Cornell University Law School, Presentation at American Constitution Society, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse? 7 (September 18, 2008), *available at* <http://www.acslaw.org/node/7149>. (See Exhibit 5 attached to my written testimony).

The Cornell study does not point to any one cause of the drop in employment discrimination cases in federal district courts. Professor Clermont and Dean Schwab do note, however, that the double standard on appeal might discourage employees and their lawyers from bringing employment discrimination cases. Professor Clermont and Dean Schwab also consider several other factors that could be related to the drop in employment discrimination cases in district courts:

Of course there are other possible explanations for the decline in jobs cases, even though it seems too sudden and big to rest on fundamental societal or workplace changes. Perhaps alternative dispute resolution, popular in the employment setting, has suddenly increased in popularity to the point of flipping the trend in case filings. But such a massive change would not have gone unnoted elsewhere. Alternatively, perhaps the plaintiffs are shifting to the greener pastures of state courts and managing to avoid removal. Unfortunately, state court data equivalent to the federal court data do not exist. In any event, both of these explanations are consistent with the idea that employment discrimination plaintiffs or, more realistically, their lawyers are becoming discouraged with their chances in federal court.<sup>3</sup>

Thus, the Cornell study considers multiple factors that might explain the drop in employment discrimination cases in federal court. Though the study reaches no conclusion as to the cause of the drop in cases, the decline combined with the double standard on appeal in employment discrimination cases are cause for alarm.

**Question 2.** The Supreme Court decided a series of recent employment rights cases in which the majority of the Court found in favor of the employee. Those decisions include, Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006), CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008), Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008), Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008), Federal Express Corporation v. Holowecki, 128 S. Ct. 1147 (2008), Sprint/United Management Company v. Mendelsohn, 128 S. Ct. 1140 (2008), and Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (2006). You testified that the federal bench is devoid of former practitioners with experience representing “ordinary Americans” and is therefore biased against employees in general.

- **Question 2a:** Contrary to your claim, don’t these decisions demonstrate that the federal courts are not hostile to employees or supportive of business interests?

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<sup>3</sup> Schwab & Clermont, *supra* note 1 at 20 (internal citations omitted).

- **Question 2b:** As the lower courts follow these precedents, will there not be more decisions that are favorable to plaintiffs?
- **Question 2c:** What is the basis for your conclusion that the bench is devoid of former practitioners with experience representing “ordinary Americans”?

**Answers 2a & 2b:** The study by Professor Clermont and Dean Schwab reveals a double standard in employment discrimination cases on appeal to the U.S. Courts of Appeals. The study did not analyze employment discrimination appeals to the U.S. Supreme Court. Thus, the Supreme Court decisions you cite do not alter the study’s conclusion that the empirical data reveal an anti-plaintiff effect in the U.S. Courts of Appeals.

Though the Cornell study did not analyze data about Supreme Court decisions, several of the decisions you cite might suggest that Supreme Court decisions in employment discrimination cases do not necessarily mirror the double standard against employees by the U.S. Courts of Appeals. Thorough empirical research is necessary, however, to determine whether the Supreme Court’s decisions in employment cases (including whether it declines to review these cases) reveal any pro-employee or pro-employer bias. The cases you cite do not include all recent Supreme Court decisions in this area and cannot be the basis for sweeping conclusions. For example, you cite only seven cases spanning 2006-2008, but the Supreme Court has decided more than seven employment discrimination cases in those three years. One Supreme Court recent case that you fail to mention is *Ledbetter*, a decision entirely out-of-touch with the experiences of American workers.

And even if some recent Supreme Court decisions can be described as pro-employee, the documented double standard in the Courts of Appeals remains very troubling. The Courts of Appeals decide numerous employment discrimination cases each year and, as a result, have a far greater impact on the lives of American workers than the Supreme Court, which delivers only a handful of written opinions on employment discrimination each year. And the relatively small number of employment discrimination cases decided by the Supreme Court – whether or not they can be characterized as pro-employee – has obviously not diminished the documented double standard against employees that prevails in the U.S. Courts of Appeals.

Moreover, though several of the Supreme Court decisions you cite resulted in relatively positive outcomes for employees, it is worth noting that not all of the decisions you cite are necessarily pro-employee. For instance, while the *Mendelsohn* decision left open the possibility that co-workers who have faced discrimination could be permitted to testify at trial, the Supreme Court’s decision was largely a routine evidentiary decision that gave discretion to trial courts and was not a “win” for Ms. Mendelsohn. The *Ash* case is another mixed bag for employees. Even though the Supreme Court rejected the 11<sup>th</sup> Circuit’s “jump off

the page” standard, it gratuitously stated that the 11<sup>th</sup> Circuit’s decision in favor of the employer might ultimately be correct. In fact, the *Ash* case is an example of a moderate Supreme Court decision *not* resulting in pro-employee decisions down the road in the appellate courts. Upon remand, the 11<sup>th</sup> Circuit still found that repeated references by a manager to an African-American employee as “boy” were insufficient to show race discrimination. *Ash v. Tyson Foods, Inc.*, 190 Fed. Appx. 924, 926-27.

Regardless of the tenor of Supreme Court decisions in employment discrimination cases, the well-documented double standard in the Courts of Appeals threatens the foundations of our judiciary. Below I describe steps the President and Senate can take to bring more diversity of experience to the appellate bench that would likely help alleviate the anti-plaintiff effect in the Courts of Appeals.

**Answer 2c:** As I stated in my written responses to Senator Leahy’s questions, the federal judges before whom I have appeared during my practice have all impressed me with their intellectual rigor and thoroughness. I applaud their skill and the quality of questions that I have received during oral argument.

However, the double standard on appeal revealed by the Clermont and Schwab study suggests that federal judges are out of sync with ordinary Americans. There is no defensible reason why U.S. Courts of Appeals would reverse employer district court victories 8.72% of the time and employee district court victories a stunning 41.10% of the time.

To better understand the experiences of sitting U.S. appellate judges, my firm undertook an informal review of their biographies. According to the U.S. Federal Judicial Center, established by Congress in 1967, there are 166 active U.S. Appellate Judges.<sup>4</sup> My firm surveyed the backgrounds of 162 of these judges whose biographical information was available in the *Almanac of the Federal Judiciary*. Though further research by scholars is necessary, we found some startling initial results.

Whereas about 138 judges or 85.2% of those surveyed had worked in private practice, only 5 judges or 3.1% had substantial prior legal experience working for not-for-profit organizations.<sup>5</sup> While the experience of these 5 judges

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<sup>4</sup> Federal Judicial Center, The Federal Judges Biographical Database, <http://www.fjc.gov/history/home.nsf> (last visited Nov. 18, 2008). We did not survey U.S. Courts of Appeals judges on senior status.

<sup>5</sup> In our review of judges’ backgrounds in private practice or non-profit organizations, we did not consider academic or government employment. Because we were interested in significant experience in non-profit work, we did not include *pro bono* activities in our results for non-profit work. The appellate judges who have worked as lawyers for a non-profit organization include: Judge Deanell Reece Tacha who served both as the Director of Douglas County Legal Aid Clinic and the Director of the Legal Aid Clinic at the University of Kansas, from 1974-77; Judge Richard A. Paez who worked as a Staff Attorney at California Rural Legal Assistance from 1972-74, as a

is notable, none of these judges has worked for a not-for-profit organization in the last 27 years. The most recent not-for-profit experience for a U.S. appellate judge was in 1981. That means the entire U.S. appellate judiciary, covering 13 circuit courts, is devoid of judges with any full-time, non-profit experience during the most recent generation. This is astonishing. Some of the most accomplished lawyers in the country are public interest lawyers with active appellate court and Supreme Court practices. Yet there is not one U.S. Circuit Court judge who served in such a role in the mid-1980s, 1990s, or this decade.

Further, not one out of 162 U.S. Court of Appeals judge has had substantial experience as in-house counsel for a labor union. Only five sitting federal appellate judges have worked for organizations that enforce traditional civil rights;<sup>6</sup> only three appellate judges have worked for organizations that represent lower-income Americans;<sup>7</sup> and only one appellate judge appears to have substantial experience advocating for consumer rights.<sup>8</sup>

Equally revealing is the imbalance in appellate judges' backgrounds in prosecutorial versus defense work – about 45% of those surveyed formerly worked for prosecutors, U.S. attorneys, state or city attorneys, attorneys general, or solicitors general. There are only two U.S. Court of Appeals judges who worked as public defenders, but both of them also are former prosecutors.

Employment discrimination plaintiffs whose cases reach the U.S. Courts of Appeals are rather unlikely to draw a panel of judges that contains even one judge with experience working for a civil rights organization or representing the

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Staff Attorney at Western Center on Law and Poverty from 1974-76, and as Senior Counsel, Director of Litigation, Acting Executive Director and Director of Litigation at the Legal Aid Foundation of Los Angeles from 1976-81; Judge Rosemary S. Pooler who worked at the New York Public Interest Research Group from 1974-76; Judge David S. Tatel who served as Executive Director for the Chicago Lawyers' Committee for Civil Rights Under Law from 1969-70, and the Director of the National Lawyers' Committee for Civil Rights Under Law from 1972-74; and finally, Judge Judith W. Rogers who served as a staff attorney at the San Francisco Neighborhood Legal Assistance Foundation from 1968-1969. In our list of judges with non-profit experience, we did not include Judge Robert A. Katzmann, who worked at the Brookings Institution from 1981-99, because we viewed his role at Brookings as akin to an academic position.

<sup>6</sup> Judge Tatel worked at the Chicago and National Lawyers' Committees for Civil Rights Under Law and served as Director of the Office for Civil Rights for the U.S. Department of Health, Education and Welfare from 1977-79; Judge Allyson Kay Duncan worked for the EEOC from 1978-86 as an appellate attorney and as executive assistant to Chair Clarence Thomas; Judge Sandra Lea Lynch served as general counsel to the Massachusetts Department of Education from 1974-78 and represented the state in the Boston desegregation cases; Judge Milan Dale Smith, Jr. served on California's Fair Employment and Housing Commission from 1987-1991; Judge Harvie Wilkinson, III served as Deputy Assistant Attorney General for the Civil Rights Division of the Reagan Department of Justice from 1982-83.

<sup>7</sup> See *supra* note 5.

<sup>8</sup> Judge Pooler served as the Executive Director of the New York Consumer Protection Board from 1981-86. We did not include Judge James B. Loken who was briefly general counsel to President Nixon's Committee on Consumer Interests.

poor or disadvantaged. Though it is difficult to ascertain the experiences of judges during their private practice,<sup>9</sup> the makeup of the judiciary currently runs the risk that their collective perspectives are largely detached from the day-to-day hardships and realities that American workers face.

In order to improve the public's confidence that workers can have a fair chance in the courts, we need more nominees confirmed to the federal bench who have experience representing ordinary Americans. The Senate should value nominees who have devoted their careers to fighting poverty, expanding rights for children, enforcing civil rights, helping break down barriers to equal opportunity, representing *qui tam* whistleblowers, or fighting for consumers. Because judges with different backgrounds can bring different perspectives to a judicial panel, the President and Senate should find potential nominees who have devoted their careers to representing ordinary Americans, consumers and the underdogs of society.

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<sup>9</sup> It was beyond the scope of our review to ascertain what each of the 138 out of 162 active appellate judges did in their private practices. It is clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations. We note, however, that one appellate federal judge's experience in private practice stood out as unique in our review. Prior serving on the bench, Judge Rosemary Barkett had a general private practice where she "mostly represented middle class individuals with ordinary legal problems." *Almanac of the Federal Judiciary*, Vol. 2, (11th Cir.) at 7 (Supp. 2008-2).